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TRoubLED EVOLuTION OF ENERgy POLICY IN THE EEC: A DISCORDANT NOTE IN THE HARMONIZATION PROCESS

by

JONATHAN D. FISHBANE*

I. INTRODUCTION

On October 24, 1991, *The Wall Street Journal* reported that because of pressure from Member-State governments, including France and Germany, the Commission of the European Economic Community ("EEC") was slowing its efforts to liberalize the energy sector in anticipation of the then upcoming Maastricht Summit on political and monetary union. According to the article, the Commission did not want "to risk alienating EC governments ahead of a December summit on treaties for economic and political union."¹

The *Journal's* report illumined the fact that despite the communitarian spirit revived by the Single Europe Act of 1986, vital economic and political sectors remained pawns of the centrifugal forces engendered by European nationalism.² This tension between national self-interest and Community institutional cohesion has characterized the evolution of EEC energy policy since the 1950's and has been responsible for repeatedly setting back target dates for the implementation of a Community-wide policy. Indeed, the goal of harmonization and coordinated policy formulation still remains years away in this key sector.³

This article will explore the troubled evolution of EEC energy policy and the attendant institutional and structural tensions that have militated against a cohesive energy policy and regulatory regime. Certainly, a by-product of such an inquiry is the issue of whether energy-based decision-making has been predicated upon a communitarian vision with Pan-European meaning, or whether nationalism and the pressures of the

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¹ *EC Reins in Energy Liberalization*, WALL ST. J., Oct. 24, 1991, at A12.

² For a discussion of the tension between centrifugal and centripetal forces operative within the Community, see Prodromos D. Dagoglou, *The Legal Nature of the European Community*, in COMMISSION OF THE EUROPEAN COMMUNITIES, THIRTY YEARS OF COMMUNITY LAW 39-40 (1983). With respect to the Single European Act, see *infra* note 264.

³ The different target dates will be discussed in the course of this article. In this regard, in a June, 1991 editorial in *Business Week*, Riemer argued that the problem of unification was a pervasive one and the "once grand-hopes for a powerful 'United-States' of Europe coming together by the mid-1990's are being pushed back at least to the end of the decade." Blanca Riemer, *United-States of Europe? Don't Hold Your Breath*, BUS. WK., June 17, 1991, at 50.

historical moment have determined the choice of rules to be made irrespective of long-term institutional considerations. While it is recognized that energy encompasses a variety of sources, including petroleum, coal, electricity, geothermal power, and nuclear energy, this article will focus upon the importance of petroleum products for the evolution of Community energy policy.

II. SOME PRELIMINARY THEMATIC REMARKS

Energy production, use, and supply were central concerns of the founders of the European Coal and Steel Community (1951) and the European Atomic Energy Community (1957).⁴ Yet, the possibilities for political and legal integration inherent in these Communities were plagued with problems from inception. By itself, coal could not supply a resurgent Europe with its energy needs. The lack of a community program to deal with price pressures caused by imported coal, coupled with growing competition from oil, contributed to serious economic dislocation as evidenced by the Belgian coal industry crisis in the late 1950's.⁵ Moreover, French preoccupations with becoming a nuclear power, and its differences with other Member States on the role of EURATOM, militated against the collective development of an atomic energy policy that could have spurred European economic development and political integration.⁶

With the establishment of the six member EEC under the Treaty of Rome in March, 1957, the potential for a cohesive European energy policy was further hindered.⁷ The Treaty of Rome did not contain "special provisions for other energy sources (hydrocarbons, natural gas) and for their specific means for transport (pipelines and gas ducts)".⁸ The drafters of the Treaty of Rome failed to see "the need for an energy policy as such

⁴Giancarlo Olmi, *Introduction*, in THIRTY YEARS OF COMMUNITY LAW 1-3 (1983); JEAN MONNET, MEMOIRS 336 (Richard Mayne trans., 1978); ROBERT MARJOLIN, EUROPE IN SEARCH OF ITS IDENTITY 28-35 (1981); WILLIAM DIEBOLD, THE SCHUMAN PLAN: A STUDY IN ECONOMIC COOPERATION 1950-1959 (1959); ANTHONY PARRY & STEPHEN HARDY, EEC LAW 412 (1981); T. Koopmans, *The Role of Law in the Next Stage of European Integration*, 35 INT'L & COMP. L.Q. 925 (1986); *Euratom: The Treaty Establishing the European Atomic Energy Community*, INT'L BUS. LAW., May, 1990, at 227-229.

⁵Gillian M. White, *Energy Policy*, in THIRTY YEARS OF COMMUNITY LAW, *supra* note 2, at 413-414.

⁶*Cf.* ROBERT TOULEMON, 2 L'INTEGRATION ECONOMIQUE EUROPEENE (1976), and White, *supra* note 5, at 416-17. See also JACQUELINE D. MATHEWS, THE ASSOCIATION SYSTEM OF THE EUROPEAN COMMUNITY (1977).

⁷The three treaties initially had three separate executives: The High Authority of the ECSC, the Commission for Euratom, and the Commission of the EEC. *Cf.* Olmi, *supra* note 4, at 2-3; Guy Schrans, *The Community and Its Institutions*, in THIRTY YEARS OF COMMUNITY LAW, *supra* note 2, at 17; WALTER HALLSTEIN, DIE EUROPÄISCHE GEMEINSCHAFT 214 (1978). See also KLAUS-DIETER BORCHARDT, EUROPEAN UNIFICATION: THE ORIGINS AND GROWTH OF THE EUROPEAN COMMUNITY (3d ed. 1989).

⁸Giuseppe Flore, *Coopération entre les États Membres et les Communautés européennes en Matière d'énergie*, in GEMEINSCHAFTSRECHT UND NATIONALE RECHTE 3, III/1 (1971). Flore notes that it is not until 1968 and 1969 in Council Directives 68/919 and 89/69 that one sees specific provisions for hydrocarbon stockpiling and research for industrial and commercial purposes. *Id.* at 3, III/1.

or any need at all for an oil policy different from that applying to the general run of manufactured products".⁹ Not only did the Treaty of Rome contain nothing specific with respect to energy, but also the two other Treaties offered no "clear direction as to an integrated energy policy".¹⁰

This failure became especially evident in the wake of the closure of the Suez Canal during the 1956 Suez crisis. The oil committee of the Organization for European Economic Cooperation (O.E.E.C.) had recommended emergency oil sharing arrangements — but to no avail.¹¹ With the resumption of low cost petroleum supplies from the Middle East in 1957, Member States did not develop a long-range Community energy strategy. Rather, they chose to rely upon existing national policies for controlling extra-community petroleum imports, including national subsidies for domestic production.¹²

In addition, the Community lacked an adequate institutional framework to develop a common energy policy. "There existed no Community authority competent to deal with a common energy policy until 1 July 1967, the day on which the institutions of the Communities were fused."¹³ Energy studies were certainly under way by the early 1960's. And, by December, 1968, the Commission had drafted its "First Guidelines for the Common Energy Policy". But, the "Guidelines" did not go beyond the goals that the Commission recommended the Community to pursue.¹⁴ As Joseph Kaiser lamented at the Fifth International Congress for European Law held in Berlin in 1970: "Neither in the Common Market nor in the German Federal Republic does there exist, in the field of energy, an inclusive conception of a unified energy economic policy" (*Energiewirtschaftspolitik*).¹⁵ Further, a Community legal order dealing with energy was lacking as well. Energy unity thus existed as a function of "abstract desiderata"¹⁶ which left the Community vulnerable to nationalist suspicions and political fragmentation.

This lack of unity still exists. To be sure, since the 1973 energy crisis, greater attention has been paid to developing policy and to implementing regulations. However, chronic national rivalries continue to stand in the way of a truly Community-wide policy. Equally troublesome are the opinions of the European Court of Justice (ECJ) in the

⁹TERENCE DAINITH & LEIGH HANCHER, *ENERGY STRATEGY IN EUROPE I* (1986).

¹⁰PARRY & HARDY, *supra* note 4, at 412.

¹¹OEEC was viewed as "the European arm of the Marshall Plan." MARGOLIN, *supra* note 4, at 20.

¹²DAINITH & HANCHER, *supra* note 9, at 19. Almost a generation ago, Walter Hallstein observed that national differences coupled with old (and new) rivalries, and the accompanying psychological blockages attendant thereto, have repeatedly hindered the integration-unification process. *See, e.g.*, HALLSTEIN, *supra* note 7, at 204.

¹³HALLSTEIN, *supra* note 7, at 214.

¹⁴*Id.* at 216.

¹⁵Joseph H. Kaiser, *Das Zusammenwirken der europäischen Rechtsordnung mit den nationalen Rechtsordnungen-Kommission III: Energie*, in *GEMEINSCHAFTSRECHT UND NATIONALE RECHTE* *supra* note 8, at 1, III/3.

¹⁶*Id.* at 2, III/3.

1970's and 1980's which legally supported national decision-making at the expense of Community authority in cases involving energy policy issues.¹⁷

In this context, whether there exists a truly European energy policy and legal structure will affect European Political Cooperation and the concern with speaking with one voice in foreign policy,¹⁸ and with that, the possibility of collective military cooperation as first envisioned by the Founding Fathers in the 1950's in the form of a European Defense Community.¹⁹ Absent a cohesive energy policy and regulatory regime, the Community will be confronted with what its founders sought to avoid: a fundamentally centrifugal arrangement of independent and self-interested nation-states. And the goal of Community integration will be at the mercy of the shifting moods of a fragile coalition mentality.

III. THE EEC AND ENERGY: 1957-1973

Nicholas Green has argued that a serious flaw in the vision of the Founding Fathers was their inability to foresee that the future of the Community's energy needs could be based upon anything other than coal or nuclear energy.²⁰

The emergence and rise of OPEC and the ascendancy of oil over other fuels were developments that fell outside this vision. Consequently, there is no treaty provision for a common energy policy nor a timetable for its elaboration. Unlike agriculture or transport, for which express nucleated treated provisions exist, the responsibility for energy matters is fragmented.²¹

Given the fact that in 1950 only 10% of the energy needs of the original Six was based upon oil, one understands why the "Founding Fathers" focused on coal and nuclear energy. However, the closure of the Suez Canal, coupled with OEEC studies and recommendations concerning a common strategy in the event of future crises, alerted

¹⁷This will be seen later, for example, in the discussion pertinent to *BP v. Commission, Campus Oil Ltd. v. Minister for Industry and Energy, and Bulk Oil (Zug) AG v. Sun International Ltd.* (1986). See *infra* p. 22, VI.

¹⁸See EUROPEAN POLITICAL COOPERATION (EPC) (5th ed. 1988) [hereinafter EPC] (the documentary collection produced by the German Federal Republic). See also Daniel T. Murphy, *The System of European Cooperation: A Brief Explanation*, 10 N.C.J. INT'L L. & COM. REG. 383 (1985); Maarten W.J. Lak, *Interaction Between European Political Cooperation and the European Community (External) - Existing Rules and Challenges*, 26 COMMON MKT. L. REV. 281 (1989); Simon J. Nuttall, *European Political Cooperation*, 3 Y.B. OF EUR. LAW 267 (1983); Note, *A Community Within a Community: Prospects for Foreign Policy Integration in the European Community*, 103 HARV. L. REV. 1066 (1990).

¹⁹*Cf.* MARGOLIN, *supra* note 4, at 36; MONNET, *supra* note 4, at 349. While the French launched the idea of a European Defense Community in 1950, it was also responsible for dashing the Pléven Plan in 1954 when the French National Assembly refused to sanction a plan that would put any constraints on its army. BORCHARDT, *supra* note 7, at 11-12.

²⁰Nicholas Green, *The Legal Basis of a Community Energy Policy*, 8 EUR. L. REV. 52, 52 (1983).

²¹*Id.*

them to the growing economic importance of oil.²² As A.C. Evans has noted: "Community institutions could hardly tackle the problems of coal and nuclear power without taking account of problems raised by oil."²³ Further, the Common Market's goal of eliminating barriers to free economic activity applied to the oil sector as well.²⁴

Interest in formulating a common energy policy that would take oil into account goes back to the late 1950's. For example, linked to the Treaty was the Protocol of Rome which was concerned with the politics of energy and the coordination of a collective policy.²⁵ Moreover, by 1959, the Commission had found that the cost of European coal was rising more quickly than imported oil; a state of affairs that was considered significant for the future of European investment and economic growth.²⁶

In June, 1962, the Interexecutive Committee for energy (which was created in 1959) produced a memorandum on energy policy. It offered two options. One option favored a free and open market that would allow market forces "to benefit from the lowest possible price for energy" in products such as oil. The other option favored political assistance to the coal community.²⁷ The Interexecutive Memorandum was refined by the Council of Ministers. In 1964, it adopted a more conservative Protocol of Agreement; the goal of which was "to build the foundation for a pragmatic coordination of national policies of such a nature so as to prepare the way for an energy policy."²⁸

The 1962 Interexecutive Memorandum was a response to the Ministers' call for a study that would address problems posed by oil and petroleum products;²⁹ including the doubling of oil consumption since the Suez Crisis and the recognition that 90% of that

²² In an article published in 1963, Fritz Hellwig, like Mr. Green, maintained that even with the events of 1956-57, the importance of oil was not foreseen. See Fritz Hellwig, *Möglichkeiten und Grenzen einer koordinierten Energiepolitik im Gemeinsamen Markt*, in *ENERGIEPOLITIK IM GEMEINSAMEN MARKT* 14 (1963). Moreover, since its creation in 1948, the OEEC committees had explored not only the importance of coal and electricity but also of petroleum. Their findings were brought to the Founders' attention in the Armand Report (1955) and the Hartley Report (1956). See also JEAN BRÉMOND, *LA COORDINATION ÉNERGETIQUE EN EUROPE: IDÉES ET RÉALISATIONS DANS L'EUROPE DE SIX* 81 (1961).

²³ Andrew C. Evans, *The Development of a Community Policy in Oil*, 17 *COMMON MKT. L. REV.* 371, 371 (1980).

²⁴ That the framers of the Rome Treaty intended to apply Treaty provisions to oil is evidenced by List F of Annex I of the Treaty and the Protocol on Mineral Oils and Certain of Their Derivatives which was signed along with the Treaty. In this regard, List F posited a zero duty on crude oil importation from third countries. *Id.* at 372.

²⁵ Cf. Hellwig, *supra* note 22, at 13.

²⁶ See THE SECOND GENERAL REPORT OF THE EUROPEAN COMMUNITIES 49 (1959); Evans, *supra* note 23, at 371 n.1.

²⁷ See GUY DE CARMOY, *LE DOSSIER EUROPÉEN DE L'ÉNERGIE* 180 (1980). See also Eliasmöller, *Die Vorschläge der EWG-Kommission für eine Politik der Gemeinschaft auf dem Erdölsektor und ihr Beitrag an der Schaffung einer gemeinsamen Erdölpolitik*, in *ENERGIEPOLITIK, ROLLE UND BEDEUTUNGSWANDEL DER EINZELNEN ENERGIESTRÄGER* at 49. (no date). Eliasmöller's essay was delivered as part of a conference on energy held in Austria in November, 1966.

²⁸ *Id.* at 180-81. The Protocol offered general goals such as the security and stability of energy stocks as well as contained provisions for consumer free choice.

²⁹ Evans, *supra* note 23, at 373.

oil was produced outside of Europe. By the early 1960's, it had become clear that European economic growth and stability were tied to the growing dependence upon foreign oil.

In December, 1962, Dr. Marcello Boldrini, the President of the Ente Nazionale Idrocarburi (ENI) and the Azienda Generale Italiana Petroli (AGIP), argued before a conference on energy at Bad Godesburg that the EEC had to confront the fact that oil was crucial to modern European industrial development. Hence, a Community-wide energy policy not only had to include it, but also had to factor in the growing importance of the oil industry in the economic and political life of post-War Europe. According to Boldrini, EEC policy had to place the public interest ahead of that of private undertakings. To achieve this, the Community had to strengthen the legal and political foundations of its competence and become an autonomous and sovereign entity in its own sphere much as an individual nation-state is within its own institutional system. This was especially critical in the area of energy since the Treaty of Rome contained no provisions for a collective energy policy.³⁰

Boldrini's challenge to the EEC to strengthen its authority with respect to energy met with limited action. The Community did acknowledge that a general program for the abolition of existing restrictions on freedom of services among Member States pursuant to Article 63 should include oil as an important service.³¹ It also began to realize that it would be in what Boldrini saw as the public interest to grant oil companies licenses for oil exploration in Member States other than their own. By linking licensing and services, the development of a Community-wide oil industrial capacity could be enhanced.³²

While the Treaty of Rome contained no energy policy provisions *per se*, Community leaders increasingly looked to various articles in the Treaty to ensure that the "new legal order" announced in *Van Gend en Loos v. Nederlandse Tariff Commissie* (1963) and *Costa v. ENEL* (1964) would have juridical force in the area of energy planning.³³ But the crucial stumbling block to legal integration remained the lack of harmonization of national energy policies.³⁴ This lack derived not only from powerful national differences, but also

³⁰ Marcello Boldrini, *Gemeinsam Markt auf der Grundlage billiger und sicherer Energieversorgung*, in *ENERGIEPOLITIK IM GEMEINSAMEN MARKT* at 41-44 (1963).

³¹ See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] art. 63, reprinted in *BASIC COMMUNITY LAWS* 45 (Bernard Rudden & Derrick Wyatt eds., 2d ed. 1986). See also *General Programme For the Abolition of Restrictions of Freedom to Provide Services* (1961), reprinted in *BASIC COMMUNITY LAWS*, *supra*, at 249-52.

³² See Boldrini, *supra* note 30, at 41-44; See also BLONDEL-SPINELLI, *L'ÉNERGIE DANS L'EUROPE DE SIX* at 308 (1966), and Council Directive 64/428, Art. 2(2), 1964 O.J. SPEC. SUPP. 1871. In this regard, Directive 64/428 also looks to Treaty Article 54(2) and (3).

³³ Case 6/64, *Costa v. ENEL*, C.M. L. R. 425, 455 (1964); *Van Gend en Loos v. Nederlandse Tariff Commissie*, 2 COMMON MKT. L. REV. 129 (1963).

³⁴ BLONDEL-SPINELLI, *supra* note 32, at 99.

from the fact that, especially with respect to petroleum, the Community deferred to Member State policy-making authority once conditions normalized in the aftermath of the Suez crisis.

In the case of France, for example, where the government controlled oil imports and refined petroleum products, the Commission had to deal with a national policy that threatened the goal of eliminating quantitative restrictions on measures having an equivalent effect as set forth in Articles 30-37 of the Treaty.³⁵ In its relationship with De Gaulle's France, the Commission tried to avoid antagonizing French political sensitivities. Thus, it did not invoke the forceful language of Articles 30, 32, or 34 which directly proscribe Member States from introducing measures having equivalent effects or increasing existing quotas. Rather, the Commission looked to the linguistically milder and legally gradualist approach contained in Article 37 and Article 90.³⁶ Article 37, for example, provides that "Member States shall *progressively* adjust any state monopolies of a commercial character so as to ensure that when the transitional period ended no discrimination regarding the conditions under which goods are procured and marketed exist between nationals of Member States."³⁷

And Article 90(2) provides that "[u]ndertakings entrusted with the operation of *general economic interest*" shall be subject to rules of competition "in so far as the application does not obstruct the performance, in law or in fact, of the particular tasks assigned them."³⁸

The Commission's preference for Articles 37 and 90 revealed a legal and political tension that militated against a unified policy. While the Commission sought to act in the general interest by asserting a defensible legal position *via* a gradualist accumulation of authority, it also implicitly chose to defer to national authority if it could be shown that undertakings having a general economic interest would be hindered by Community rules. This approach left unresolved the question of whether Treaty obligations connected to Community energy requirements were superior to a national policy predicated upon national needs.

The outbreak of war in the Middle East in 1967 sharpened these tensions. After the Six Day War in June, 1967, some Arab countries tried to boycott those EEC nations suspected of being pro-Israel and which still sought to import Arab oil. Fortunately, "the main disruption of supplies . . . arose from shortages of tanker capacity precipitated when oil suddenly had to be moved around the Cape."³⁹ However, the 1967 War, and the

³⁵ See DENIS TOURET, *LE RÉGIME FRANÇAIS D'IMPORTATION DU PÉTROLE ET LA COMMUNAUTÉ ÉCONOMIQUE EUROPÉENNE* at 73 (1968).

³⁶ *Id.* at 83. See also Evans, *supra* note 23, at 375-76.

³⁷ EEC TREATY art. 37, reprinted in *BASIC COMMUNITY LAWS*, *supra* note 31, at 33 (emphasis added).

³⁸ *Id.* at 53.

³⁹ Jack Hartshorn, *Europe's Energy Imports in A NATION WRIT LARGE?: FOREIGN POLICY PROBLEMS BEFORE THE EUROPEAN COMMUNITY* 116 (Max Kohnstamm & Wolfgang Hager eds., 1973).

concomitant disruption of supply, underscored the economic vulnerability of the Community because of its dependence on Middle Eastern crude oil.

Accordingly, both the O.E.C.D. and the European Commission took up the question of energy supply. O.E.C.D. Oil Committee discussions led to a voluntary agreement among Member States to work out ways to improve the stockpiling of supplies as well as emergency procedures to distribute them.⁴⁰ The involvement of the Commission in O.E.C.D. discussions not only led to its 1968 memorandum entitled: "First Guidelines for the Common Energy Policy"; but also to the Council's enactment of Directives 68/414 and 68/416 pursuant to the conjunctural policy provisions of Article 103 of the Treaty.⁴¹

A. *The 1968 Guidelines*

The title of the Commission's Memorandum implicitly recognized the reality that previous protocols, decisions, and studies had not led to a coordinated energy policy capable of imposing strict rules upon the market.⁴² While the "Guidelines" recalled the aims of the 1964 Protocol, including having low cost and secure energy supplies,⁴³ it admitted that the Community had to transcend the aims and objectives stage. Energy products had not become integrated into a common market in the manner that agriculture, for example, had become integrated. Hence, if this situation did not improve, and if a common energy market was not achieved in the near future, the level of integration already attained would be endangered.⁴⁴ Sounding an alarm that not only had rattled the walls of the Community since inception, but also was prophetic of EEC political cooperation in the wake of the Yom Kippur War, the Commission held that nationalism and the lack of harmonization threatened to disintegrate a truly European community.

Disparities between costs of use of energy resulting primarily from divergences between energy policies of the individual Member States are increasingly distorting competition in industries with high energy consumption and penalize certain regions of the Community when important invest-

⁴⁰ See A.C. Evans, *European Community Law and the Problem of Oil Shortages*, 31 INT'L & COMP. L.Q. 1,5 (1982).

⁴¹ See Bulletin of the European Community, No. 12, Supplement (1968) [hereinafter Bull. of E.C.]; Council Directive of 20 Dec. 1968 (68/414), 1968-1969 O.J. SPEC. ED. No. L 308/14; Council Decision of 20 Dec. 1968 (68/416), 1968-1969 O.J. SPEC. ED. No. L 308/19; See also Evans, *supra* note 40, at 5-6.

⁴² In this context, in the 1960's, Maurice Bye offered the following definition of policy:

A policy is a coherent group of decisions destined to attain, at a given time, one or several quantitatively and qualitatively determined objectives. It defines the means and proper actions and rules of conduct to follow . . . Being, by definition, a choice, it is not governed by the market but assumes an imprint (*emprise*) upon the market . . .

BLONDELL-SPINELLI, *supra* note 32, at 7. See also DAINITTH & HANCHER, *supra* note 9, at 20-21.

⁴³ Bull. of E.C., No. 12, *supra* note 41, at 6 & n.1. The Commission noted that it did "not think it necessary to define again the aims of a Community energy policy, which the Member States fixed in the protocol of 1964". *Id.*

⁴⁴ *Id.* at 5.

ment decisions are to be taken. The attempts made to remedy this state of things by measures at the national level are leading to a gradual *disintegration* of the Community's energy economy. Uneconomic systems of aid, consumption taxes varying from country to country and increasingly *nationalist* supply and marketing policies are the result. This dangerous trend can only be changed by a Community energy policy which fully integrates the energy sector into a common market.⁴⁵

Despite the almost Jeremiad call "to change things before it was too late", the *Guidelines* offered precious little as to how to institutionalize such change. The Commission acknowledged that more than half of the Community's energy requirements came from imports.⁴⁶ Yet, in its "Framework for Action" section, it offered only broad theoretical proposals. For example, concerning supplying the Community with oil and natural gas, it merely stated that "there is a need for a study of the supply and demand conditions on the world market for an assessment of import requirements and investment expenditures."⁴⁷ Concerning the potential disruption of supply of petroleum imports, the Commission blandly proposed the following: 1) the need for a permanent study of the supply possibilities open to the Community, of the risks of disruption, and of the means for coping with disruption; and 2) a stockpiling policy that could be applied to crude oil products and nuclear fuels as part of an overall supply policy.⁴⁸

The Commission was quite aware that any attempt to institutionalize the proposed guidelines had to first deal with the problems presented by national policy and independent state action. Indeed, it admitted that

all or nearly all the aspects of energy economy are governed by special arrangements, both in the Community Member States and outside the Community. State intervention ranges from bans or restrictions on imports to the control of marketing or of prices and to various provisions affecting the interplay of supply and demand.⁴⁹

As a threshold matter, the Community would have to develop a policy that would try to harmonize Community ends with national needs.⁵⁰

⁴⁵ *Id.* (emphasis added).

⁴⁶ *Id.* at 6.

⁴⁷ *Id.* at 10.

⁴⁸ *Id.* at 11.

⁴⁹ *Id.* at 8.

⁵⁰ *Id.* at 9.

B. *The Post Guidelines Directives*

Despite its generality, the *Guidelines* helped to create rules that obligated Member States to maintain minimum stocks of crude oil and petroleum. For example, Directive 68/414 and Decision 68/416 were enacted pursuant to Article 103 of the Treaty which was utilized for the purpose of crisis analysis.⁵¹ Thus, energy policy was linked to the conjunctural policies of Member States "as a matter of common concern" and "if any difficulty should arise in the supply of certain products."⁵² Directive 68/414 acknowledged more explicitly than the *Guidelines* that "a crisis in obtaining supplies could occur unexpectedly."⁵³ Therefore, it was necessary to increase the security of supply for crude oil and petroleum products in Member States by maintaining a 65 day minimum stock of such products.⁵⁴ If crude oil was indigenously produced, this minimum could be reduced by 15%.⁵⁵ In addition, implementation of the Directive under Article (6) could be achieved by individual agreements "within the territory of a Member State or the account of undertakings established within another Member State."⁵⁶

Yet, the Directive's approach seemed to be more concerned with voluntarism than with creating a legal framework to enforce agreements. A. C. Evans has argued that detailed provisions for these agreements were set forth in Council Decision 68/416.⁵⁷ However, his argument exaggerates the scope of the Decision. Article I, for example, merely states that if an agreement could not be reached within eight months pursuant to Article 6(2) of Directive 68/414, then the governments were to notify the Commission; and the Commission, in turn, "may propose to the governments concerned appropriate measures for overcoming their difficulties."⁵⁸

In fact, the concept of individual agreements enunciated in the Directive seems detached from a meaningful regulatory regime that could coordinate policy on a Community-wide basis. For example, as a general rule, the agreements were to be for an unlimited duration.⁵⁹ However, they could contain a unilateral termination provision as long as the Commission received advance notice with respect thereto. In addition, while

⁵¹ Cf. Council Directive 68/414, *supra* note 41 and Council Decision 68/416, *supra* note 41.

⁵² Cf. EEC TREATY art. 103(1)-(4), *reprinted in* BASIC COMMUNITY LAWS, *supra* note 31, at 59.

⁵³ Council Directive 68/414, *supra* note 41, at 586.

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 587. A.C. Evans has contended that these agreements were to be allowed so that Directive 68/414 "would not exacerbate the problem of excess storage and refining capacity; a problem which had long been recognized by the Commission." Evans, *supra* note 40, at 5.

⁵⁷ Evans traced Commission recognition back to the 1963 Memorandum of the Interexecutive Energy Group. *Id.* at 5 n.18.

⁵⁸ Council Directive 68/416, *supra* note 41, at 591; and Council Directive 68/414, *supra* note 41, at 587.

⁵⁹ Council Directive 68/414, *supra* note 41, at 587.

unilateral termination "shall not operate during a supply crisis,"⁶⁰ a clearly articulated enforcement mechanism to deal with a violation was missing. Hence, even though Article 6(2) of Directive 68/414 encouraged greater inter-governmental cooperation, it reflected the Community's continued reticence to assert greater legal and institutional control over energy policy and planning.⁶¹ It thus missed an opportunity to begin building a regulatory structure that could hold in check centrifugal forces that would prove so destructive in the wake of the 1973 Yom Kippur War.

Like acrobats on a high-wire, the Commission and the Council were still inching their way toward a coherent conjunctural energy policy; and with it, toward some measure of legal control without upsetting delicate national political sensitivities. In so doing, the Community admitted its institutional weakness *vis à vis* the Member States in the area of energy policy and often stood in the way of the very harmonization it sought to achieve. This is *a fortiori* the case in Commission proposals to align 1) national excise duties on petroleum products; and 2) national policies concerning the importation of hydrocarbons from third countries. Neither proposal was accepted nor enacted by the Council.⁶²

Nevertheless, the Council did adopt Regulations 1055/72 and 1056/72 which involved notifying the Commission of 1) imports of crude oil and natural gas; and 2) investment projects in the petroleum, natural gas, and electricity sectors. But the purpose of Regulation 1055/72 was primarily informational in nature and designed "to enable the Commission to assess the supply situation" within the Member States pursuant to Article 213.⁶³ Not surprisingly, therefore, the regulation did not have a procedural mechanism that would enable the Commission to act decisively in the event of a supply breakdown.

Moreover, while Article I of Regulation 1055/72 obligated Member States to notify the Commission of crude oil and natural gas imports from third countries,⁶⁴ there were no real legal restrictions placed upon them concerning trade in oil and petroleum products. National initiatives thus retained supremacy at the expense of harmonization. This point can be further illustrated by the fact that by 1973, the French were still unwilling

⁶⁰*Id.*

⁶¹*Id.* Article 6(2) provides that for the purposes of implementation, "stocks may be established under individual agreements between governments, within the territory of a Member State for the account of undertakings established in another Member State." *Id.*

⁶²See, e.g., *Proposition de directive du Conseil sur la rapprochement de taxes spécifiques de consommation frappant les hydrocarbures liquides destinées à être utilisées comme combustibles* in O.J. (1970) No. C 14/25 and *Proposal for a Council Directive on the harmonization of excise duties on mineral oils* in O.J. No. C 92/36. See also Evans, *supra* note 23.

⁶³Commission Regulation 1055/72, 1972 O.J. SPFC. ED. 462,463. Article 213 provides that the Commission may, within the limits established by the council, "collect any information and carry out any checks required for the performance of tasks entrusted to it." See EEC TREATY art. 213, reprinted in BASIC COMMUNITY LAWS, *supra* note 31, at 102.

⁶⁴Commission Regulation 1055/72, *supra* note 63, at 462-63.

to abandon their monopoly unless the Community adopted a *dirigiste* policy which, by its very nature, would only serve to polarize the Member States. In the face of French intransigence, the institutional weakness of the Community became only too evident. The Commission "failed to obtain significant adjustments of the monopoly and was indeed still authorizing the French to maintain consequential barriers to intra-Community trade on the basis of Article 115."⁶⁵ In fact, the Commission even authorized France "to maintain its quota system until the end of 1975."⁶⁶

Viewed from the vantage point of 1973, aside from Directive 73/238, which was passed before the Yom Kippur War with the goal of providing emergency measures to mitigate the effects of petroleum supply difficulties,⁶⁷ Community energy policy was ill-equipped to deal with a crisis. It was "negative, both in regard to the development of specific solutions to energy problems and even with respect to the regular application and development of a general Community regime as it affected the energy sector."⁶⁸ It neither confronted the political dimensions of petroleum directly, nor did it actively seek a "politically safer fuel." In early 1973, Jack Hartshorn correctly perceived that if the Community chose "to develop a 'politically safer fuel' at home or abroad to improve the security of supply, it must be prepared to pay a premium for safety."⁶⁹ The failure to make such a choice by October, 1973 was disastrous to both Community integration and the economies of the Member States.

IV. THE ENERGY CRISIS AND THE CRISIS OF EUROPEAN POLITICAL COOPERATION

A. *The EEC and the Events of October, 1973*

With the Yom Kippur War, the inherent weakness of the existing energy regulatory regime became painfully clear. "The outbreak of the oil crisis in October, 1973 found the European Community unprepared."⁷⁰ Rules governing energy were insufficient to deal with the Arab oil embargo, the reduction in crude oil production, and the quadrupling of oil prices. OPEC's goal was to use oil as a weapon to shift the political and

⁶⁵ DAINITH & HANCHER, *supra* note 9, at 25.

⁶⁶ *Id.* at 25 & n.48.

⁶⁷ Council Directive 73/238, 1973 O.J. (L228) 1.

⁶⁸ DAINITH & HANCHER, *supra* note 9, at 22.

⁶⁹ Hartshorn, *supra* note 39, at 116.

⁷⁰ ELKE THIEL, *BILANZ UND PERSPEKTIVEN DER EUROPÄISCHEN GEMEINSCHAFT* 112 (1983). Michel Godet and Olivier Ruyssen understate the problem with their contention that the energy disarray was due to a large degree to the inability to forecast the quadrupling of oil prices in 1973-1974. While it may be granted that 'models for long term forecasting were based on a continuation of the falling price of oil in constant money terms', such a claim disguises the weakness of the energy regime including the Commission's recognition that an unexpected crisis could hurt the EEC. Cf. MICHEL GODET & OLIVER RUYSSSEN, *THE OLD WORLD AND THE NEW TECHNOLOGIES: CHALLENGES TO EUROPE IN A HOSTILE WORLD* 58 (1981).

diplomatic balance from a generally pro-Israeli position to a pro-Arab one.⁷¹ Given the EEC's enormous dependence on Middle Eastern oil, it had to go along with OPEC's decisions.

The events of October "put a strain on solidarity everywhere."⁷² Where solidarity "should have been the order of the day in the Fall of 1973," each Member State looked first to its own self-interest.⁷³ Nationalist sentiment stood in the way of the Treaty's goals and threatened to undermine the foundation of a European community. For example, the Arab embargo hit the Dutch the hardest. Dutch support of the Israelis resulted in a complete embargo on Arab oil shipments to Holland. The Dutch plea for oil sharing assistance, pursuant to O.E.C.D. guidelines, fell on deaf ears. In retaliation, they threatened to cut off supplies of North Sea natural gas. Yet, the Dutch were fundamentally isolated and their efforts to obtain Community legal and political support to guarantee security of supply came to naught.⁷⁴

On November 21, 1973, the British government notified Holland that it would not be sending it oil because the Arab oil producing states had threatened reprisals if such aid were given.⁷⁵ Moreover, pointing to the inherent weakness of the EEC legal regime in energy (to which its *dirigisme* contributed), the French government advised that since there was no real Community energy policy, it had no legal obligation to maintain European solidarity in this area.⁷⁶ Under the influence of its Foreign Minister M. Joubert, the French did not want to jeopardize their relationship with the Arabs "by too overtly manifesting its solidarity with European partners" such as the Dutch.⁷⁷ Thus, it was no accident that under the economic pressure generated by the oil crisis, and the inherent weakness of Community laws and institutions to deal with it, Member States sought to work out their own bilateral oil arrangements with the Arab states - with France leading the way.⁷⁸

⁷¹ See WERNER J. FELD, *THE EUROPEAN COMMUNITY IN WORLD AFFAIRS: ECONOMIC POWER AND POLITICAL INFLUENCE* 279 (1976); THIEL, *supra* note 70, at 113; see also de Bauw, *Energy*, in *THE COMMUNITY TODAY* 181 (1983).

⁷² MONNET, *supra* note 4, at 508.

⁷³ FELD, *supra* note 71, at 283.

⁷⁴ See *id.* at 284; see also DAINITTH & HANCHER, *supra* note 9, at 26.

⁷⁵ THIEL, *supra* note 70, at 113-15.

⁷⁶ *Id.* See also TOULEMON, *supra* note 6, at 222.

⁷⁷ TOULEMON, *supra* note 6, at 222.

⁷⁸ Even with the Algerian nationalization of oil in 1971, which resulted in a French minority shareholder position, France continued a pattern of government-to-government deals. When Iraq nationalized its oil fields in the early 1970s, France moved quickly to conclude a deal with that country to ensure its supply of crude oil. Cf. Hartshorn, *supra* note 39, at 120.

With its controlled energy market and *dirigiste* approach to energy, France had a history of seeking government-to-government sales agreements to secure its own supply from OPEC. In the wake of the 1973 crisis, France was also joined by other Member States, such as Belgium, Germany, and Great Britain, "in seeking such deals with the objective of getting a direct and secure supply" for themselves.⁷⁹ Well before the crisis, Walter Hallstein perceived the fundamentally cynical nature of this nationalist policy when he wrote "if only energy policy on a purely national basis carried conviction."⁸⁰

B. *The Energy Crisis and the Problem of European Political Cooperation*

Since the Hague Communiqué of the Conference of the Heads of State and Government of the Member States of 2 December 1969, it had been a goal of the Member States to make the EEC a coordinate political actor in foreign affairs as well as to find ways to achieve European political unification.⁸¹ Pursuant to Paragraph 15 of the subsequent Communiqué issued on July 20, 1970, the Foreign Ministers of the Member States filed the Luxembourg Report on October 27, 1970. They argued that implementation of common policies had to be linked to "corresponding developments in the political sphere."⁸² This was necessary if Europe was ever to have a foreign policy mechanism that would permit her "to speak with one voice."⁸³ The Paris Summit of the Heads of State of 21 October 1972 sought to improve the means to coordinate political union and foreign policy. The Heads of State agreed that consultations should be intensified at all levels. The Foreign Ministers would meet four times per year and follow-up on the Luxembourg Report by the summer of 1973.⁸⁴

At the end of the Paris Summit, less than one year before the outbreak of hostilities in the Middle East, the Heads of States expressed their intention "to transform before the end of the present decade, the whole complex of their relations into a European Union."⁸⁵ This objective was nearly shattered by the events of 1973. In fact, the oil crisis set in motion by the Yom Kippur War profoundly affected the December, 1973 Copenhagen Summit.

⁷⁹Paul Kemezis, *The Politics of Energy*, European Community, No. 206 (1978), at 41. See also David Allen, *The Euro-Arab Dialogue*, 16 J. OF COMMON MKT. STUD. 323 (1978).

⁸⁰HALLSTEIN, *supra* note 7, at 213.

⁸¹*Cf.* EPC, *supra* note 18, at 22-31.

⁸²*Id.* at 30. See also Otto von der Gablenz, *Luxembourg Revisited or the Importance of European Political Cooperation*, 16 COMMON MKT. L. REV. 685 (1979); HEINZ KRAMER & REINHARDT RUMMEL, *GEMEINSCHAFTSBILDUNG WESTEUROPAS IN DER AUSSENPOLITIK* (1978); Murphy, *supra* note 18.

⁸³EPC, *supra* note 18, at 26. "Desirous of making progress in the field of political unification the government decide to cooperate in the sphere of foreign policy." *Id.* at 31; see also Lak, *supra* note 18, at 285-86.

⁸⁴*Cf.* Statement of the Conference of the Heads of State and Government of the European Community (Paris, 31 October 1972), reprinted in EPC *supra* note 18, at 31. The Paris Summit was followed by the Copenhagen Report of July 1973 in which institutions and procedures for political cooperation were recommended by the Foreign Ministers. *Id.* at 31-48; see also Murphy, *supra* note 18, at 384-86.

⁸⁵EPC *supra* note 18, at 32.

The goal of the Summit was to make progress toward economic and political union and to have the Community speak with one voice. Such efforts were inherently problematic in the wake of the rejection of aid to Holland, the French contempt for EEC energy policy, and the pursuit of purely national objectives to obtain energy supplies in disregard of the Community interest.

In anticipation of the Copenhagen Summit, *The Times* of London reported on 3 December 1973 “[w]ith the energy crisis generating fears. . . and mutual suspicions in the capitals of the Nine,” the prospects for European cohesion were not promising.⁸⁶ Discussions between Sheikh Yamani and the Dutch Economic Minister Mr. Lubbers did not, according to Mr. Yamani, lead to progress in Dutch efforts to improve relations with the Arabs. Accordingly, the Arab oil embargo would not be lifted.⁸⁷ Two days later, *The Times* reported that some five hours of discussion on the energy situation by the Ministers of the Nine did nothing “to allay Dutch fears that their Community partners might let them down if the Arab oil embargo bites deep into their economic life.”⁸⁸ In this fearful climate, Willy Brandt’s call for an agreement on Community solidarity on oil at the Copenhagen Summit seemed more urgent than ever.⁸⁹ Tragically, the call was not heeded.

In the face of Member State nationalism, the weakness of Community institutions was underscored further when Henri Simonet, the European Commission member responsible for energy policy, had to kow tow to British and French officials who insisted that “this was not the time for paperwork but for discrete consultations.”⁹⁰ Mon. Simonet thus produced “an oral rather than written list of possible actions by the Nine to coordinate their policies.”⁹¹ Simonet’s frustration was echoed a few days later by Wilhelm Haferkamp, Vice President of the Commission, who ominously declared in a speech in Bonn that if the EEC was to survive at all, it needed a community energy policy.

Tension mounted when it was announced that “Foreign Ministers from several oil producing Arab states [would be] in Copenhagen. . . to seek contact with Foreign Ministers of the EEC.”⁹² Their arrival put pressure on Summit leaders and shifted their attention away from key political business. As *The Times* correspondent reported:

⁸⁶ See Roger Berthoud, *Moment of Truth Approaching for EEC*, THE TIMES, Dec. 3, 1973, at 4; see also Allen, *supra* note 79, at 325-26.

⁸⁷ See Berthoud, *supra* note 86.

⁸⁸ Roger Berthoud, *Dutch Hint of EEC Delay Tactics If Oil Is Not Shared*, THE TIMES, Dec. 5, 1973, at 1.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Arabs to be in Copenhagen for EEC Summit*, THE TIMES, Dec. 13, 1973, at 1. The French Foreign Minister Joubert rather unctuously and disingenuously looked to the Summit as a “test of truth” concerning the reality of a United Europe in the face of crisis. *Id.*

In a very real sense the uncovenanted arrival here of oil ministers from oil producing countries in the Middle East has . . . hijacked the summit talks. For most of today their movements and statements made in their name have dominated the talk in the corridors and antechambers of the Conference itself. . . .⁹³

In this atmosphere of crisis and nationalist suspicion, it was psychologically and politically significant that the document drafted by the Foreign Ministers was "a document on the European Identity."⁹⁴ In fact, the crisis in energy was linked to this crisis of European identity. In early 1974, Rudolf Herlt poignantly wrote in *Die Zeit*:

The number of words published in the Hague Communiqué on energy policy stood diametrically opposed to collective actions (*gemeinsamen Taten*). The nine countries let themselves be divided among each other . . . by the oil producing states. Two of them, France and England, have prostituted (*gebuhlt*) themselves with a painful lack of dignity in order to win the good will of the Arabs. Their partner Holland was fully forgotten; a partner which had pushed tirelessly for English admission into the Community. The feeling for solidarity is truly underdeveloped in the Community.⁹⁵

Similarly, in his *Memoirs*, Jean Monnet recalled that Europe "had once again shown the world the sad spectacle of selfishness and disunion."⁹⁶ The swan song of European identity, political cooperation, and integration would remain a dissonant one until the Member States decided to take the interests of the Community seriously; including developing a legal regime that would guarantee the common interest.⁹⁷

V. BEYOND 1973; EEC ENERGY INITIATIVES

The Copenhagen Summit was a failure.⁹⁸ European leaders turned a deaf ear to Willy Brandt's call for solidarity in the area of energy. However, to its credit, the European Commission renewed its efforts to push for a common policy, and tried to limit the number of bilateral deals between Member States and the oil producing states.⁹⁹ One

⁹³ David Wood, *Prime Minister Faces EEC Pressure For Plan to Share Oil Resources*, THE TIMES, Dec. 15, 1973, at 5.

⁹⁴ EPC, *supra* note 18, at 57-63.

⁹⁵ Rudolf Herlt, *Mit Phantasie gegen Fakten*, DIE ZEIT, Jan. 11, 1974.

⁹⁶ MONNET, *supra* note 4, at 511.

⁹⁷ *Id.*; see also Herlt, *supra* note 95.

⁹⁸ Jean Monnet referred to it as a "spectacular failure" in which "the Heads of State and Government lost control over their meeting." MONNET, *supra* note 4, at 510.

⁹⁹ FIELD, *supra* note 71, at 285.

possibility lay in broader cooperation with the United States and Japan in order to establish an energy action group to overcome energy problems.¹⁰⁰

In February, 1974, the United States convened a multi-national energy conference to deal with the problem of energy supply. France again stood in the way of cooperation. It refused to participate on the alleged grounds that the Americans were trying to use the conference in order to dominate European economic and political life. French protests were a smoke-screen for its real behavior. At that time, France was "negotiating pacts with Saudi Arabia, Kuwait and Libya that would guarantee it millions of barrels of oil in return for stepped up deliveries of French weapons technology to the producers."¹⁰¹

Despite the French boycott, and its underlying political agenda, the Washington Conference resulted in an agreement between the remaining EEC members and other OECD nations with respect to establishing an autonomously functioning International Energy Agency (IEA) within the OECD.¹⁰² In this regard, on November 18, 1974, the International Energy Program (IEP) was completed. It provided that in the event of a collective or individual shortfall, energy supplies would be supplied by IEA members.¹⁰³ Its objective was to coordinate mutual self-sufficiency in oil stocks and supplies, reduce demand during a crisis, and allocate available oil equitably among its membership in the event of an emergency. The emergency allocation procedure would be activated only when one or more of the IEA Member nations, or all the participating nations as a group, suffered a reduction of 7% or more in the daily rate of oil supplies.¹⁰⁴

¹⁰⁰ This possibility was suggested by Henry Kissinger in December, 1973. Cf. *Arabs to be in Copenhagen for EEC Summit*, *supra* note 92. The Kissinger proposal also received favorable press in Germany. See, e.g., Theo Sommers' comments in *DIE ZEIT*, Jan. 11, 1974.

¹⁰¹ FELD, *supra* note 71, at 285. See also Paul G. Taylor, *THE LIMITS OF EUROPEAN INTEGRATION* 151 (1983). In this context, French behavior not only inhibited any effort to control bilateral arrangements, it also served as a model for action by others in the European community as well as for the Americans—in spite of their public rejection of such bilateralism. FELD, *supra* note 71, at 286.

¹⁰² The Commission was given the status of observer within the IEA. While France, a non-signatory nation, viewed the agency as confrontational with respect to OPEC, it nevertheless found it politically important to be represented on the OECD's Committee for Energy Policy which was created in April, 1975. See J.G. Van der Linde & R. Lefeber, *International Energy Agency Captures the Development of European Community Energy Law*, 22 *J. OF WORLD TRADE* 5 (1989); *Re The International Energy Programme: Notice of the Commission*, 1 *COMMON MKT. L. REV.* 92,92 (1984); Evans, *supra* note 40, at 4; see also U. Lantzke, *The International Energy Agency*, 26 *EUR. Y.B.* 41 (1978).

¹⁰³ Cf. *Case 83/671 In re Int'l Energy Programme*, 2 *C.M. L.R.* 186 (1984). THIEL, *supra* note 69, at 117-18; DAINITH & HANCHER, *supra* note 108, at 27; see also Van der Linde & Lefeber, *supra* note 102. Founding members of the IEA included: Austria, Canada, EEC (excluding France), Japan, Spain, Sweden, Switzerland, and Turkey. Concerning the objectives of the IEA, see *ENERGY IN THE EUROPEAN COMMUNITY* 13 (4th ed. 1991).

¹⁰⁴ See *Re The International Energy Programme: Notice of the E.C. Commission*, 1 *C.M. L.R.* 92, 92-95 (1984). Andrew Evans has argued that the 7% shortfall activation mechanism illustrates a defect in the IEP since prior to such a finding Members were free to react to shortages by undertaking national measures to secure their own supplies which could have a deleterious effect on the availability of supplies to other participants. Evans, *supra* note 40, at 1-3.

Under the terms of the IEP, the decision to activate the emergency allocation system would be left to the IEA's Governing Board (which was composed of representatives of the governments of participating nations). One of the goals of the program was to obtain advisory assistance from the oil industry *via* an International Advisory Board in order to assess the world supply system properly as precondition to activating the allocation system.¹⁰⁵ The IEA and the IEP represented a positive step toward realizing the Commission's long-term agenda of creating a coordinated energy supply and research system for the EEC. In fact, in 1977, in conjunction with the IEA, the EEC developed a crisis machinery to deal with future energy shortages and enhance the possibility of political and structural interdependence in the field of energy.

A. *In Re The IEP*

In order to enhance the proper functioning of the IEP with respect to EEC participants, the Commission sought to integrate it into the legal framework of the Treaty in case the program was ever activated. The Commission's concern with legal integration was set in motion in January, 1982, when, on behalf of the oil companies participating in the emergency allocation system, it was asked to provide either negative clearance or exemption under Article 85(3) of the Treaty.¹⁰⁶

According to the Commission, a proper response necessitated inquiry into the structural interplay between Article 85(1) and 85(3) of the Treaty which set forth the rules of competition with respect to undertakings. Article 85(1) prohibited "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention or distortion of competition within the common market. . . ."¹⁰⁷

Article 85(1) applied particularly to those undertaking which were in a position to "limit or control production, markets, technical development or investment."¹⁰⁸

Analytically, the Commission recognized that both reporting and non-reporting international oil companies were undertakings pursuant to Article 85(1). Yet, there remained the unanswered question as to whether companies cooperating within the framework of the IEP's emergency allocation system represented a concerted practice which would have the effect of distorting competition in violation of Article 85(1).

¹⁰⁵ In its 1983 Notice, the Commission looked favorably upon oil company participation in the allocation and invited "interested third parties" for their comments and observations on the matter. *Re The International Energy Programme*, *supra* note 104, at 93-96; *see also* Evans, *supra* note 40, at 2-4.

¹⁰⁶ Van der Linde & Lefebvre, *supra* note 102, at 13-18.

¹⁰⁷ EEC TREATY art. 85, *reprinted in* BASIC COMMUNITY LAWS, *supra* note 31, at 51.

¹⁰⁸ *Id.*

As a preliminary matter, the Commission determined that the cooperative nature of the companies' activities under the IEP appeared to be concerted in nature.¹⁰⁹ In fact, the activation of the allocation system meant that, in some cases, oil would be directed to destinations it would not otherwise have gone had there been no activation. Hence, one could infer that "the usual market processes" could be set aside "in order to bring about results different from those which unrestricted competition would bring about in a supply shortfall."¹¹⁰ This could lead to a distortion of normal market conditions. The Commission was concerned that concerted activity by the oil companies with respect to the allocation and redistribution of oil supplies would not only affect "transactions across frontiers," but also intra-Community trade itself.¹¹¹

Yet, the Commission also knew that if Article 85(1) were to govern, it could have a restrictive effect upon the IEP as well as upon the proper allocation of oil supplies in the EEC itself in the event of an emergency. Hence, it looked for a way to get around the strictures inherent in Article 85(1). It found one in the language of Article 85(3) which negates the application of subsection (1) under certain conditions. According to Article 85(3),

The provisions of paragraph 1 may . . . be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings;
- any decision or category of decisions by associations of undertakings;
- any concerted practice or category of concerted practices which contributes to improving the production and distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit. . . .¹¹²

The Commission concluded that subsection (3) could be invoked because the activation of the emergency allocation system would enhance the proper distribution of supply and provide consumers with a fair share of the resulting benefit. Moreover, under Subsection (3)(b), competition with respect to a substantial portion of the products in question would not be eliminated.¹¹³ Pursuant to Article 85(3), the Commission decided that the provisions of Article 85(1) would be declared inapplicable to concerted practices

¹⁰⁹ *In re Int'l Energy Programme*, 2 C.M. L.R. 193 (1984).

¹¹⁰ *Id.* at 194.

¹¹¹ *Id.*

¹¹² EEC TREATY art. 85, *reprinted in* BASIC COMMUNITY LAWS, *supra* note 31, at 51.

¹¹³ *In re Int'l Energy Programme*, 2, C.M. L.R. at 195.

between all oil companies involved in carrying out the IEP's emergency allocation system; and declared that its decision was effective until December 31, 1993.¹¹⁴

The Commission's conclusion was predicated upon the underlying rationale that Article 85(3) afforded a legal means to suspend the rules governing free competition in order to deal with a future crisis while at the same time preserving the integrity of the Treaty.¹¹⁵ Equally significant, the Commission's decision in *Re The IEP* was evidence of growth in Community political and juridical authority. Some thirty-two international oil companies had applied to the Commission to obtain legal relief in order to comply with the rules subsuming the emergency allocation system. Such conduct helped to reinforce the system's structural linkage to Community policy initiatives in the area of energy distribution and supply. Had the companies not applied to the Commission for legal relief, it would have indicated that the entire system was fundamentally an institutional house of cards.

B. Beyond the Washington Conference: EEC Energy Initiatives

The creation of the IEA helped to engender a host of Commission recommendations that led to the Council Resolution of 17 September 1974 "concerning a new energy strategy for the Community."¹¹⁶ The new strategy involved: 1) collective efforts at a rational reduction of internal consumption; 2) the improvement of supply security by developing nuclear energy, hydrocarbon, and solid fuel resources; and 3) a Community research and technology program to develop energy resources for the Member States.¹¹⁷

The Resolution not only was an effort to show that the Council had the "political will" to undertake the drafting and implementation of a Community energy policy, it also demonstrated that such a policy necessitated the "close coordination of positions of Member States of the Community which will enable it to express a common viewpoint on energy problems *vis à vis* the outside world."¹¹⁸ By its nature, the formulation of energy policy would have to be linked to political cooperation and foreign policy coordination among the Member States. The importance of such a linkage was acknowledged by the Heads of State at the Paris meeting in December.

¹¹⁴*Id.* at 197-99.

¹¹⁵In this context, in *Re United Reprocessors GmbH*, 2 C.M. L.R. D1, D8 (1976), the Commission noted that "under Article 85(3), the provisions of Article 85(1) may be declared inapplicable to any agreement which contributes to improving the production or distribution of goods or to promoting technical and economic progress while allowing consumers a fair share of the resulting benefit. . . ." *Id.*

¹¹⁶See Council Resolution of September 17, 1974; O.J. (C 153/1); 9.7.75.

¹¹⁷*Id.* at 153/2.

¹¹⁸*Id.* at 153/1.

Following the Resolution in September, and the Paris meeting in December, the Council passed its Resolutions of 17 December 1974 concerning setting energy policy objectives for 1985 and the rational utilization of energy supplies.¹¹⁹ These Resolutions reminded the Community of the need for (1) an effective conjunctural policy that would align national policies with Community policy; and (2) a rational reduction in internal consumption as well as a rational utilization of energy resources.¹²⁰ Unfortunately, there was nothing substantive in the Resolutions concerning how these objectives were to be realized and enforced.

Like pre-1973 Resolutions, Directives, and Decisions, the guidelines and objectives of 1974 remained broad statements of principle and were non-committal about how the new program would be implemented. Quite telling is the statement in the December Resolution pertaining to 1985 policy objectives which blandly proffered: "Whereas it should be possible to apply coherent guidelines to the various energy resources of the Community while complying with the Treaties."¹²¹ All too often, measures merely announced that implementation of an energy policy was an objective that the Community had set for itself.¹²² "Such proclamations reflect the essence of the problem; the responsibility for common action is a self-assumed and not a treaty designated task."¹²³ It also revealed that Community authority was still a pawn of centrifugal forces within the more powerful Member States especially.

Despite these shortcomings, one can discern a greater attention to the regulation of energy issues. Such attention led to a number of legislative initiatives between 1975-1977 which helped promote Community self-confidence to proceed with building a viable energy regulatory structure. For example, pursuant to the conjunctural policy goal inherent in Article 103, the Council Directive of May 20, 1975 obligated Member States to maintain minimum stocks of fossil fuel at thermal stations to ensure the security of supplies for 30 days in the event of an unexpected crisis such as that of 1973.¹²⁴ Shortly thereafter, the Council moved under Article 235 (which provides a legal means for filling lacunae in the Treaty) to implement an energy research and development program. This program included a specific expenditure limit to finance solar and geothermal energy projects and energy conservation.¹²⁵

¹¹⁹ See Council Resolutions of Dec. 17, 1974, O.J. (C 153/2) 2,5 respectively; 9.7.75.

¹²⁰ See Council Resolution of February 13, 1975 concerning measures to be implemented to achieve the policy objectives adopted by the Council on December 17, 1974, O.J. No. C153/6; 9.7.75; and Council Resolution of June 26, 1975 which set a short term target for oil consumption reduction, O.J. No. C 153/9; 9.7.75.

¹²¹ O.J. (C 153/3).

¹²² Cf. Council Directive of Feb. 13, 1975, 1975 O.J. (L 178/24).

¹²³ Green, *supra* note 20, at 53.

¹²⁴ O.J. (75/339) L 153/35 (1975).

¹²⁵ Cf. Council Decision of 22 August 1975 (75/510), O.J. No. L231/1-5. (This would be amended by Decision 77/54 O.J. L 10/28.) See also Council Decision of 25 August 1975 which dealt with solar energy, and recycling of raw materials, including a call for studies on biological conversion. O.J. No. L231-25 (1975). See EEC TREATY art. 235, reprinted in BASIC COMMUNITY LAWS, *supra* note 31, at 107.

Moreover, the Council adopted regulations to establish procedures by which Member States could communicate their energy situation to the Commission. It provided the Commission with the authority to determine more effectively the conditions of supply within Member States as well as procedures to obtain a) information on crude oil and petroleum prices pursuant to Articles 1, 2, 5, and 213; and b) information on investment projects in the petroleum and electricity sectors.¹²⁶

In essence, the Commission had begun to acquire important oversight powers crucial to the development and implementation of a Community energy policy. And by having access to the IEP as well, the Community had, by 1977, begun to lay the foundation for a structure that could house (1) an emergency energy allocation and reserve system; (2) consumption and reduction targets; and (3) Community funded research and development programs. Yet, tensions over how to build a solid legal edifice in energy began to surface in the late 1970's with a number of disconcerting decisions by European Court of Justice involving oil policy.

VI. LEGAL STRATEGIES AT LOGGERHEADS: FISSURES IN THE COMMUNITY EDIFICE

A. *The Problem of Restrictive Practices in the Wake of the 1973 War*

(1) *Aardolie Belangen Gemeenschap BV v. Esso Nederland BV (Before The Commission - 77/327)*

In November of 1973, in the wake of the Yom Kippur War, many oil producing countries began to limit petroleum production. Their decision set in motion a crisis in the international oil market by disrupting the supply-demand equilibrium with respect to petroleum products.¹²⁷ The crisis was particularly acute in the Netherlands where the embargo on shipments of crude oil to Rotterdam in December, 1973 created a drastic reduction in supplies available.¹²⁸

On January 4, 1974, the Commission received an application from the Dutch company Aardolie Gemeenschap BV ("ABG") to initiate proceedings¹²⁹ against several oil companies. These included three Dutch companies which were wholly-owned subsidiaries of the British Petroleum Company (collectively denominated as "BP"). ABG

¹²⁶ See, e.g., Council Directive 75/339, 1975 O.J. (L 135/5); Council Regulation 1729/76, 1976 O.J. (L 198/1).

¹²⁷ *Aardolie Belangen Gemeenschap BV v. Esso Nederland BV* 2 C.M.L.R. D1, D3 (1977). See also Evans, *supra* note 23, at 384.

¹²⁸ *Aardolie Belangen Gemeenschap BV*, 2 C.M.L.R. at D3.

¹²⁹ The proceedings were also brought by *Avia Nederland CV*. Aardolie apparently functioned as a purchasing cooperative for the 19 member AVIA group in the Netherlands. See the discussion of the Advocate General Jean-Pierre Warner in *Benzine en Petroleum Handel smaatschappig BV, British Petroleum Raffinaderiz Nederland NV and British Petroleum Maatschappig Nederland v. E.C. Commission*, 3 C.M.L.R. 174, 177 (1978). The BP case will be discussed later in this section.

contended that the companies had violated Articles 85 and 86 of the Treaty.¹³⁰ During the twelve months before the crisis, BP had served as ABG's principal supplier of crude petroleum; a product critical to the Dutch motor fuel market. According to Commission findings, BP accounted for an average of 81% of ABG's supply requirements during this period and literally 100% during the October War period itself.¹³¹

Beginning in November, 1973, there was a radical change in the origin and quantities of products supplied to ABG. During the crisis, the Dutch government called for a reduction of 15-20% in consumption in the Netherlands.¹³² BP cut its supplies of motor fuel to ABG even more. In fact, the Commission found that BP reduced delivery to ABG at percentages far greater than those to other customers. For example, Commission statistics revealed that in November, BP increased its supply to other customers 4.2% while reducing ABG's by 60.9%. This enormous disparity continued until April, 1974. Despite efforts to purchase its supply elsewhere, ABG had difficulty obtaining supply and could not make up its requirements.¹³³ The Commission found that during the crisis "ABG's stocks fell to the equivalent of three days' supply and, at certain times, were simply non-existent."¹³⁴

The Commission's factual findings triggered an inquiry into whether the BP group violated Article 86 of the Treaty. Under Article 86: "Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market insofar as it may affect trade between Member States."¹³⁵

The Commission argued that firms hold a dominant position in the marketplace when they can conduct their affairs without concern for the reactions of either their competitors or their customers. Such a state of affairs obtains when "general economic circumstances and particular market conditions combine so that firms with an established market position . . . find themselves in a position to control production and distribution in a substantial proportion of the market."¹³⁶

¹³⁰ *Aardolie Belangen Gemeenschap BV*, 2 C.M.L.R. at D3.

¹³¹ The Commission fact-finder determined that imports had fallen by 50% of their October level. *Id.* Gulf supplied 8% and Shell, Chevron, and others supplied the rest. *Id.* at D9-10. In this regard, for a discussion on ABG's long-term contractual relations with BP, *see id.* at D8-9.

¹³² *Id.* at D10.

¹³³ In this regard, there were four refiners that supplied ABG in the year prior to the crisis. BP's supplies fell drastically between November, 1973 - March, 1974. Gulf's supplies also declined considerably between January - March, 1974 over its prior monthly average. Shell and Chevron, however, increased the supply to ABG between January - March, 1974. *Id.* at D10-13.

¹³⁴ *Id.* at D12.

¹³⁵ EEC TREATY art. 86, reprinted in BASIC COMMUNITY LAWS, *supra* note 31, at 51-52.

¹³⁶ *Aardolie Belangen Gemeenschap BV*, 2 C.M.L.R. at D13.

Analytically, the market in question was the motor fuel market. The general economic circumstances were those set in motion around November 1, 1973 when the supply of oil on the world market combined with a substantial increase in the price demanded for such supply. Given the special relationship that large multi-national oil companies had with Middle Eastern oil producing states, they were the only ones with "access to oil supplies at economically viable prices. . . ."¹³⁷ The Commission concluded that "[s]uch a sudden shortage, especially one that was not brought about by economic considerations, led to a restriction of both actual and potential competition among the small group of companies concerned, a restriction that was particularly marked at the level of distribution."¹³⁸ Hence, given the supply crisis in Holland in the fall of 1973, companies such as the BP group were in a position to dominate competition, alter the structure of commercial relationships, and cause customers to be completely dependent upon them.

In order for an undertaking to avoid being found to have violated Article 86, it "must allocate any available quantities to its several buyers on an equitable basis."¹³⁹ Such equity had not been the case in BP's dealings with ABG during the oil crisis. In fact, its supplies to ABG were cut disproportionately more than those to its other customers.¹⁴⁰ In the Commission's view, while a crisis situation may cause changes in the normal course of doing business, there must be objectively valid reasons for treating customers differently and any differences could not have a discriminatory effect. "In any event, it is abusive to treat a regular long-standing and substantial customer in a way which is clearly discriminatory by comparison with other customers."¹⁴¹

The Commission found that BP had abused its dominant position under Article 86 when it violated its continuous long-standing commercial relationship with ABG. In so finding, the Commission articulated a principle of law based upon the policy of preserving a Community-wide economic infrastructure. The stability of such an infrastructure was itself predicated upon not only maintaining regular commercial relationships, but also avoiding capricious conduct that could upset the supply and demand equilibrium to the detriment of intra-Community trade. Indeed,

[f]rom the Community law point of view, it is the extent, regularity and continuity of commercial relationships which ought to be taken into consideration. If it were otherwise, the availability of supplies during a short-

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.* at D14.

¹⁴⁰ *Id.* at D15.

¹⁴¹ *Id.* at D16.

age . . . could be influenced by firms which are in a dominant position for reasons which may be casual, artificial or arbitrary.¹⁴²

While it took more than three years to render a decision from the time of ABG's application to initiate proceedings, the Commission's ruling represented a step forward in the effort to develop an enforceable Community regulatory structure by applying Community legal norms to a transnational crisis. It not only had the practical result of assuring the regularity of supply during a crisis, it implicitly recognized that Community law could be utilized to enhance a "Community idea." Article 86 could thus be invoked to "require oil companies to maintain the *unity of the Common Market* in the face of uncoordinated and disruptive national emergency measures."¹⁴³

(2) BP v. Commission

BP moved to have the decision annulled. It commenced proceedings under Article 173 of the Treaty which permitted a corporate entity to request the ECJ to review the legality of a Commission act or decision which affected it directly.¹⁴⁴ Disturbingly, the Court held that BP had not abused its dominant position within the meaning of Article 86. By annulling the Commission's decision, the Court caused a fissure to appear in the walls of an already fragile Community juridical structure. Indeed, it gave a legal justification to deferring to national decision-making in times of crisis at the expense of the Treaty's goal of encouraging competition in the marketplace.¹⁴⁵

The Court focused upon the conjunctural policies set forth in Article 103 of the Treaty as the appropriate means to analyze future energy supply crises. In this context, it is instructive to examine the dialectical interplay of arguments concerning the applicability of Articles 86 and 103 of the Treaty as set forth in the opinions of the Advocate General and the Court in order to realize that the holding was not a legal advance over the result reached by the Commission.

The Advocate General admitted that he "would shrink from holding that BP's share of the Dutch market for motor spirit was negligible."¹⁴⁶ He conceded that while BP's

¹⁴² *Id.* at D15.

¹⁴³ Evans, *supra* note 40, at 10 (emphasis added).

¹⁴⁴ *Benzine en Petroleum Handelsmaatschappig BV, British Petroleum Raffinaderij Nederland NV and British Petroleum Maatschappig Nederland v. E.C. Commission (BP v. Commission)*, 3 C.M.L.R. 174,176 (1978) *see also* Rudden and Wyatt, *supra* note 30, at 86-87. Concerning Article 173 procedure and its relationship to Article 177, *see* Gerhard Bebr, *Direct and Indirect Judicial Control of Community Acts in Practice: The Relation Between Articles 173 and 177 of the EEC Treaty*, 82 MICH. L. REV. 1229 (1984). The BP group was notified on April 25, 1977, and commenced proceedings on July 1, 1977. Under the third paragraph of Article 173, a party plaintiff has two months to institute proceedings from the point of publication or notification, whichever is later. Hence, technically, while BP was out of rule, the issue is not addressed by the court. *Id.*

¹⁴⁵ PARRY & HARDY, *supra* note 4, at 418.

¹⁴⁶ *BP v. Commission*, 3 C.M.L.R. at 184.

share of the Community market may have been small, it was a substantial portion of the Dutch market. Yet, he shifted the focus away from the consequences of such an interpretation by framing the question narrowly as follows: Did Article 86 apply "to a situation in which owing to an emergency causing a temporary scarcity of supplies of a particular commodity, the customers of the 'normal' customers of each supplier may become dependent on him?"¹⁴⁷ Predictably, he answered his own question in the negative (otherwise there would have been no need to extend the inquiry given his acknowledgement of the Commission's correct interpretation of Article 86).

The Advocate General opined that it was the function of the particular national government to allocate and regulate supply in a crisis. Typically, two options were available to governmental authorities: (1) not to intervene and let prices rise to the point at which supply and demand are in balance; or (2) avoid this approach by controlling price and supply distribution. He concluded that the Commission's view seemed to be "that where there is a lacuna in whatever governmental measures may have been taken, Article 86 may be invoked to fill it."¹⁴⁸

Yet, this was not the Commission's view. The Commission wanted to stop corporations from manipulating contract law in order to dominate the marketplace. It specifically stated that "[u]ndertakings cannot avail themselves of criteria based on the law of contract in order to prevent the realisation of the objectives of competition law in the Community"¹⁴⁹ Contrary to the Advocate General's view, the Commission's objective was to preserve one of the fundamental values of the Economic Community - a free market guaranteed by Treaty law. It was not predicated upon a mechanistic methodology of waiting to see whether governmental regulatory decisions left lacunae and then using Community law to fill them.

According to the Advocate General, a dominant position under Article 86 meant that an undertaking had to be in a position of such economic power so as to be able to act independently of its customers and competitors. Then, in disregard of the Commission's factual findings, and the legal implications flowing therefrom, he reached the following opaque conclusion to support his contention that Article 86 was inapposite:

In a temporary emergency of the kind here in question, . . . a trader cannot distribute his scarce supplies regardless of the attitudes of his customers. He must have in mind that, once the emergency is over, they will have memories of the way in which they were treated by him during the period of scarcity. Contractual customers will expect favorable treatment to which

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ See *Aardolie Belangen Gemeenschap BV v. Esso Nederland BV*, 2 C.M.L.R. D1, D15 (1977).

their contracts entitle them, both as a matter of law and as a matter of commercial honor as BP pointed out. Non-contractual but regular customers will expect the loyalty shown by them. . . on the part of their supplier in the period of scarcity. A supplier can disregard those considerations only at the peril of losing customers to his competitors after the emergency is over. So I do not think that he is during the emergency, in a dominant position in which that expression is used in Article 86.¹⁵⁰

The Advocate General further concluded that the case was outside the ambit of Article 86 and even argued that BP could take the position that (1) it had no legal or commercial relationship with ABG obliging it to supply ABG during the boycott; and (2) the burden of responsibility lay at the doorstep of the national authorities not at that of the multi-nationals.¹⁵¹ He then made the astonishing logical leap that even if BP had a dominant position, "it cannot be held to have abused that position."¹⁵²

The Court agreed with the Advocate General that BP had not violated Article 86. In its view, ABG had been only an occasional customer.¹⁵³ However, as Andrew Evans has noted, "the Court, unlike the Advocate General, did not expressly reject the possibility that an undertaking could in principle abuse its dominant position by applying unequal reductions of supply during a shortage."¹⁵⁴ Yet, rather than sustaining the Commission's decision to apply Article 86, the Court took a different tack. It reasoned that the imposition of a legal duty upon a supplier to apply a similar rate of reduction in deliveries to its customers during a crisis, regardless of the existing contractual obligations in place, obtained only *via* Article 103 of the Treaty; or, more troublingly, "in default of that, by the national authorities."¹⁵⁵

In this regard, Article 103 provides a legal basis for the coordination of Member States' conjunctural policies. Section (1), for example, provides that conjunctural policy shall be regarded as "a matter of common concern;" and requires consultation among Member States and with the Commission to determine what measures should be taken under given circumstances. Section 3 allows the Council to issue the necessary directives to deal with a particular situation. Finally, and no doubt the key section for the Court, Article 103(4) provides that "[t]he procedures provided for in this Article shall also apply if any difficulty should arise in the supply of certain products."¹⁵⁶

¹⁵⁰ *BP v. Commission*, 3 C.M.L.R. at 186.

¹⁵¹ BP had contended that Directive 73/238 of July 24, 1973 made the national authorities, not the oil companies, responsible for supply allocation and for taking the appropriate measures to mitigate the effects of shortages brought on by a crisis. *Id.*

¹⁵² *Id.* at 188.

¹⁵³ *Id.* at 192.

¹⁵⁴ Evans, *supra* note 40, at 10.

¹⁵⁵ *BP v. Commission*, 3 C.M.L.R. at 193.

¹⁵⁶ EEC TREATY art. 103, reprinted in BASIC COMMUNITY LAWS, *supra* note 31, at 59.

With its conclusion that Article 103 offered the best means to resolve a product supply problem, the Court basically accepted (1) BP's argument that the responsibility for supply difficulties in a crisis should be placed at the doorstep of the Member State governments and not the multi-nationals; and (2) the Advocate General's argument that there was a regulatory lacuna to fill.

BP essentially had built its case upon Council Directive 73/238 of July 24, 1973, which operated within the ambit of Article 103.¹⁵⁷ Article I directed that "Member States shall take all necessary measures to provide the competent authorities with the necessary powers in the event of difficulties arising in the supply of crude oil and petroleum products which might appreciably reduce the supply of these products and cause severe disruption."¹⁵⁸

Despite this apparent focus on actions to be taken by national governments, the tenor of the Directive is to take a Community-wide view within the coordinate framework of the Treaty. Thus, in the preamble, for example, the Council acknowledged that any difficulty, however temporary, which reduced supplies of vital products, could seriously disrupt the economic well-being of the Community itself. "The Community must, therefore, be in a position to offset or at least diminish any harmful effects in such a case."¹⁵⁹ Indeed, Article 3 of the Directive provided that if difficulties arose, the Commission and Member States' representatives were to convene in order to begin coordinating measures in the Community interest.¹⁶⁰

The Community interest meant taking all measures necessary to ensure the regularization and stabilization of crude oil and petroleum supplies. The Commission had noted in its Decision that the Dutch Government had accepted the fact that during the crisis period there might have to be a 20 percent per month supply reduction to customers in comparison with the corresponding month of the preceding year. "But in so doing they made no distinction between 'contractual' and 'non-contractual' customers."¹⁶¹ The BP group tried to capitalize on the crisis by drawing upon this lack of a formal distinction to reap advantages while aware of the difficulties the national authorities were having in trying to create discipline in the marketplace.

Under such circumstances, both conjunctural policy and competition in a key supply sector were clearly affected. In footnote 12 of its Opinion, the Court noted that conjunctural was a non-English *term* which "means roughly short-term economic."¹⁶² In the Court's

¹⁵⁷ See 1973 O.J. (L 228/1).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* at pmb1 1.

¹⁶⁰ *Id.* at Art. 3.

¹⁶¹ *Aardolie Belangen Gemeenschap BV v. Esso Nederland BV*, 2 C.M.L.R. D1, D15 (1977).

¹⁶² *BP v. Commission*, 3 C.M.L.R. 174, 190 n.12. (1978).

view, rules involving common economic policy pursuant to Article 103 are distinguishable from the measures involving competition under Articles 85 and 86. Each sector apparently had its own analytical sphere of reference.

Yet, the Court did not explain why. Apparently, it was predicated upon the fact that Articles 85-86 fell beneath the rubric of Part Three Title I of the Treaty: "Common Rules;" while Article 103 fell beneath the rubric of Part Three Title II: "Economic Policy." Yet, problems and rules relating to competition in the market cannot be dissociated from common economic policy unless subjected to an excessive and unnecessary formalism. Commercial policy, for example, which is within the same title as conjunctural policy, is concerned with the impact it has upon competition among undertakings in the Member States.¹⁶³

Thus, except for such a formalism, there was really nothing to stand in the way of the Commission's application of Article 86 of the Treaty. As Andrew Evans has remarked, the Commission already had experienced difficulties in trying to set further measures enacted under Article 103 with respect to raising the minimum level of reserve stocks to 120 days.¹⁶⁴ What would happen if its efforts were hampered? The Court's decision to limit matters to Article 103 hardly resolves such an eventuality.

Further, Directive 73/238, which was enacted pursuant to Article 103 in particular, provided in the preamble that "the establishment of a common energy policy is one of the objectives the Communities have set for itself."¹⁶⁵ This common energy policy was formulated by the Commission in its 1968 Guidelines; the basic principles of which were adopted by the Council in its May 18, 1972 Regulation.¹⁶⁶ In the 1968 Guidelines, the Commission stated:

Since the energy policy is intended to serve the consumers' interest, its basic guiding factor must be competition. Competition forces enterprises to exert all their competitive strength, compels them to become technically progressive, stimulates the natural processes of substitution, and brings with it a differentiation in supply. But even energy policy fundamentally geared to competition cannot be implemented without the instruments of economic policy enabling the interplay of supply and demand to be supervised and influenced more extensively than a large part of the other economic fields.¹⁶⁷

¹⁶³ See EEC TREATY arts. 85, 103, 109, reprinted in BASIC COMMUNITY LAWS, *supra* note 31, at 51, 59, 62.

¹⁶⁴ Evans, *supra* note 40, at 10, 1978 O.J. (C. 15) 3. See also Council Directive 68/414, 1968 O.J. (L 308/14) which sets forth, in Article 1, a 65 day level.

¹⁶⁵ 1973 O.J. (L 228/1).

¹⁶⁶ See Commission Regulation 1055/72, 1972 O.J. SPEC. ED. 462 (L 120/3) 462.

¹⁶⁷ First Guidelines for a Community Energy Policy, 12 Bull. of E.C. 7 (Supp. 1968).

Hence, the objective of establishing a common energy policy, as set forth within an Article 103 Directive, involved the coordinate integration of sectoral rules with respect to competition and conjunctural policy. There was no lacuna to fill. The nascent regulatory structure was in place and the Commission had approached the matter appropriately. Thus, the Court's decision undermined a common policy and created unnecessary tension in the Community decision-making apparatus by putting two key regulatory institutions at loggerheads. There was no contradiction in applying Article 86 to Article 103. It is submitted that the proper application of the rules of competition to conjunctural policy would not only have prevented legal formalism, it would also have strengthened the crisis mechanism built into Article 103 of the Treaty.

B. Beyond BP v. Commission: The Road to the Campus Oil and Bulk Oil (Zug) Cases

The 1979-1980 market disturbances in the wake of the Iranian Revolution once again revealed the EEC's vulnerability.¹⁶⁸ While the spate of regulations in the mid-1970's had led to important advances, no serious attempt at creating a centralized energy decision-making mechanism had occurred. Thus, with renewed disturbances in the oil market, the pattern of self-interested Member States seeking to secure their own supplies recurred. In such a political climate, with its centrifugal implications for Community cohesion, the Council's conduct was reminiscent of the pre-1973 period. It made sweeping pronouncements about the need to harmonize national policies - but this time by 1990.¹⁶⁹

In 1981, the Commission produced still another paper on the same troubled theme - the need to develop a Community energy policy. The paper was entitled: "The Development of an Energy Strategy for the Community." The Commission held out the hope that while Member State energy policies remained institutionally divergent, common interests might lead to common discipline. Hence, without saying so, the Commission implicitly acknowledged that Community institution building was still at the mercy of Member State nationalism. Its broad policy goals and hopes had their "objective correlative" in the area of European political cooperation in which attempts to conduct a Euro-Arab dialogue, and discussions with Japan to coordinate energy policies, accomplished very little for the Community.¹⁷⁰

The early 1980's did witness some positive developments; including Council decisions to grant subsidies for oil and gas projects and for the improvements of Community

¹⁶⁸ Fourteenth General Report on the Activities of the European Communities (1980).

¹⁶⁹ *Id.* The Report noted that on June 9, 1980, the Council had adopted a Resolution on Community energy policy objectives for 1990 and convergence of Member State policies. The Resolution moved for greater energy savings and reduction of oil imports. *Id.*

¹⁷⁰ See, e.g., Allen, *The Euro-Arab Dialogue*, *supra*, Bull. of E.C. 6 1979, points 1.1.1, 1.1.18, 1.1.19, 1.2.1, 1.2.2, Bull. of E.C. - 5 (1985), point 2.1.107, Bull. of EC - 12 (1985) points 2.1.224, 2.1.228.

¹⁷¹ Bull of E.C. - 10 (1985), point 2.1.138.

storage facilities.¹⁷¹ Equally significant, the IEA decided to set up a surveillance system for imported oil products aimed at ensuring that members of IEA opened up their markets to them. The Commission agreed to operate a similar system for the EEC.¹⁷²

Nevertheless, the overall picture was one of continued institutional tension and floundering. For example, in May, 1985, the Commission sent the Council another draft resolution for common energy goals: this time with a 1995 target date. It called for the efficient use of energy, less dependence on imported oil, and increasing the present share of solid fuels in the Community market.¹⁷³ In March of 1986, the Parliament issued its Opinion on the draft resolution for 1995 and confronted the problem directly by deploring the fact that the objectives were not more ambitious or more precisely defined.¹⁷⁴

Moreover, ECJ decisions during the 1980's disturbingly provided legal arguments which supported national energy policy decision-making. These decisions remain inhibitors to coordinate Community-wide action in energy policy. While the geopolitical order has changed since the 1991 Gulf War and the fragmentation of OPEC, legal and regulatory uncertainty in energy still remain long-range challenges to European political cooperation - despite the harmonization process underway since the passage of the Single European Act in 1986. It is, therefore, appropriate that we turn next to these ECJ decisions.

C. Campus Oil Ltd. v. Minister for Industry and Energy

On August 25, 1982, the Irish Minister for Industry and Energy issued an Order pursuant to Section 2 of the Fuels (Control of Supplies) Act of 1971 (as amended in 1981). Section 2 gave the Government broad discretionary powers to regulate the supply, distribution, and marketing of designated fuels if it believed that such action was in the national interest.¹⁷⁵ The purpose of the Order was to require each company importing oil into Ireland to purchase a proportion of its requirements from the state-owned Irish National Petroleum Corporation (INPC) whose refinery was located at Whitegate in the County of Cork.¹⁷⁶

Prior to 1982, the refinery had been owned and operated by the Irish Refining Company, Ltd. (IRC). IRC itself was owned by a consortium of four major multinational oil companies. By the mid-1970's, the consortium increasingly sought to import its supplies from more cost-efficient refineries in Europe.¹⁷⁷ Given Ireland's

¹⁷² *Id.* at point 2.1.139.

¹⁷³ Bull. of E.C. 5 (1985), point 2.1.106.

¹⁷⁴ Bull. of E.C. 3 (1986), point 2.1.153.

¹⁷⁵ See *Campus Oil Ltd. v. Minister for Industry and Energy*, 1 C.M.L.R. 465, 466-67 (Ir. H. Ct. 1984).

¹⁷⁶ *Id.*

¹⁷⁷ Finbarr Murphy, *Case Law: The National Courts*, 21 COMMON MKT. L. REV. 741 (1984).

dependency upon the consortium, the Government set up the INPC. The INPC's objective was to secure a proportion of the petroleum market in order to enhance the country's oil industry economically.¹⁷⁸ In fact, between 1979 and 1981, the INPC had concluded contracts with foreign suppliers which provided the country with 10% of its petroleum supplies.¹⁷⁹

In the summer of 1981, the consortium notified the Ministry of Industry and Energy that it would be more profitable for it to close the Whitegate Refinery. The Government determined that if the refinery closed, then suppliers of refined petroleum products would have to obtain their supplies abroad; primarily from the United Kingdom.¹⁸⁰ Accordingly, through the INPC, it purchased the IRC's share capital and decided to keep the refinery open. The Government's decision, and the concomitant cost incurred, led to the August Order.¹⁸¹

As a result, several Irish traders in petroleum products moved to challenge the validity of the Order. They applied for injunctive relief in the Irish High Court on the grounds that the Order (a) represented the introduction of a measure having an equivalent effect; (b) distorted competition; and (c) represented an abuse of a dominant in violation of Articles 30, 31, 85, and 86 of the Treaty of Rome.

The Plaintiffs looked to *Procureur Du Roi v. Dassonville* (1974) and *Officier van Justitie v. Adriaan de Peijper* (1976) in support of their Article 30 claims. *Dassonville* stood for the proposition that Member State trading rules that hindered Community trade, whether directly or indirectly, constituted measures having an equivalent effect to quantitative restrictions upon the importation of products.¹⁸²

The Court's holding in *Dassonville* was re-emphasized two years later in *de Peijper*. In *de Peijper* the ECJ had ruled that regulatory regimes that placed impediments upon intra-Community trade violated Article 30 of the Treaty.¹⁸³ Specifically,

¹⁷⁸ The objectives of the INPC are outlined in Justice Murphy's Order to the Irish Supreme Court. See *Campus Oil Ltd. v. Minister for Industry and Energy*, 1 C.M.L.R. 479 (Ir. S.C. 1984).

¹⁷⁹ Case 72/83, *Campus Oil Ltd. v. Minister of Industry and Energy*, 3 C.M.L.R. 544, 549-50 (1984).

¹⁸⁰ *Id.* at 550. See also *Campul Oil*, 1 C.M.L.R. at 482-83. On the growth British oil capacity and its implication for the EEC, see, e.g., Andrew Evans, *United Kingdom North Sea Oil Policy and EEC Law*, 7 EUR. L. REV 355 (1982); John Woodliffe, *Privatisation of the British National Oil Corporation and the British Gas Corporation*, 8 EUR. L. REV 133,135 (1983).

¹⁸¹ See *Campus Oil Ltd.*, 1 C.M.L.R. at 483-84.

¹⁸² *Id.* at 467-69; see also *Procureur Du Roi v. Dassonville* 2 C.M.L.R. 436 (1974). As David Keeling has recently argued, in *Dassonville*, the ECJ gave "an extremely wide definition" of the concept of measures having equivalent effect to a quantitative restriction on imports. In fact, according to Keeling, the breadth of the definition was amplified in the *Vande Haar* and *Kaveka de Meern* cases (Joined cases 177 and 178/82) "to the effect that even a slight hindrance to imports would bring Article 30 into play." See David T. Keeling, *The Free Movement of Goods in EEC Law: Basic Principles and Recent Developments in the Case Law of the Court of Justice of the European Communities*, 26 INT'L LAW. 467,468 (1992).

¹⁸³ Case 104/75, *Officier van Justitie v. Adrian de Peijper* 2 C.M.L.R. 271, 304 (1976)

National measures of the kind in question have an effect equivalent to a quantitative restriction and are prohibited under Article 30 of the Treaty if they are likely to constitute an obstacle directly or indirectly, actually or potentially, to imports between Member-States. Rules or practices which result in imports being channelled in such a way that only certain traders can effect these imports, whereas others are prevented from doing so, constitute such an obstacle to imports.¹⁸⁴

The Plaintiffs further contended, correctly in this writer's view, that a state run corporation that controlled 35% of the supply of the national petroleum market pursuant to a mandatory regime engineered by the State, not only restricted and distorted the market in violation of Article 85, but also abused the dominant position it had garnered for itself in violation of Article 86.¹⁸⁵

The Defendants argued against injunctive relief on the grounds that the Ministry's Order was a protectable public security measure under Article 36. Given the importance of petroleum for the national economy, the Order was essential for national economic security and the preservation of public services. The Irish Government thus tried to bring economic policy and the regulation of the distribution of petroleum supply and related services within the ambit of the rather amorphous public security language set forth in Article 36.¹⁸⁶

Justice Murphy refused to issue an injunction on the grounds that "the balance of convenience in the present case favors withholding as against granting of an injunction. . . ."¹⁸⁷ Nevertheless, he referred a number of questions to the ECJ pursuant to Article 177 of the Treaty of Rome. The Defendants objected and appealed his Order of Reference to the Irish Supreme Court.

On February 25, 1983, after hearing the arguments of the parties, the Supreme Court dismissed the appeal. It held: "It is a matter of Irish law that Article 177 confers upon an Irish national judge an unfettered discretion to make a preliminary reference to the European Court of Justice (ECJ) for an interpretation of the Treaty of Rome"¹⁸⁸ Disregarding European law on the issue, and construing Irish law narrowly, the Court opined that Article 177, by its nature, afforded a national judge unimpeded access to the ECJ. Accordingly, it upheld the Order of Reference.¹⁸⁹

¹⁸⁴ *Id.*

¹⁸⁵ *Campus Oil Ltd.*, 1 C.M.L.R. at 469.

¹⁸⁶ *Id.* at 468-69.

¹⁸⁷ *Id.* at 475.

¹⁸⁸ *Id.* at 487; *see also* *Bebr*, *supra* note 144.

¹⁸⁹ Finbar Murphy has argued that the Supreme Court's argument is flawed since there is nothing within Article 177 that would prevent a reference order from being overruled. He further opined that an appeal against reference was compatible with Community law and the Supreme Court should not have dispensed so perfunctorily with that dimension of the debate. *See* *Murphy*, *Case Law*, *supra* note 17, at 748-52.

The Irish High Court asked the ECJ to respond to the following interlocking questions:

1. Are Articles 30 and 31 of the EEC Treaty to be interpreted as applying to a system such as that established by the Fuels (Control of Supplies) Order 1982 insofar as that system requires importers of oil products into a Member State of the European Economic Community (in this case Ireland) to purchase from a state-owned oil refinery up to 35 per cent of their requirements of petroleum oils?
2. If the answer to the foregoing question is in the affirmative, are the concepts of 'public policy' or 'public security' in Article 36 of the Treaty aforesaid to be interpreted in relation to a system such as that established by the 1982 Order so that:
 - (a) such a system as above-recited is exempt by Article 36 of the Treaty from the provisions of Articles 30 to 34 thereof, or
 - (b) such scheme is capable of being so exempt in any circumstances and, if so, in what circumstances?¹⁹⁰

In his Opinion, Advocate General Slynn argued that the Irish Government's assertion that Article 30 was designed to prevent conduct aimed at protecting domestic products over imports was too narrow a reading of the rule.¹⁹¹ Rather, pursuant to *Procureur Du Roi v. Dassonville*, the proper focus of Article 30 analysis was whether the measure in question was capable of hindering intra-Community trade, not what in the language of the regulation was discriminatory.¹⁹²

He rejected the suggestion that *Rewe v. Bundesmonopolverwaltung für Branntwein* (1979), (the *Cassis de Dijon* case), (a) recognized exceptions to Article 30 independently of Article 36; and (b) permitted hindering the movement of goods within the Community when disparities between national laws relating to the marketing of products were ultimately necessary to effectuate commercial fairness and the protection of public health. According to the Government, *Rewe* could be extended to apply to national oil refining capacity given its profound linkage to the maintenance of fiscal and commercial order.

¹⁹⁰ Case 72/83, *Campus Oil Ltd. v. Minister of Industry and Energy*, 3 C.M.L.R. 544, 552 (1984).

¹⁹¹ *Id.* at 554-55. For a discussion of the tensions within Article 30 jurisprudence generally, see Kamiel Mortelmans, *Article 30 of the EEC Treaty and Legislation Relating to Market Circumstances: Time to Consider a New Definition?*, 28 COMMON MKT. L. REV. 115 (1991).

¹⁹² However, he notes that even if one approached it textually, discrimination was obtained since it compelled traders to buy a percentage of their requirements at prices fixed by the national government. *Cf. Campus Oil Ltd.*, 3 C.M.L.R. at 555.

Mr. Slynn considered *Rewe* inapposite: "There is an extensive body of directives and decisions made by the Community in respect of oil supply and the obstacles in question do not simply result from disparities between national laws."¹⁹³ He rejected the idea that because oil was important to the national economy, a government could control the sources of supply and regulate price. Thus, he answered the first question in the affirmative. Article 30's prohibition on measures having an equivalent effect was applicable.

The way now stood open for deciding whether Article 36 concepts of public security and/or public policy exempted certain regulations from the prohibitions set forth in Article 30. The Commission had argued that the Irish Government had not demonstrated any public security threat if products did not first go through the Whitegate refinery. Indeed, there was considerable refining capacity within the Community itself. A refinery, in and of itself, does not prevent shortages. The Commission correctly maintained that the solution of the problem was to "hold adequate stocks in accordance with obligations under Community directives supplemented by long term contracts for the supply of crude oil which can perfectly well be refined in other parts of the Common Market."¹⁹⁴ In short, the institutional recognition and enforcement of the Community energy regulatory regime, and the social, economic, and political discipline that would obtain from it, would strengthen the goals of Article 30 and prevent arbitrary recourse to Article 36 as a Treaty-based disguise for pursuing narrow nationalist policies and goals.

The Advocate General demurred from the Commission's opinion. Given the importance of petroleum to state stability, he considered recourse to Article 36 appropriate. Analytically, recourse to policy security arguments should not serve as a means to protect an otherwise economic interest. In support of this proposition, he looked to *Duphar BV v. The State of Netherlands* (Case 238/82) (1985).¹⁹⁵ *Duphar* involved an Order by the Dutch government to reorganize the system of health benefits and medicinal preparations with respect to a national health insurance fund for certain categories of benefits in order to correct the fund's mounting budget deficit.

The Dutch Government had advanced two arguments (that sound curiously parallel to that of the Irish Government in *Campus Oil*): (1) since it made a decision to safeguard the quality of health based on objective considerations, the measure by its nature did not involve a restriction on inter-state trade; (2) alternatively, even if the measure had an effect equivalent to a quantitative restriction on pharmaceutical products, it was a protectable public policy measure pursuant to Article 36 since its purpose was to protect national health.¹⁹⁶

¹⁹³ *Id.* at 555. For a useful review of the *Cassis de Dijon* line of cases, see Keeling, *supra* note 182, at 469-79.

¹⁹⁴ *Campus Oil Ltd.*, 3 C.M.L.R. at 557.

¹⁹⁵ *Id.* at 558.

¹⁹⁶ *Duphar BV v. State of Netherlands*, 1 C.M.L.R. 256, 276 (1985).

The ECJ was not convinced. It ruled: "Article 36 relates to measures of a non-economic nature. That provision cannot therefore justify a measure whose primary objective is budgetary inasmuch as it is intended to reduce the operating costs of a sickness insurance scheme."¹⁹⁷

Yet, while the Advocate General nodded in agreement with *Duphar*, he proceeded to argue that petroleum supply could trigger an Article 36 inquiry even though the Irish Government's Order had economic and budgetary objectives in mind. What was operative under Article 36 analysis was a public security issue not a public policy one. "The maintenance of essential oil supplies is in my view capable of falling within 'public security' in that it is vital to the stability and cohesion of the life of the modern State."¹⁹⁸ Thus, if the Court found that there were non-economic factors which warranted the Order, then the measure would not be precluded by Article 30 on the grounds of public security pursuant to Article 36.¹⁹⁹ In essence, Mr. Slynn avoided taking a stand. One is left in doubt about the legal and institutional strength of Community directives as well as whether the Irish Government's Order really involved a public security question that could not be cured by the existing regulatory regime.²⁰⁰

In responding to the questions before it, the Court concluded that the purchasing requirement established by the 1982 Order favored national production and inhibited the purchase of petroleum products from producers located in other Member States. The Order thus fell within the ambit of Article 30 which encompassed any measure which hindered intra-Community trade; whether "directly or indirectly, actually or potentially. . . ."²⁰¹ Therefore, in principle, the Irish Government's action constituted a quantitative restriction having an equivalent effect. Moreover, "[g]oods cannot . . . be considered exempt from the application of that fundamental principle merely because they are of particular importance for the life or the economy of a Member-State."²⁰²

The question now remained whether the public policy/public security objectives of Article 36 applied. The Commission had argued that Article 36 did not apply because (1) the Community had already adopted rules to ensure petroleum supplies to Member-States in the event of a crisis; and (2) the Irish Government's action was fundamentally economic in nature and, therefore, precluded by Article 36.²⁰³

¹⁹⁷ *Id.* at 279.

¹⁹⁸ *Campus Oil Ltd.*, 3 C.M.L.R. at 559.

¹⁹⁹ *Id.* at 562. See also Peter Oliver, *A Review of the Case Law of the Court of Justice on Articles 30 to 36 in 1984*, 22 COMMON MKT. L. REV. 301, 310 (1985).

²⁰⁰ Kamiel Mortelmans has also viewed the Advocate General's position to be an ambiguous one. See his review and annotation of the case in *Campus Oil Ltd. v. Minister for Industry and Energy*, 21 COMMON MKT. L. REV. 687, 703 (1984).

²⁰¹ *Campus Oil Ltd.*, 3 C.M.L.R. at 566.

²⁰² *Id.*

²⁰³ *Id.* at 567-68.

While the Court had opined that goods were not exempt from the prohibitions of Article 30 even if they were "of particular importance for the life of the nation", it began its inquiry into Article 36 by indicating that the Order might be justified if the supply of petroleum products was "not sufficiently guaranteed by measures taken for that purpose by the Community institutions."²⁰⁴

The Court admitted that the Community had, in fact, taken precautionary measures to deal with the supply of petroleum products in emergency situations. Moreover, additional measures were in place within the framework of the IEA. Nevertheless,

[T]his does not mean that the Member-State concerned has an unconditional assurance that supplies will in any event be maintained at least as a level sufficient to meet its minimum needs. In those circumstances, the possibility for a Member-State to rely on Article 36 to justify appropriate complementary measures at the national level cannot be excluded, even where there exist Community rules on the matter.²⁰⁵

The Court's Article 36 analysis thus began in the following rather contradictory manner: (a) goods of particular importance for the life of the nation are not exempt from the strictures of Article 30; but (b) goods of a particular importance for the life of the nation are exempt from the strictures of Article 30, if the Court can somehow find that Community rules are not sufficiently complete with respect thereto.

The Court looked to *E.C. Commission v. Germany* (1980)²⁰⁶ to bolster its emerging position that economic issues that affected the life of a nation could be placed outside the reach of Article 30 if it found incomplete rule-making by Community institutions. *E.C. Commission v. Germany* permitted "national legislation to derogate from the principle of the free movement of goods to the extent to which this is and remains justified in order to achieve the objectives set out in the Article."²⁰⁷

The Court admitted that under prevailing law Article 36 applied "to matters of a non-economic nature;"²⁰⁸ and a Member-State could not plead economic difficulty to circumvent the free-flow of goods between Member-States. Yet, after contending that goods

²⁰⁴ *Id.* at 568.

²⁰⁵ *Id.* at 569.

²⁰⁶ *E.C. Commission v. Germany*, 1 C.M.L.R. 198 (1980).

²⁰⁷ *Campus Oil Ltd.*, 3 C.M.L.R. at 569. This rule had previously been articulated in *Carlo Tedeschi v. Denkavit Commerciale*, 1 C.M.L.R. 1, 18 (1978) and reiterated in *Case 251/78, Denkavit Futtermittel GmbH v. Minister für Ernährung, Landwirtschaft und Forsten des Landes Nordrhein-Westfalen*, 3 C.M.L.R. 513 (1980). Yet, the Court's argument adds unnecessary tension to Article 30 jurisprudence. As David Keeling noted with respect to *Dassonville*, *Van de Haar*, and *Kavka de Meern*, "at least in theory, even a measure that causes a slight indirect, potential hindrance to trade between Member States offends against Article 30. Keeling, *supra* note 182, at 468.

²⁰⁸ *Campul Oil Ltd.*, 3 C.M.L.R. at 570.

of particular importance for the life of a nation were not exempt from Article 30, the Court held that the supply of petroleum was of such national importance that "the aim of ensuring a minimum supply of petroleum products at all times is to be regarded as transcending purely economic considerations and thus as capable of constituting an objective covered by the concept of public security."²⁰⁹ Hence, if a public security justification can be established, then accompanying economic objectives will not bar the application of Article 36.

The Court's conclusion is troubling. The Commission had shown that the Community had a considerable body of rules already in place to meet a crisis. And the Advocate General also had acknowledged the existence of "an extensive body of directives and decisions made by the Community in respect to oil supply" when he rejected the Irish Government's argument that there were exceptions implied in *Cassis de Dijon* which supported its position. Hence, the Court's decision not only undermined Article 30 jurisprudence, but also enhanced national authority at the expense of the Commission at a time when judicial support for the regulatory structure was needed.

D. Bulk Oil (Zug) A.G. v. Sun International Ltd.

Subsequent to *Campus Oil*, in the case of *Bulk Oil (Zug) A.G. v. Sun International Ltd.* (Case No. 174/84), the ECJ (this time with Commission support) upheld the priority of national energy policy over a Community agreement with a non-Member State.²¹⁰ *Bulk Oil* originated in the English High Court and was referred to the ECJ pursuant to Article 177 of the Treaty of Rome. The pertinent facts of the case are as follows.²¹¹

On April 13, 1981, Sun Oil Trading Company ("Sun"), a company incorporated in both Bermuda and the United States, entered into an agreement with the Swiss company Bulk Oil (Zug) AG ("Bulk") to provide it with large quantities of British crude oil from the North Sea. Sun's supplier was the British Petroleum Company ("BP"). Bulk entered into the contract with Sun in order to supply oil to Israel which was suffering from an acute shortage due to the Arab boycott and the loss of supplies from Iran in the wake of the Iranian revolution and the overthrow of the Shah.²¹²

The contract contained the following clause: "Destination free but always in line with the exporting country's Government policy."²¹³ When Sun learned that Bulk had named Israel as the destination point, BP and Sun refused to load the ship nominated by

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ Case 174/84, *Bulk Oil (Zug) A.G. v. Sun Int'l Ltd. and Sun Oil Trading Co.*, 2 C.M.L.R. 732 (1986).

²¹² *Id.* at 735-36, 753.

²¹³ *Id.* at 736.

Bulk for delivery to Haifa on the grounds that Bulk was in violation of British oil policy. Thus, no oil was ever delivered to Israel under the Sun-Bulk contract.²¹⁴

Since January, 1979, British policy only permitted exportation of its North Sea oil to (a) Member-States of the Community; (b) Member-States of the IEA; and (c) those countries with which there had been an existing pattern of trade prior to 1979.²¹⁵ While the policy was made known to the public, it was never incorporated into any legislation or legally binding form. However, the British Government did document the policy for the Committee of Permanent Representatives (COREPER) of the Member States of the Community.²¹⁶ Sensitive to the politics of oil in an era of boycotts and a destabilized Iran, the British Government adopted a policy that precluded oil sales to Israel.

Bulk challenged the validity of the policy and claimed that the contracting parties knew Israel was the point of destination for the oil. The dispute was referred to arbitration.²¹⁷ The arbitrator found that Bulk's insistence on naming Haifa as the port of destination constituted a repudiation of the contract and awarded Sun damages.²¹⁸

Bulk appealed the arbitrator's findings to the English High Court which upheld the arbitrator. Relying on the principles contained in the classic case of *Hadley v. Baxendale* (1854), it reasoned that it was foreseeable that damage would arise from the natural course of things when Bulk breached the destination clause.²¹⁹ Curiously, neither the arbitrator nor the High Court queried whether BP or Sun had a duty to inquire into the content of the policy and notify Bulk accordingly at the time that they entered into a supply agreement.

In addition to challenging the finding of damages under English law, Bulk sought an order of reference to the ECJ pursuant to Article 177 of the Treaty.²²⁰ It argued that the order was necessary to determine whether English policy was in conformity with the EEC-Israel commercial trade agreement entered into on May 11, 1975 and formally adopted by the Community pursuant to Council Regulation No. 1274/75 on May 20, 1975.²²¹ The Court agreed. It referred several questions to the ECJ which may be summed up broadly as follows: (1) Did the 1975 agreement preclude quantitative restrictions on English exports to Israel and would any answer to the question be affected by Regulation 2603/69?; (2) Was English policy incompatible with the EEC Treaty or

²¹⁴ *Id.* at 736.

²¹⁵ *Id.* at 736, 753.

²¹⁶ *Id.* at 752-53.

²¹⁷ *Id.* at 753.

²¹⁸ *Id.* at 736, 753.

²¹⁹ *Id.*

²²⁰ *Bulk Oil (Zug) A.G. v. Sun Int'l Ltd.*, 2 C.M.L.R. 91, 109 (1984).

²²¹ *Bulk Oil (Zug) A.G.*, 2 C.M.L.R. at 736, 753-54.

at least should England have notified the Community and/or obtained its approval prior to placing such strictures on the contract?; and (3) If English policy was incompatible with the Treaty, do the relevant provisions have direct effect so as to allow an individual to rely on them at all; including as against another individual to a contract when such contract requires compliance with the national policy of a Member State?²²²

The purpose of the 1975 EEC-Israel Agreement was to consolidate and extend the agreement previously concluded between them in 1964 and 1970 respectively.²²³ The parties resolved "to continue the progressive elimination of the obstacles to substantially all their trade. . . and to establish cooperation between the Contracting Parties on a basis of mutual advantage."²²⁴ Article I reiterated the goal of removing trade barriers between Israel and the EEC as a collective entity. This raised the twin issues of whether with the Agreement the EEC preempted the field of commercial relations with Israel; or whether there were excepted areas left open to Member State competence. Both the Advocate General and the ECJ decided that EEC did not take over the whole field of trade with Israel with respect to the Agreement and that a Member State could impose product restrictions.²²⁵

The Court focused its inquiry upon Articles 3, 4, 11, 12, and 25 of the Agreement. In this regard, Article 3 precluded the introduction of (a) any new customs duty on imports or charges having an equivalent effect; or (b) any quantitative restriction on imports or measure having an equivalent effect in trade between the EEC and Israel. Article 4 precluded the introduction of any new customs duty on exports or charges having an equivalent effect.²²⁶

Article 11 provided that restrictions on imports or exports were justified on grounds of public morality, policy, or security as long as they did not constitute "a disguised restriction on trade between the Contracting Parties."²²⁷ Under Article 12, actions of states or undertakings that restricted competition were deemed incompatible with the Agreement "insofar as they affect trade between the Community and Israel."²²⁸ Finally, Article 25 contained a catch-all provision: "The Contracting Parties shall refrain from any measure likely to jeopardize the attainment of the objectives of the Agreement."²²⁹

The ECJ admitted that a policy whose objective was to impose quantitative restrictions on exports to a non-Member State must be viewed as having an effect equivalent

²²² *Id.* at 754. See also Council Regulation 1274/75, O.J. (L 136/1).

²²³ *Bulk Oil (Zug) A.G.*, 2 C.M.L.R. at 754-55.

²²⁴ *Id.* at 756.

²²⁵ 1975 O.J. (L 136/3).

²²⁶ See *Bulk Oil (Zug) A.G.*, 2 C.M.L.R. at 732.

²²⁷ *Id.* at 756-57; see also 1975 O.J. (L 136) 4,5.

²²⁸ *Bulk Oil (Zug) A.G.*, 2 C.M.L.R. at 756; 1975 O.J. (136/5).

²²⁹ *Bulk Oil (Zug) A.G.*, 2 C.M.L.R. at 756; 1975 O.J. (136/7).

to such a restriction. The fact that the policy had not been incorporated into decisions binding on undertakings did not mean that it could escape the prohibitions set forth in Community law.²³⁰ Nevertheless, the Court found that British policy toward Israel did not violate Community law.

In arriving at its holding, the ECJ focused narrowly on Article 4. It reasoned that Article 4 contained no language expressly prohibiting quantitative restrictions or measures having an equivalent effect on exports similar to that for imports as set forth in Article 3.²³¹ Moreover, "it cannot be inferred from Article 11, ambiguous though it may be, that a clause prohibiting quantitative restrictions on exports should be understood to have been intended by the Contracting Parties."²³² Further, because Article 3 did not expressly proscribe export restrictions, it followed that "the argument that the Agreement deprived the Member States of their power to introduce such restrictions must be rejected, and the question of whether measures imposing quantitative restrictions on exports are compatible with Articles 11, 12, and 25(1) of the EEC-Israel Agreement is irrelevant."²³³

The Court's reasoning is quite baffling. Article 11, for example, provided that while quantitative restrictions and measures having an equivalent effect on exports could be justified on grounds of public security, they should not serve as a means for arbitrary discrimination or a disguised restriction on trade between the parties.²³⁴ Nowhere is it argued that the English Government's refusal to export oil to Israel was a public security measure. And even if it were, it would not just reflect the narrowly targeted discriminatory nature of the measure. It would also constitute a disguised means of acquiescing in an international boycott against a country with which the Community had concluded an international agreement in conformity with its common commercial policy in the area of external relations. Accordingly, the policy would be contrary to both Articles 12 and 25(1).

For the Court, like for the Advocate General, once it had been concluded that no formal restricting language obtained in Article 4 parallel to Article 3, then the substantive implications of Articles 11, 12, and 25 could be declared irrelevant and the problem of competence declared resolved.²³⁵ However, the implications of Article 2 of the Agreement was side-stepped. Article 2(2) provides that "Products originating in the Community shall on importation into Israel be governed by the provisions of Protocol 2."²³⁶

²³⁰ *Bulk Oil (Zug) A.G.*, 2 C.M.L.R. at 756-57.

²³¹ *Id.* at 756-57.

²³² *Id.* at 757.

²³³ *Id.* at 757.

²³⁴ 1975 O.J. (L 136) 4,5.

²³⁵ *Bulk Oil (Zug) A.G.*, 2 C.M.L.R. at 757.

²³⁶ 1975 O.J. (L 136/3).

Article 5 of Protocol 2 provided for the abolition of quantitative restrictions on imports into Israel.²³⁷ Thus, even assuming *arguendo* that quantitative restrictions on the product in dispute were subject to progressive abolition, the imposition of any restriction by a Member state would fall within the exclusive competence of the EEC for review.

What is equally troubling is that the Court's conclusion implicitly accepted the premise of British policy that the government could reserve the right to export oil to those third countries with which it had a "pattern of trade" prior to 1979 in spite of the existence of a pattern of trade (established by formal agreement) between the EEC and Israel. Thus, the Court sanctioned the priority of national trade policy over Community commercial policy; thereby granting a Member State parallel powers in an area that fell within the Community's exclusive competence.

Yet, the Court asserted that British policy did not fall within the exclusive competence of the Community. It reasoned that Regulation 2603/69 excluded products listed in its Annex, such as crude oil, from the rules pertaining to freedom of export until such time as common rules had been introduced by the Council during the transition period. "It must therefore be held, as *Sun*, the United Kingdom and the Commission have argued, that Article 10 of Regulation No. 2603/69 and the annex to that regulation constitute a specific authorization permitting Member States to impose quantitative restrictions on exports of oil"²³⁸

Does Article 10 of Regulation No. 2603/69 provide such an authorization? To be sure, it provides that "the principle of freedom of export from the Community as laid down in Article 1 shall not apply to those products" listed in the Annex.²³⁹ However, Article 10 must be read in context.

Under Article 1, exportation of products from the EEC shall be free unless subject to restrictions "which are applied in conformity with the provisions of this Regulation."²⁴⁰ Article 2, which is subsumed beneath the rubric of Title II, which itself categorically encompasses "Community information and consultation procedure," states: "If, as a result of any unusual developments on the market, a Member State considers that protective measures within the meaning of Title III might be necessary, it shall notify the Commission, which shall advise the other Member State."²⁴¹

Title III outlines protective measures that might be considered. Article 6(1) pertains to critical product shortages and subsection of that article allows for measures involving

²³⁷ *Id.* at 27.

²³⁸ *Bulk Oil (Zug) A.G.*, 2 C.M.L.R. at 760.

²³⁹ Council Regulation 2603/69 of 20 Dec., 1969, 1969 O.J. (L 324/25) 593.

²⁴⁰ *Id.* at 591.

²⁴¹ *Id.*

exports to certain countries.²⁴² Thus, Article 10, is not a *carte blanche* for a Member State to pick and choose upon which countries it wishes to impose quantitative restrictions from the products listed in the Annex. It must be read integrally with Titles II and III which involve an information and consultation procedure for critical product areas as set forth in the Annex. Following the Court's rationale, a Member State could control the export of vital products to those countries it deemed politically and economically expedient to do so regardless of whether its decisions collided with internationally binding commitments made by the EEC in conformity with the common commercial policy.

As E. M. Völker has noted, such a broad interpretation is puzzling in light of the fact that Regulation 2603/69 was amended by Regulation 1934/82. "The amendment now clearly states that only certain Member States were supposed to apply export quotas for certain products mentioned in annex. Crude oil and certain petroleum products and gases were taken out of the annex and included in Article 10 itself as amended."²⁴³

The principle of limiting freedom of export with respect to previously annexed products, such as crude oil, would not apply to all Member States "in view of the . . . of the international commitments entered into by certain Member States."²⁴⁴ The Court construed this to mean that "all the Member States, whether or not they have restricted exports of oil in the past, are free to do so and were already free to do so under Regulation No. 2603/69."²⁴⁵ Such a construction is unsettling and stretches the meaning of the amended Regulation beyond recognition.

Regulation 1934/82 limited freedom of export of crude oil to those countries, such as France, that previously had entered into international contracts and which had to be honored. Neither Sun nor the British Government proffered any argument that the refusal to export oil to Israel was a function of honoring prior international commitments. In essence, the Court's decision (this time with support from the Commission) ratified national policy at the expense of the Community's regulatory regime.

Moreover, the Court implicitly acknowledged the politicization of oil as well as the need to safeguard a national policy that fundamentally accepted the boycott of Israel in the area of petroleum products so that existing relationships in a destabilized marketplace could be preserved in the wake of the Iranian revolution and the outbreak of war between the regimes of Khomeini and Saddam Hussein. Thus, it deferred to national

²⁴² *Bulk Oil (Zug) A.G.*, 2 C.M.L.R. at 760-61.

²⁴³ E. M. Völker, *Case Law: Bulk Oil (Zug) A.G. v. Sun International Ltd. & Sun Oil Trading Company*, 24 COMMON MKT. L. REV. 99, 108 (1987).

²⁴⁴ *Id.* at 109; see also *Bulk Oil (Zug) A.G.*, 2 C.M.L.R. at 759, 761.

²⁴⁵ *Bulk Oil (Zug) A.G.*, 2 C.M.L.R. at 759.

decision-making at the expense of Community regulatory structures and unwittingly encouraged the very centrifugal forces it (and the Commission) had sought to overcome.

At further issue was whether British oil export policy toward Israel violated the principles of the Community's common commercial policy (and implicitly its external relations power) as set forth in Articles 113-116 of the Treaty.²⁴⁶ The Court recognized that in an area covered by the Common commercial policy, Member States could not share concurrent authority with the Community. Otherwise, Member States could adopt policies at loggerheads with that of the Community. This, in turn, would "distort the institutional framework, call into question the mutual trust within the Community, and prevent the latter from fulfilling its task in the defense of the common interest."²⁴⁷ This principal of acknowledging Community competence in the common commercial policy was predicated, significantly, upon an ECJ opinion rendered only a few months after the EEC concluded its agreement with the state of Israel.²⁴⁸

The Court reinforced this view by looking to the principle set forth in *Donckerwolke v. Procureur de la République* (Case No. 41/76) that since Article 113 gave the Community exclusive competence in the area of the common commercial policy, national measures affecting such policy were permissible at the end of the transitional period only by virtue of specific Community authorization.²⁴⁹ Moreover, the Court acknowledged that "the fact that a product may have a political importance by reason of the building-up of security stocks is not a reason for excluding that product from the domain of the common commercial policy."²⁵⁰

Yet, the Court then claimed that this latter principle could be discounted since it was predicated upon an ECJ Opinion which "was concerned only with the principle of general exclusion . . . of certain products from the field of application of the common commercial policy. . . ."²⁵¹ As if the Court had a preconceived result in mind, it ignored Regulation No. 1934/82 and returned to Regulation No. 2603/69 as providing specific authorization for Member States to impose quantitative restricts on oil to non-Member States. Given the circularity of its logic, it could then conclude:

Having regard to the discretion which it enjoys in an economic matter of such complexity, in this case the Council could, without contravening Article 113, provisionally exclude a product such as oil from the common rules on

²⁴⁶ *Id.* at 757-61.

²⁴⁷ *Id.* at 759-60.

²⁴⁸ *Id.* at 759.

²⁴⁹ *Id.* at 760.

²⁵⁰ *Id.*

²⁵¹ *Id.* at 760-61.

exports to non-member countries, in view in particular of the international commitments entered into by certain Member States and taking into account the particular characteristics of that product, which is of vital importance for the economy of a State and for the functioning of its institutions and public services.²⁵²

Having reached this result, it is not surprising that the Court would hold that British policy (a) did not contravene Articles 34 and 85 of the Treaty; and (b) no prior notice to or authorization from the Community was necessary.

The result reached by the Court was fraught with danger. It overfocused on the loopholes inherent in Regulation 2603/69 at the expense of the internal competence of the Community in the area of external relations as provided in Articles 112-115, 238 of the Treaty and related case law. In addition, it blithely ignored the implications of the 1982 amended version of the Regulation.

Articles 113 and 238 gave the Community the authority to negotiate and conclude commercial agreements with non-Member states.²⁵³ This authority was evidenced by the signing of a trade agreement between the Community and the State of Israel in 1975.

Moreover, under Article 115: "In case of urgency during the transitional period, Member States may themselves take necessary measure and shall notify them to the other Member States and to the Commission, which may decide that the States concerned shall amend or abolish such measures."²⁵⁴ This is consistent with Titles II and III of Regulation No. 2603/69. Given the international oil situation in January, 1979, one would assume that the British decision to refuse to export its oil to Israel, in spite of an existing Community agreement with that country, was predicated upon a sense of political and economic urgency. If one accepts such a premise, it would follow that the British Government was obliged to notify the other Member States and the Commission pursuant to Article 115 of the Treaty. If the policy was not formulated in response to an urgency, then it violated the 1975 agreement and encroached upon Community competence.

Incredibly, the Commission did not address Article 115. Rather, it tepidly argued that while the British submission of its policy to COREPER technically violated the Council Decisions which required notification and consultation on all changes in national rules applicable to exports to third countries, "the obligation to notify is not a rule

²⁵² *Id.* at 761. The Israel-EEC Agreement aside, in 1982, Andrew Evans cogently argued that British oil policy was, by its very nature, designed to promote the development of the British oil industry at the expense of Member States' markets. In fact, the policy was "fundamentally irreconcilable with the basic theory of the Common Market. . . ." Evans, *supra* note 180, at 367.

²⁵³ *Bulk Oil (Zug) Ag*, 2 C.M.L.R. at 761.

²⁵⁴ EEC TREATY art. 115, *reprinted in* BASIC COMMUNITY LAWS, *supra* note 31, at 64.

of Community law which has direct effect in the sense of . . . *Costa v. ENEL* (Case No. 6/64).²⁵⁵

Yet, as the Advocate General argued in *Donckerwolcke*, and his argument was fundamentally adopted by the Court, "in principle, protective measures must be authorized by the Commission in each individual case where exceptional circumstances provided for under Article 115 occur."²⁵⁶ Indeed, any derogations from the principles set forth in Article 115 must be "strictly interpreted and applied."²⁵⁷ Accordingly, under *Donckerwolcke*, the Community had exclusive power in the area of Commercial policy which, by definition, excluded concurrent power with a Member State.

This is consistent with the principles announced in the E.R. T.A. case (Case 22/70).²⁵⁸ In E.R.T.A., the Court ruled that

the Community alone is in a position to assume and carry out contractual obligations towards non-member states affecting the whole sphere of application of the Community legal systems. One cannot, therefore, in implementing the provisions of the Treaty, separate the category of measures internal to the Community from that of external relations.²⁵⁹

Hence, given the 1975 Agreement, British policy should have been subject to review and authorization by the Community before implementation. E. M. Völker is quite right in arguing that Article 10 of Regulation 2603/69 did not provide a specific authorization for the British Government to implement its policy. If it had constituted an authorization for a Member State to take whatever action it wanted for an indefinite period of time, then one would be left with a system of concurrent competencies despite the Common Commercial policy and the case law.²⁶⁰

Further, "the Community has taken over the commitments of the Member States in the field of GATT."²⁶¹ Under GATT, quantitative restrictions on exports are prohibited. Hence, "[i]f Article 10 forms an authorization for all Member States for any measure related to exports, the Community has lost the necessary control in a field for which it

²⁵⁵ *Id.*

²⁵⁶ *Bulk Oil (Zug) A.G.*, 2 C.M.L.R. at 764.

²⁵⁷ *Suzanne Criel, nee Donekerwolcke and Henri Schou v. Procureur de la Republique au Tribunal de Grande Instance, Lille and Director of Customs*, 2 C.M.L.R. 535 (1977).

²⁵⁸ *Id.*

²⁵⁹ *Case 22/70, Re the European Road Transport Agreement: E.C. Commission v. E.C. Council*, C.M.L.R. 335, 355 (1971). See also Patricia M. Leopold, *External Relations Power of EEC in Theory and in Practice*, 26 INT'L & COMP. L. Q. 54 (1977).

²⁶⁰ Völker, *supra* note 243, at 106-07.

²⁶¹ *Id.* at 108.

bears full responsibility."²⁶² In sum, the Court's decision in *Bulk Oil*, this time with the Commission's approval, represented another stress fracture in the regulatory arm of Community unity in the field of energy.

VIII. BEYOND BULK OIL ZUG

On February 17, 1986, the day after the *Bulk Oil* decision was issued, the Single European Act (SEA) was adopted by the Member States.²⁶³ While this might simply be an historical coincidence, it is symbolic of the fundamental tension that has hindered Community development: sweeping programmatic goals for community cohesion identified in one institutional sphere while national autonomy is reenforced in another institutional sphere.

The underlying goal of the Act was to show that the "European idea" corresponded to the wishes of a democratic Europe and transform the relations of the individual Member States into a European Union in which they would speak "ever increasingly with one voice."²⁶⁴ Yet, in spite of the "High Contracting Parties" professed intention of coordinating their economic and political relations,²⁶⁵ there was nothing in the SEA

²⁶² *Id.* In this context, the Court also muddied the waters by holding that individuals did not have the legal right to challenge a Member State's policy on the grounds that it failed to fulfill its obligation to properly notify other Member States and the Commission in advance of taking any action. Yet, in so ruling, the Court really skirted the issue of the direct effect of an international agreement upon individual rights. In essence, it provided a legal rationale to enable the national policy of a Member State to thwart Community trade objectives and binding international agreements. *Bulk Oil (Zug) A.G. v. Sun Int'l Ltd.*, 2 C.M.L.R. 732, 766-67 (1986). For an excellent discussion on the direct and binding effects of international agreements in Community law, see Jacques H. J. Bourgeois, *Effects of International Agreements in European Community Law: Are the Dice Cast?*, 82 MICH. L. REV. 1250 (1984).

²⁶³ EPC, *supra* note 18 doc. #13, at 79.

²⁶⁴ The literature on the Single European Act is extensive. The following articles represent a sampling: George A. Bermann, *The Single European Act: A New Constitution for the Community*, 27 COLUM. J. TRANSNAT'L L. 529 (1989); Jules Lonbay, *The Single European Act*, 11 B.C. INT'L & COMP. L. REV., 31 (No. 1 1988); Stefan A. Riesenfeld, *The Single European Act*, 13 HASTINGS INT'L & COMP. L. REV. 371 (1990); Pierre Pescatore, *Some Critical Remarks on the 'Single European Act'*, 24 COMMON MKT. L. REV. 9 (1987); Kathryn Good, *Institutional Reform Under the Single European Act*, 3 AM. U.J. INT'L L. & POL'Y 299 (1988); C. D. Ehlermann, *The Internal Market Following the Single European Act*, 24 COMMON MKT. L. REV. 361 (1987); Martin E. Elling, *The Emerging European Community: A Framework for Institutional and Legal Analysis*, 13 HASTINGS INT'L & COMP. L. REV. 511 (1990); Daniel T. Murphy, *European Political Cooperation After the Single European Act: The Future of Foreign Affairs in European Communities*, 12 B.C. INT'L & COMP. L. REV. 335; Eric Stein, *European Foreign Affairs System and the Single European Act of 1986*, 23 INT'L LAW. 977 (1989); Aaron Schildhaus, *1992 and the Single European Act*, 23 INT'L LAW. 549 (1989); A. Campbell, *The Single European Act and the Implications*, 35 INT'L & COMP. L. Q. 932 (1986); see also Robert M. Jarvis, *American Business and the Single European Act: Scaling Fortress Europe*, 20 CAL. W. INT'L L.J. 227 (1990); Norbert Walter, *Europe 1992 and Beyond*, 22 CASE W. RES. J. INT'L L. 331 (1990); David L. Perrott, *Regional Developments: The European Communities*, 21 INT'L LAW. 571 (1987).

²⁶⁵ See *Single European Act* doc # 13, reprinted in EPC, *supra* note 18, at 81-87. The goal of creating a United Europe was articulated in the "Solemn Declaration on European Union" concluded at the 26th European Council held in Stuttgart on June 19, 1983. *Id.* doc. #11, at 70-78. See also Pauline Neville-Jones, *The Genscher/Colombo Proposals on European Union*, 20 COMMON MKT. L. REV. 657 (1983).

that either provided for a Community energy policy or structurally coordinated energy relations among the Member States. The avoidance of making energy a treaty-mandated section, not only implied that energy harmonization was years away, but also called into question whether the Member States were really serious about a coordinate security policy given the importance of energy for military planning.

How to implement a Community-wide energy strategy still remained a problem more than four years later in the Commission's 1990 Opinion on European Union.²⁶⁶ In Section IV of the Opinion, which significantly enough was entitled "improving the effectiveness of the institutions," the Commission stated:

"As far as energy is concerned, the treaties could be consolidated into a single chapter making it possible to implement a common energy policy."²⁶⁷ Two years later in 1992, in the "Maastricht Texts of the EEC Treaty and European,"²⁶⁸ this hoped-for integration had not progressed much further. Buried in Article 3 subsection (t) of the section on principles, was the statement that as part of its overall task of establishing Member State solidarity "final activities shall include. . . (t) measures in the spheres of energy, civil protection and tourism."²⁶⁹

Thus, in the intervening six years between the SEA and the publication of the Maastricht texts of the European Union Treaty, a cohesive energy policy remained as elusive as ever. Significantly, in 1986, the Council adopted a Resolution on the Community's energy objectives not for 1992; but for 1995 at the earliest.²⁷⁰ The Council no doubt knew that national policy still remained at loggerheads with Community goals. As J. G. Van der Linde and R. Lefeber have written: "Member States have so far preferred to use national policy to secure their long-term energy supplies, rather than commit themselves to a Community policy."²⁷¹

Even though the Council's 1986 Resolution sought to begin the process of re-orienting Member State thinking by creating an internal market in energy as part of the harmonization process,²⁷² achievements in the economic market have not led to regula-

²⁶⁶ *Commission Opinion of 21 October 1990 on the Proposal for Amendment of the Treaty Establishing the European Economic Community with a View to Political Union*, (Luxembourg, 1990). For a general discussion on the Treaty text, see Ulrich Everling, *Reflections on the Structure of the European Union*, 29 COMMON MKT. L. REV. 1053 (1992).

²⁶⁷ *Id.* at 23.

²⁶⁸ These texts were published as part of a "Special Issue" in 63 COMMON MKT. L. REV. (March, 1992).

²⁶⁹ *Id.* at 588-89.

²⁷⁰ O.J. 1986, C 241/L. These objectives were developed by the Commission in 1985. See ENERGY IN THE EUROPEAN COMMUNITY, *supra* note 103, at 19-24.

²⁷¹ Van der Linde & Lefeber, *supra* note 102.

²⁷² O.J. 1986, C 241/L; Leigh Hancker, *Energy and the Environment: Striking a Balance?*, 26 COMMON MKT. L. REV. 475 (1989).

tory and policy integration in the energy sector.²⁷³ The market approach was a tacit admission that the formulation of a centralized regulatory apparatus remained insufficient to overcome the resistance of national decision-making. Thus, a new approach to integration had to be considered.²⁷⁴

A. *The Internal Energy Market*

As part of a first step towards creating an internal market in energy, the Commission undertook a review of Member State energy policies in light of the Community's energy objectives for 1995. In the spring of 1988, it transmitted its findings to the Council in a communication entitled: "The Internal Energy Market."²⁷⁵ The Commission recognized that Member States have often taken varying approaches to energy which have stood in the way of Community solidarity.

In the Commission's view, long-term objectives should include increasing energy efficiency, limit consumption, and consider ways to increase energy from renewable sources.²⁷⁶ In this regard, the Commission took a market oriented approach and looked for ways to overcome the formidable obstacles that stood in the way of energy solidarity in a manner akin to the approach taken toward effecting overall market harmonization. In its April 27, 1988 "Information Memo", the Commission implicitly admitted that Member States were traditionally prone to safeguarding their own supplies:

Leaving aside the general problem of economic and social cohesion within the Community, the constraints on completion of the internal energy market stem chiefly from the objective of safeguarding security of supply and from the strategic importance of the energy industry. To overcome these constraints, future Community energy policy must be based on the right combination of market forces and political measures to safeguard and coordinate the Twelve's supplies.²⁷⁷

²⁷³ Van der Linde & Lefeber, *supra* note 102, at 1-2.

²⁷⁴ In the early 1980's, the Commission recognized that common objectives might have to be pursued without requiring "substantial centralization of energy policy instruments." See the Commission's report in COM (81) 540, at para. 6; see also Hancher, *supra* note 271, at 483.

²⁷⁵ See the Commission's Information Memo, of 29 March 1988 (P36) and 27 April 1988 (P(88)52) which reported the adoption of the communication. For the working paper, see COM (88).

²⁷⁶ See Information Memo, *supra* note 275.

²⁷⁷ Information Memo, 27 April 1988, at 2. The Commission also acknowledged that any future action would have to include "determine enforcement of Community legislation." *Id.*, at 2-3. See also ENERGY IN THE EUROPEAN COMMUNITY, *supra* note 103, at 24-25 wherein it was officially acknowledged that the energy sector "may even be more deeply entrenched and more vigorously defended by those they have hitherto protected than in other areas."

In 1990, the Commission produced its first "progress report" with respect to the internal energy market.²⁷⁸ Commenting on the energy situation in the wake of the progress report, N. Commeau-Yannoussis, a member of the task force on Community integration, wrote that the situation was still "characterized by major national disparities between Member States of a kind liable to jeopardize the resumption of growth."²⁷⁹

Ms. Commeau-Yannoussis also noted that while the internal energy market was geared to the objectives of Community economic integration, energy represented a special case in the harmonization process. "However, due to the special nature of the energy sector, this general definition has to be modified slightly: the internal energy market must be capable of promoting greater solidarity among the Member States and of ensuring the optimum allocation of available resources."²⁸⁰

She quite correctly recognized that there was "more to solidarity in the energy sector than mere economic and social cohesion (Article 130A of the EEC Treaty)."²⁸¹ Rather, the Community needed to reduce the risks of supply breakdowns and improve the allocation of available resources.²⁸² It also needed to devise ways of speaking with one voice in external and commercial relations policy with respect to energy,²⁸³ in order to prevent a repeat of the kind of crises that nearly unhinged the Community in 1973 especially. Ms. Commeau-Yannoussis was fully aware, in 1990, that a cohesive internal energy market was years away. Indeed, "the obstacles to a genuine internal energy market are too numerous, and often too complex, to be overcome in one fell swoop. A gradual but at the same time determined approach is essential, and a logical start must be made if all the intricacies are to be unravelled."²⁸⁴

But there remained the twin issues as to whether it was possible to prevent national pressures and self-interest from impeding the development of the "European idea" and whether the legal and regulatory regime in energy had sufficient respect and authority to help do so. Significantly, in a working paper endorsed by the European Commission in July of 1990, it was noted: "National measures should be kept under a common framework to avoid conflict with the general community interest. Further measures may

²⁷⁸ Cf. COM (90) 124. The progress report followed on the heels of several communications to the Council offering proposals with respect to increasing intra-community trade in gas and electricity, price transparency to final consumers in gas and electricity, and investment projects in the energy sector. See COM (89) 332-336.

²⁷⁹ N. Commeau-Yannoussis, *The Internal Energy Market* ENERGY IN EUROPE, Dec., 1990, at 45. Ms. Commeau-Yannoussis' article was an update of an article co-authored with J. C. Gubal and published in February, 1990 in the *Revue du Marché Commun*.

²⁸⁰ *Id.* at 46.

²⁸¹ *Id.* at 49.

²⁸² *Id.*

²⁸³ *Id.* at 50-51.

²⁸⁴ *Id.* at 52.

be needed to guarantee a strategic level of security for the Community but these should be adopted and coordinated at the EC level.²⁸⁵

The drafters of the working paper sought to confront the problem by setting as a Commission task organizing “a transition from national control to security on a Community scale.”²⁸⁶ To effect the transition, a legal approach was needed; the first step of which involved “making use of existing Community legal instruments to incorporate the various national systems under a common framework.”²⁸⁷ While the paper was initially tabled,²⁸⁸ many of the ideas were adopted by the Commission in October of 1990 in proposals aimed at strengthening the regulatory machinery necessary to deal with a supply crisis.²⁸⁹

The Commission believed that the regulatory regime dating back to directives adopted in the late 1960’s and early 1970’s needed to be updated. It proposed new directives dealing with emergency measures in connection with managing supplies and reducing consumption.²⁹⁰ Moreover, it sought to persuade the Council to effect greater institutional integration between the Community and the IEA.²⁹¹

Under the proposal, there remained the unchanged obligation that each Member State had to maintain stocks equivalent to at least 90 days’ consumption.²⁹² However, the Commission proposed that a body be set up to manage 60 days’ worth of stocks to increase efficiency and price transparency. Yet, the proposals once again pointed out the unresolved tension between a Community regulatory regime and national political pressures. While the Commission would (a) establish the existence of supply difficulties via IEA analyses and international contracts entered into by the Community; and (b) notify

²⁸⁵ See *Security of Supply*, ENERGY IN EUROPE Dec., 1990, at 53. Similar views were articulated by the Commission representative, Mr. Dominioni, to the 34th General Conference of the Atomic Energy Agency (IAEA) held in Vienna in September, 1990. See *XXXIVth Take General Conference*, reprinted in ENERGY IN EUROPE Dec., 1990, at 63-66.

²⁸⁶ *Id.* at 53.

²⁸⁷ *Id.*

²⁸⁸ Mr. Cardoso e Cunha, the Commissioner for Energy, initially tabled the paper. *Id.*

²⁸⁹ The initiative for these proposals was taken by Mr. Cardoso e Cunha. See the Commission’s Information Note, 25 October, 1990 (P-18).

²⁹⁰ *Id.*

²⁹¹ *Id.* See also Van der Linde & Lefeber, *supra* note 102.

²⁹² See the summary in the 25 October 1990 Information Note and the Opinion of the Economic and Social Committee on the proposal for a council directive for providing measures to be taken in the event of a supply crisis in O.J. No. C 332/75 (16-12-92). The Council decided to consult the Economic and Social Committee on the matter in the spring, 1992. In this context, in October, 1990, the Commission adopted the SAVE Programme (“Specific Actions for Vigorous Energy Efficiency”) proposed by Mr Cardoso e Cunha as way to deal with supply problems at least until 1995. The program sought to address some other technical issues involved including transport, training and financial issues. See *Save Programme: More Efficient Use of Energy in the Community*, ENERGY IN EUROPE Dec., 1990, at 44; and the Commission Communication describing the objectives of program in O.J.: Information and Notices, No. C 23/8, (30.1.92).

Member States of decisions it wanted to take and convene a consultative committee with respect thereto to deal with a crisis, it nevertheless left the responsibility for the choice and implementation of measures to the Member States themselves.²⁹³

The Commission was similarly willing to defer to national energy plans with respect to the SAVE Programme. In its 1992 communication to the Council concerning SAVE, it noted: "Measures will be taken to promote, and where appropriate strengthen, special national and regional agencies, which will be given a leading role in managing energy-saving policies, in particular by drawing up regional energy plans."²⁹⁴

While deferring to national agencies and authorities on the one hand, the Commission envisioned pan-European cooperation in the energy field on the other. In this regard, in early 1991, it adopted a proposal for a European Energy Charter to send to the Council for consideration.²⁹⁵

The Commission viewed the Charter as a "code of conduct" which its signatories would agree to follow. However, specific binding international agreements would have to be concluded separately by the signatories to realize the objectives of the Charter.²⁹⁶ Quite significantly, these agreements, not the Charter, would provide the applicable legal framework. The Charter thus served, as did so many past proposals concerning energy, as a set of non-binding guidelines and principles in which Europeans would acknowledge a common interest in improving the security of supply and the development of cooperative infrastructures to deal with supply difficulties.²⁹⁷

Once again the tension between the European idea and national realities remained outstanding and, in effect, unaddressed. This tension was manifest in the Economic and Social Committee's October, 1992 Opinion concerning actions to be taken in the event of supply difficulties in crude oil and petroleum.²⁹⁸ The Committee noted that when it was consulted in May, 1991, it was asked to consider draft directives concerning the alleviation of oil supply difficulties which were intended to update directives from the

²⁹³ See also the written question No. 1090/91 by Mr. Carlos Rubles Piquer concerning practical implementation of security of supply in Spain in the area of natural gas and Mr. Cardoso e Cunha's response concerning the integrated grid in this energy section in Information and Notices, O.J. No. C 2/15 (6.1.92). On the attempt to effect common rules for an internal market on natural gas. See the proposal for a directive in Information and Notices O.J. No. C 65/14 (14.3.92) and previously related directives cited therein.

²⁹⁴ See *Specific Actions for Vigorous Energy Efficiency - SAVE*, in O.J. No. C 23/10 (1992), and *SAVE Programme, ENERGY IN EUROPE* *supra* note 292, at 44.

²⁹⁵ COM (91) 36. The Proposal was based upon a related set of principles set out in the Paris Charter of November 21, 1990 following the Conference on Security and Cooperation in Europe.

²⁹⁶ *Id.* See also Commission Information Note, 13 February 1991 (P(91)5).

²⁹⁷ *Id.* See also Commission Information Note, 11 July 1991 (P(91)665) reporting on the preparatory session of the Conference on the proposed Energy Charter scheduled for July 15-19, 1991 in Brussels.

²⁹⁸ O.J. (C 127), 19.5.1992 and O.J. (C 332), 16.12.1992.

1970's.²⁹⁹ Moreover, following Council meetings in May and October, 1991, the Commission was required to present revised proposals. Yet, no new draft of the oil stockholding proposal appeared. Accordingly, the Committee was only asked for its Opinion with respect to the draft Directive concerning emergency measures.³⁰⁰

The Committee advised that in the wake of the Gulf Crisis and the events of the 1970's, enhanced institutional cooperation and integration between the Community and the IEA needed to be considered. Further, it warned that existing crisis mechanisms still could be undermined by national and local pressures. While it was hoped that emergency measures could be coordinated as the internal market program took effect after January 1, 1993, "measures, e.g., to restrict oil consumption which differed between Member States would also be at obvious risk of evasion."³⁰¹ A proposal for a cohesive regulatory regime that would prevent Member State evasion was not advanced beyond recommending establishing yet another consultative Committee of Member State representatives that would meet with the Commission to resolve supply problems.

In the wake of Maastricht and the efforts at European Union, energy policy remains a discordant note in the harmonization process reflecting the unresolved "contrapuntal" tension between Community unity and national separateness. Thus, the concern with downplaying the relationship of the energy sector to the overall scheme of European Union at the Maastricht Summit in 1991, with which this article opened, remains symptomatic of the deeper institutional problem that needs to be solved.

²⁹⁹ O.J. (C 332), at para. 1.1.

³⁰⁰ As set forth in COM (92) 145. *Id.* at para. 1.3. The Committee also noted in para. 1.4 that the adoption of the draft directives would have impacted on the "balance of power" between the Council and Commission. The Committee noted that "both the previous draft Directives, presented by the Commission after the Iraqi invasion of Kuwait in August, 1990, but before 'Desert Storm' in the first months of 1991, would — if accepted by the Council — have significantly increased the Commission's power to act independently of the Council in the spheres of activity concerned".

³⁰¹ *Id.* at para. 2.4.

