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Settlement of Disputes within the IEA Oil Emergency Sharing System.

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SETTLEMENT OF DISPUTES WITHIN THE IEA OIL EMERGENCY SHARING SYSTEM

Richard F. Scott*

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I. INTRODUCTION

Dispute settlement procedures were not foremost among the concerns of the members of the International Energy Agency (IEA) when it was established in November 1974.[1] Their primary concern was the

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1. The sixteen initial members of the International Energy Agency were Austria,

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resolution of the consumer countries' problems with substantive energy policy.[2] In the wake of the unprecedented Arab oil embargo of 1973/74, preparation of measures to meet oil supply emergencies, particularly preparation of measures to deal with disruptions in oil imports from the Middle East, was of first importance. A comprehensive information system had to be set up promptly in order for oil supply emergencies to be managed intelligently and to accomplish the broader purpose of enhancing oil market understanding. This required a permanent system of consultation with oil companies, as well as the creation of other data mechanisms. Under the security protection of the IEA Emergency Sharing System, dependence on imported oil had to be reduced over the long-term, principally by means of cooperative efforts concerning energy conservation, accelerated development of alternative sources of energy, and a program of energy research and development. Those activities were to be carried out within a new inter-governmental organization established in Paris as an autonomous agency of the Organisation for Economic Co-Operation and Development (OECD).

An immense and urgent energy policy challenge thus faced the newly created International Energy Agency. The Agency's program prepared thoughtfully, but expeditiously throughout most of 1974

Belgium, Canada, Denmark, Germany, Ireland, Italy, Japan, Luxembourg, the Netherlands, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. *See* Agreement on an International Energy Program, Nov. 18, 1974, 27 U.S.T. 1685, T.I.A.S. No. 8278, 14 I.L.M. 1 (1975) [hereinafter I.E.P.]. Subsequently, Australia, Greece, New Zealand and Portugal became members. *See* Office of the Legal Advisor, U.S. Dep't of State, Pub. No. 9433, Treaties In Force 241-42 (1987). Norway takes part pursuant to a document entitled "Agreement Concerning the Participation of Norway in the Work of the International Energy Agency." *See* Agreement Concerning the Participation of Norway in the Work of the International Energy Agency, Feb. 7, 1975, 14 I.L.M. 641, 641 (1975). The International Energy Agency (IEA) is an autonomous agency of the Organisation for Economic Co-operation and Development (OECD). *See* Decision of the Council Establishing an International Energy Agency of the Organisation, Nov. 15, 1974, [C(74)203(Final)] 14 I.L.M. 789 (1975)(Finland, France and Greece abstained). All OECD Member Countries except Finland, France and Iceland now participate in the Agency.

2. For this history and general description of the IEA see Manin, *Les Réactions des États Victimes de la Crise de l'énérgie*, SOCIÉTÉ FRANÇAISE POUR LE D. INT., COLLOQUE DE CAEN, LA CRISE DE L'ÉNÉ RGIE ET LE D. INT., 137, 137 (1976); Scott, *Innovation in International Organization: The International Energy Agency*, HASTINGS INT'L & COMP. L. REV. 1, 1 (1977); Claudy, *The International Energy Agency*, 14 NAT. RESOURCES LAW. 457, 457 (1982); Holley, *The IEA and EEC Emergency Oil Allocation Systems: Legal Problems*, 1 J. ENERGY & NAT. RESOURCES L. 73, 73 (1983); Toner, *The International Energy Agency and the Development of the Stocks Decision*, ENERGY POL'Y 40, 40 (1987) and the other literature cited within those sources.

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culminated in the Agreement on an International Energy Program (I.E.P. Agreement).[3] It called for immediate policy development action by member governments and for appointment of a Secretariat. Time had allowed for only the most urgent features of the program to be fully negotiated for inclusion in the I.E.P. Agreement. These features included the Emergency Sharing System commitments, the information system, and the most essential institutional provisions. Policies and procedures in most other sectors of the Agency's work, including long-term energy development, research and development and producer/consumer relations were foreseen only in the broadest terms within the Agreement. Policies and procedures regarding these sectors were to be developed more concretely by the Agency itself, and its Governing Board was given binding decision-making power in order to make that possible.

Dispute settlement procedures, on the other hand, were not specifically dealt with at all in the Agreement; nor were they as such discussed at length in the I.E.P. preparatory work which took place in the Energy Coordinating Group at Brussels in the course of 1974. While a number of I.E.P. provisions were designed to help shape the resolution of policy disagreements within the Agency, and some of these will be discussed below, there was no specific provision for the resolution of disputes of a legal nature, such as questions of interpretation of the Agreement, competence of the various IEA bodies, the validity of unprecedented actions to be taken by the Secretariat, compliance by governments with their new I.E.P. obligations, or disputes which might arise between the cooperating oil companies and the Agency or governments or other companies.

The sense of the Energy Coordinating Group was that legal as well as political disagreements among the various participants would have to be resolved in accordance with the future decisions of the Governing Board, which is the highest level decision-making body of the

3. The text of the Agreement on an International Energy Program, also referred to as the "I.E.P. Agreement", the "I.E.P.", or the "Agreement" is reproduced in 27 U.S.T. 1685, T.I.A.S. No. 8278, 14 I.L.M. 1 (1975). It has since been amended only with respect to provisional accession of new members and by the addition of new members to the voting table. *See id.* at art. 71, 27 U.S.T. at 1720-21, T.I.A.S. No. 8278, 14 I.L.M. at 31; *id.* at art. 62.2, 27 U.S.T. at 1716-17, T.I.A.S. No. 8278, 14 I.L.M. at 26-28. There have also been consequential adjustments of the voting weights as set forth in Article 62.2 and of the special majority definitions in Article 62.4(a) and (b). *See id.* at art. 62.4(a) & (b), 27 U.S.T. at 1716-17, T.I.A.S. No. 8278, 14 I.L.M. at 27-28.

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Agency.[4] Such questions as whether the Governing Board's actions concerning disputes would be a case-to-case process or whether the Board would establish separate mechanisms for dispute resolution were not explicitly addressed. Nor would it have been feasible for the founders to write into the I.E.P. Agreement a comprehensive dispute settlement mechanism while there was clearly a more urgent need to proceed with broader questions of policy. Furthermore, it would have been difficult at that early date to make a thorough analysis of the kinds of disputes which might arise under the Emergency Sharing System, and it would have been quite impossible to foresee the nature of disputes in those sectors which would be developed only after the Agency had become fully operational.

After more than thirteen years of experience in Agency operations, it is now possible to analyze the dispute settlement mechanisms available, or not available, for operations under the Emergency Sharing System. Before examining those mechanisms as respects the principal participants in the system: the Secretariat, the Agency, the member governments and cooperating oil companies, the respective functions of those participants within the context of the Emergency Sharing System must be briefly described.

II. THE EMERGENCY SHARING SYSTEM

The Emergency Sharing System is designed to ensure an equitable sharing of the supplies of oil which would remain available to IEA countries during a severe oil supply disruption.[5] The burden of a shortfall to the group of IEA countries or to any individual IEA country is to be distributed fairly throughout the group in accordance with rules, summarized below, which were initially set forth in the I.E.P. Agreement and later refined by the Governing Board. In this

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4. *See id.* at art. 50-52, 27 U.S.T. at 1712, T.I.A.S. No. 8278, 14 I.L.M. at 23-24.

5. *See* Second Plan of Action to Implement the International Energy Program, 53 Fed. Reg. 2866 (1988) (describes Emergency Sharing System); *see also* Commission Decision Relating to a Proceeding Under Article 85 of the EEC Treaty (IV/30.525 International Energy Agency), Dec. 12, 1983, 31 O.J. EUR. COMM. (No. L 370/30) 3 (1983), Common Mkt. Rep. (CCH) ¶ 10,563, *reprinted in* 23 I.L.M. 457, 457-67. Among the most complete and reliable sources of information concerning the IEA Emergency Sharing System are the Reports of the United States Attorney General pursuant to section 252(i) of the Energy Policy and Conservation Act of the United States, published periodically by the United States Department of Justice, and parallel reports published by the United States Federal Trade Commission. *See* Energy Policy and Conservation Act of 1975, Pub. L. No. 94-163, Fed. Energy Guidelines (CCH) ¶ 10,850.

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distribution process the members are expected to retain their relative economic positions, notwithstanding how the disruption would otherwise fall, and to overcome the temptation "to scramble" for reduced supplies or to submit to possible political or economic pressures from oil producers outside of the IEA region. The system for equitable distribution of available oil might also be expected to ensure that the emergency would not result in unacceptably higher prices in the market for crude oil or products.

One of the most sensitive elements of the Emergency Sharing System which could give rise to policy or legal disagreements is the trigger mechanism for activating the sharing obligations contained in the I.E.P. Agreement. Those obligations are not automatically activated when the emergency oil shortfall levels are reached, nor is an intervening political decision necessary before they become activated. They normally require a Secretariat "finding" that:

> — [T]he *group of IEA countries* has sustained or can reasonably be expected to sustain a reduction in the daily rate of its oil supplies at least equal to 7% of its consumption during an historical reference period;[6]
>
> — or any *particular IEA country* has sustained or can reasonably be expected to sustain a reduction in its oil supply in a like percentage of its consumption.[7]

When the "finding" becomes operative under the conditions described below, legally binding sharing obligations arise under the I.E.P. Agreement.[8] Shortly after the "finding" of a qualifying supply disruption for the Group of IEA countries is made, the Secretariat performs the calculations necessary to fix the scope of the sharing obligations for each member country. This is done first by calculation of a "supply right," which represents an amount of oil based on historical consumption, less that country's proportionate share of the shortfall, and less the amount of oil which the country is required to save under its demand restraint obligation. Once the supply rights of the members are established, the allocation of available oil can be made in accordance with principles set forth in the I.E.P. Agreement. If a country's supply right exceeds its domestic oil production and net

6. *See* I.E.P., arts. 13-14, 27 U.S.T. at 1697, T.I.A.S. No. 8278, 14 I.L.M. at 10.

7. *See id.* at art. 17, 27 U.S.T. at 1698, T.I.A.S. No. 8278, 14 I.L.M. at 11.

8. The basic rules governing the allocation of oil in consequence of a shortfall of supply to the group of IEA countries as a whole are contained in the I.E.P. Agreement. *See id.* at art. 7, 27 U.S.T. at 1694-95, T.I.A.S. No. 8278, 14 I.L.M. at 7-8.

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available imports during the emergency, the country is entitled to an "allocation right" for additional net imports equal to the amount of that excess. The additional imports are to be received from the imports or domestic production of other IEA countries found to have an "allocation obligation" in accordance with similar principles. An "allocation obligation" arises when the sum of a country's normal domestic production and net imports of oil exceeds its supply right calculated on the basis of the principles indicated above.

A somewhat different procedure is followed in the case of a qualifying supply disruption affecting a single country.[9] In such a situation, that country would have an allocation right and all other IEA countries would have a corresponding allocation obligation. The country with the short supply absorbs the first seven per cent of its reduction in oil supplies and its allocation right is limited to the excess of the shortfall over the amount required to be absorbed. The allocation obligation is then shared among the other countries in proportion to their consumption during an historical reference period. When one or more other members of the group suffer a seven per cent or greater supply disruption during the same period, the foregoing procedures for dealing with a single country problem may be applied *mutatis mutandis* for those other countries as well.

All of the calculations which determine the relative positions of the IEA countries under the various conditions described above and which give meaning to the obligations to share oil are performed by the Secretariat, not by the governments concerned. No longer is the right to receive available oil to be fixed by each country on the basis of its political or economic judgments, by the supply actions of oil producing countries outside of the Agency, or by the oil companies. Nor is the inter-governmental action to be confined to recommendations or requests to IEA countries. Instead, the right of each country is to be formulated as part of a system of firm legal obligations activated by the Secretariat and expressed in terms of definite amounts of oil calculated by the Secretariat.

These calculations are complicated by the expected interface between the European Economic Community (EEC) and the IEA sharing systems.[10] Since the two systems rest on different conceptual

9. *See id.* at art. 8, 27 U.S.T. at 1695, T.I.A.S. No. 8278, 14 I.L.M. at 8.

10. *See* Holley, *The IEA and EEC Emergency Oil Allocation Systems: Legal Problems*, 1 J. ENERGY & NAT. RESOURCES L. 73, 73, 75 (1983). The European Commission participates

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bases and the EEC system includes France while the IEA does not, there will always be some differences in the amounts of oil to be supplied under the two systems. Possible operational conflict between the two systems is minimized by an adjustment of the IEA allocation rights and allocation obligations of the EEC countries as required among themselves in order to take account of the EEC rules. The EEC Commission delivers the necessary information concerning the internal EEC re-allocation to the Secretariat, and the re-allocation is then carried out by oil companies operating within the EEC. Volumes of oil can be made available to France by companies operating under instructions from an EEC country acting at the request of the EEC Commission.

The calculations of supply rights, allocation rights, allocation obligations, and the adjustments required by the EEC interface are based upon data supplied to the Secretariat by twenty-one IEA governments, the European Commission and some forty-two cooperating oil companies.[11] Since the data base cannot be absolutely sound and since discrepancies are expected to appear in data derived from such disparate sources, the initial calculations may not be fully reliable and are therefore subject to final revision at a later stage.

Once the allocation rights and allocation obligations are established by the Secretariat, they are communicated to IEA governments and cooperating oil companies. They are also provided to the IEA Emergency Management Organization, which consists of members of the Secretariat, as well as of oil supply experts who are drawn from the companies and organized as an Industry Supply Advisory Group (ISAG) in Paris. The actual process of oil allocation then takes place by means of the following types of allocation activities:

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in the IEA in accordance with OECD rules. The active participation of the Commission includes the attendance at meetings of IEA bodies, the right to speak (but not to vote) and the receipt of documents. *See* Supplementary Protocol No. 1 to the Convention on the Organisation for Economic Co-operation and Development, Paris, Dec. 14, 1960, 12 U.S.T. 1728, T.I.A.S. 4891, 888 U.N.T.S. 179 (with protocols 1 and 2). Under Article 72 of the I.E.P. Agreement, that Agreement is open for accession by the European Commission, but such accession has not taken place. *See* I.E.P., art. 72, 27 U.S.T. at 1721, T.I.A.S. No. 8278, 14 I.L.M. at 31.

11. *See id.* at arts. 32-36, 27 U.S.T. at 1705-06, T.I.A.S. No. 8278, 14 I.L.M. at 17-18. References in the text to "Co-operating Companies" or "Companies" denote the oil companies which have established relations with the IEA as "Reporting Companies" in IEA terminology, unless the context indicates otherwise. The important role these companies play in the IEA is discussed in greater detail in Section V of this article.

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> *Type 1*: The oil companies, voluntarily and independently of the IEA, rearrange their own supply systems in response to the emergency situation, and in so doing may take into account IEA allocation right and obligation information supplied by the Agency, but without the specific transaction approval by the Agency foreseen under the Type 2 process described below.
> *Type 2*: The oil companies voluntarily rearrange supplies in response to specific requests of the IEA Emergency Management Organization in order to bring about a balancing of allocation rights and obligations, making voluntary offers to give up or to receive oil. This process is aided by the ISAG and other members of the Emergency Management Organization in order to bring about appropriate offers. With the approval by the IEA Executive Director, acting as IEA Allocation Coordinator, supply actions under the voluntary offer system are contracted for and carried out by the companies concerned.
> *Type 3*: If the foregoing voluntary process does not result in the fulfilment of countries' supply rights, an inter-governmental body of the Agency, the SEQ Emergency Group,[12] decides what further actions are required and how they will be implemented. Such actions could include direct instructions from individual governments to oil companies in what might be called mandatory or involuntary supply actions.

This process is carried out monthly with updated allocation right and allocation obligation calculations, and takes into account actions taken under the system and other intervening developments. Successive series of the three types of supply activities described above are carried out as necessary until the emergency conditions pass and the system is closed down pursuant to agreed deactivation procedures.[13]

As in the case of most complex systems, the Emergency Sharing System creates a great potential for disputes. The commitments taken under the system, as well as the instructions under which the Secretariat functions, are often stated broadly to ensure flexibility and future adaptation. The definition of Secretariat responsibilities is not always formulated with ideal legal precision and clarity. Moreover, disagreements under such provisions are more likely to arise in the operation of the Sharing System because the actions to be taken affect important political and economic interests and involve oil cargoes of very great

12. *See infra* note 59 (introduction into the composition and functions of the SEQ Emergency Group); *see also infra* notes 59-69 and accompanying text (overview of SEQ Emergency Group functions concerning allocation actions).

13. *See* I.E.P., arts. 23-24, 27 U.S.T. 1685, 1701, T.I.A.S. No. 8278, 14 I.L.M. 1, 13-14 (1975).

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financial value. All of these factors combine to create a potential for legal as well as policy disagreements among the interested participants in the course of operations under the Emergency Sharing System.

III. Possible Disputes Concerning Secretariat Actions: The Trigger "Finding"

As evidenced in the foregoing summary of the Emergency Sharing System, the IEA Secretariat has unique responsibilities which extend beyond the meeting support, program development, data collection, research, and publication activities commonly conferred upon international secretariats. Among the most important operational responsibilities of the IEA Secretariat are the making of "findings" under the I.E.P. Agreement, particularly "findings" which trigger the Emergency Sharing System, and the calculation of supply rights, allocation rights, and allocation obligations. Each of these Secretariat functions is described in the I.E.P. Agreement and supporting Governing Board decisions in terms which provide a reasonable basis for determining whether they are correctly performed. However, each function contains subjective elements which make legal judgments of rule compliance difficult to formulate. They thus provide a useful starting point for an examination of the mechanism for resolving members' challenges to Secretariat actions in these and in other areas of the Secretariat's work.

A. *The "Finding"*

The Emergency Sharing System is activated under a process which begins, under Article 19.1 of the I.E.P. Agreement, with a Secretariat action.[14] That action consists of the making of a "finding", pursuant to a legal obligation when a reduction of oil supplies mentioned in the applicable activation article of the I.E.P. Agreement has occurred or may reasonably be expected to occur.[15]

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14. *See id.* at art. 19.1, 27 U.S.T. at 1698-99, T.I.A.S. No. 8278, 14 I.L.M. at 11.

15. *See id.* Article 19.1 provides:

The Secretariat shall make a finding when a reduction of oil supplies as mentioned in Articles 13, 14 or 17 has occurred or can reasonably be expected to occur, and shall establish the amount of the reduction or expected reduction for each Participating Country and for the group. The Secretariat shall keep the Management Committee informed of its deliberations, and shall immediately report its finding to the members of the Committee and inform the Participating Countries thereof. The report shall include information on the nature of the reduction.

The I.E.P. rules appear to provide an objective standard for making a "finding", a standard that might well be subject to legal procedures for resolving controversy. For example, either the seven per cent level under Articles 13 or 17 is reached or it is not; if that level is not reached, there is either a reasonable expectation of the shortfall reaching the seven per cent level or there is not. In the affirmative cases the "finding" could theoretically be protected by applying legal standards in dispute settlement procedures. Where the seven per cent level is reached, the Secretariat is expected to support its position, if challenged, by at least a preponderance of evidence or the more convincing case. However, the Secretariat can establish its case by demonstrating only "a reasonable expectation" that the shortfall may occur. The latter, less stringent standard substantially reduces the proof which should be required to support the "finding". The reasonable expectation standard seems to require the production of substantial and convincing evidence to support the expectation, but not necessarily to the degree required to establish that expectation beyond reasonable doubt or by the most convincing case, or even by a preponderance of supporting evidence. This type of examination could fruitfully be made by judges or arbitrators under the applicable standards of proof. However, the I.E.P. Agreement provides a political process in a number of stages under terms and conditions which all but excludes any possibility of such a formal legal review.

In cases of a positive "finding" that would trigger the system, the first review foreseen in the I.E.P. Agreement is begun promptly in the Management Committee, composed of senior representatives of all IEA governments.[16] Within a period of forty-eight hours, that Com-

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Id. Article 13 provides:

> Whenever the group sustains or can reasonably be expected to sustain a reduction in the daily rate of its oil supplies at least equal to 7 per cent of the average daily rate of its final consumption during the base period, each Participating Country shall implement demand restraint measures sufficient to reduce its final consumption by an amount equal to 7 per cent of its final consumption during the base period, and allocation of available oil among the Participating Countries shall take place in accordance with Articles 7, 9, 10 and 11.

Id. at art. 13, 27 U.S.T. at 1697, T.I.A.S. No. 8278, 14 I.L.M. at 10. Article 14 parallels Article 13 for cases of twelve per cent supply reduction for which ten per cent demand restraint is applicable. *Compare id.* at art. 14, 27 U.S.T. at 1697, T.I.A.S. No. 8278, 14 I.L.M. at 10 *with id.* at art. 13, 27 U.S.T. at 1697, T.I.A.S. No. 8278, 14 I.L.M. at 10. Article 17 provides for allocation of oil to a Participating Country which individually sustains or can reasonably be expected to sustain a seven per cent reduction in its supply; this is known as the "selective trigger." *See id.* at art. 17, 27 U.S.T. at 1698, T.I.A.S. No. 8278, 14 I.L.M. at 11.

16. *See id.* at art. 19.1, 27 U.S.T. at 1698-99, T.I.A.S. No. 8278, 14 I.L.M. at 11; *see also*

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mittee must meet to review the accuracy of the relevant data and information by performing an essentially technical review of the data supporting the "finding". The Committee's report sets out the views of its members without making a decision as to the validity of the "finding", and the report is then promptly forwarded to the Governing Board.[17]

A policy review is then performed by the Governing Board, which is a political body composed of "one or more ministers or their delegates" from each member country.[18] The "finding" is deemed by operation of law to be confirmed and thus to become operative within fifteen days,[19] unless the Governing Board, acting by a special majority, decides otherwise within specified time limits.[20] When the Governing Board interrupts the process of activation under Article 19.3, it acts by a strong majority without any textual constraints as to the reasons for its action. It may decide not to activate (and in effect to annul the "finding") for any reason it deems sufficient, such as a determination that the Secretariat erred in "finding" the supply reduction to have reached or to be reasonably expected to reach the critical seven per cent level. On the other hand, the Board might determine that the disruption is best resolved by other means, such as coordinated stockdraw[21] or that the disruption will disappear before the im-

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id. at art. 53.1, 27 U.S.T. at 1713, T.I.A.S. No. 8278, 14 I.L.M. at 24. The I.E.P. provides for a Management Committee stage. The Management Committee meets jointly with the Governing Board in a de facto merger of the two and has never met separately. If that practice were followed in an emergency, the Management Committee stage could in effect be bypassed and the Committee's functions could be carried out by the Governing Board at the same time that the Board exercised its functions. This could reduce the time foreseen for carrying out the finding review procedures.

17. *See id.* at art. 19.2, 27 U.S.T. at 1699, T.I.A.S. No. 8278, 14 I.L.M. at 11-12.

18. *See id.* at art. 50.1, 27 U.S.T. at 1712, T.I.A.S. No. 8278, 14 I.L.M. at 23.

19. *See id.* at art. 19.3, 27 U.S.T. at 1699, T.I.A.S. No. 8278, 14 I.L.M. at 12.

20. *See id.* at art. 62.4, 27 U.S.T. at 1716-17, T.I.A.S. No. 8278, 14 I.L.M. at 27-28. The majority required to block the trigger is at least 15 out of a total of 20 members for the "general trigger" in cases of a supply shortage of the entire group, and 17 out of 20 members is required for the "selective trigger" in cases of supply shortage of one or more particular members only. The voting rules are discussed at greater length in Scott, *Innovation in International Organization: The International Energy Agency*, HASTINGS INT'L & COMP. L. REV. 1, 50 (1977).

21. On July 11, 1984 the Governing Board adopted the "Decision on Stocks and Supply Disruptions" (see IEA/Press(84)7, July 11, 1984) which established procedures to be employed for prompt decisions on the use of oil stocks, particularly government-owned or government-controlled oil stocks, early in a supply disruption. Although a coordinated stockdraw was foreseen principally as a quick response measure for dealing with supply shortfalls of less than the seven per cent level required to trigger the IEA Emergency Sharing System, the

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pact of the IEA actions can be felt. The Board might also act in consequence of political or other considerations having no relation to IEA operations. With such complete freedom of choice and in the absence of any obligation to articulate the reasons for its choice, the Board's decision becomes a political one, which probably cannot be effectively controlled by judges or arbitrators. This is tantamount to a provision excluding such legal review in these situations, except perhaps for compliance with procedural requirements.

In the case of a negative determination by the Secretariat as to the requisite level of shortfall (this would be like a negative "finding"), there could also be a challenge, indeed there might be greater likelihood of challenge, by one or more adversely affected member countries in need of oil under the System. In such cases legal remedies might be considered appropriate if an adversely affected member country could establish that the Secretariat failed to act in the face of a shortfall which demonstratively exceeded the activation minimum. That country could presumably show actual injury, particularly where it alone suffered the loss of supply and where the Agency failed to make up the loss in accordance with IEA rules. There are, however, both substantive and procedural obstacles to overcome in considering possible legal remedies in such cases.

B. *Problems with Employing Legal Procedures*[22]

The I.E.P. Agreement standards are not as clear and free from ambiguity as they might first appear. Articles 13, 14 and 17 state the activation standards in categorical terms and Article 19.1 is equally categorical in stating that the Secretariat "shall make a "finding" when a reduction of oil supplies as mentioned in Article 13, 14 or 17 has occurred or can reasonably be expected to occur . . . ."[23] However, these provisions are not to be applied rigidly or automatically or without taking into account the intentions of the members in accepting the I.E.P. commitments, or the situation currently prevailing in member countries. It would be unreasonable to trigger the system

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Governing Board could, of course, adopt coordinated stockdraw to complement the Sharing System or as a substitute for it in cases where the seven per cent threshold is reached.

22. References in the text to "legal procedures," "legal remedies," "legal decisions," "dispute settlement procedures" and the like denote formal procedures for the application of legal standards such as would take place in judicial or arbitral procedures.

23. *See* I.E.P., art. 19.1, 27 U.S.T. 1685, 1698-99, T.I.A.S. No. 8278, 14 I.L.M. 1, 10-11.

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in any case where the shortfall is not expected to continue for the prolonged period of time which might be required for the Emergency System to be fully activated.[24]

The "finding" concept contained within the I.E.P. Agreement thus requires the Secretariat to exercise an element of judgment. Although the criteria to be applied by the Secretariat are not stated in the I.E.P. Agreement, certain types of cases in which the allocation system is to be activated are readily discernable. Those types of cases are understood to include curtailments of oil exports from producing countries, whether economically or politically motivated, or where production or transportation is interrupted because of war, other hostile acts, or major national disasters. Yet, it could not have been intended for the Emergency Sharing System to cover fluctuations of supply attributable to market forces or ordinary operational difficulties of the industry or interruptions of supply due to strikes; nor should the System be triggered when a notional seven per cent shortfall is produced by statistical anomalies. Thus, instead of a rigid objective standard, there are subjective elements to be assessed by the Secretariat in determining whether to make the "finding".

As a safeguard against possible error or inaction by the Secretariat, the I.E.P. Agreement provides an alternative procedure in order for an adversely affected country to obtain a "finding". Article 21 permits any participating country to request the Secretariat to make a "finding".[25] If the Secretariat does not make the "finding", the country may invoke review provisions which empower the Governing Board itself to make the "finding" by a majority vote.[26] As in the case of a Governing Board action following a positive "finding", the Board's action in reviewing the Secretariat's failure to make a "finding" is a political matter. There is again no requirement that the Board articulate the reasons for its action in acting or failing to act as requested[27] nor is it under compulsion to apply objective standards to make or to refuse to make the "finding". Under these conditions it is doubtful that the Board's political action can be effectively controlled by judges or arbitrators.

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24. An example of a prolonged period of time which might be required for the Emergency Sharing System to be fully activated is two or three months.

25. *See* I.E.P., art. 21, 27 U.S.T. at 1700, T.I.A.S. No. 8278, 14 I.L.M. at 13.

26. *See id.*

27. *See id.*

A number of sound reasons exists for excluding judicial or arbitral remedies in respect to the "finding" actions and the resulting activation or non-activation of the Emergency Sharing System. The System is first and foremost an emergency system designed to function upon short notice at very great speed. The System must be promptly and vigorously put into operation by responsible officials, without hesitation or second thoughts grounded upon possible legal liability or interference and without the possible burden of litigation distractions in the course of operations. Judicial interruption of the sharing process is therefore unthinkable, as is judicial compulsion to remedy non-activation. In the latter case, the emergency will doubtless have receded or disappeared before the requisite legal decisions can be rendered. Judgments or awards declaring or establishing legal principles would have little precedential value for future cases, which could scarcely be expected to repeat the earlier emergency conditions on which the precedents would be based. Additionally, international claims for compensation of members for losses suffered by reason of non-activation are clearly outside the scope of the commitments members took in the political context of the I.E.P. Agreement in 1974 and outside the scope of their present expectations. In confining the procedures to political ones and in creating conditions under which judicial or arbitral procedures could not be applied, members have agreed to assume the risks, whether political, operational or financial, of the system not being operated in accordance with the apparent thrust of the rules set forth in the I.E.P. Agreement.

Procedural obstacles to the use of judicial or arbitral remedies also exist. No courts, whether national or international, have been granted general jurisdiction over the parties or the subject matter of judicial actions which might be instituted, and no such jurisdiction, much less consent by the parties, has been given for arbitration proceedings raising the types of issues referred to above.

The Secretariat and the Governing Board are internal creations of the IEA, having no independent legal capacity or standing under the I.E.P. Agreement or under national legislation implementing the I.E.P. Agreement.[28] Nothing in the I.E.P. Agreement establishes any remedy against actions of the Secretariat or the Governing Board and it would be only with great difficulty that one could imagine what

28. *See id.* at arts. 49, 59, 27 U.S.T. at 1711-15, T.I.A.S. No. 8278, 14 I.L.M. at 22-23 & 25-26.

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appropriate and effective legal remedies might be fashioned. The Secretariat, following normal international practice, is responsible solely to the principal organ of the Agency, in this case the Governing Board, which in turn is fully empowered to make all decisions necessary for the establishment and the functioning of the Secretariat. Internal decisions affecting the Secretariat may thus be made by the Governing Board, but there is virtually no institutional control on actions by the Governing Board. Moreover, the Executive Director of the Agency, as well as the members of the staff and the government representatives serving on the Governing Board or in other bodies of the Agency, are granted immunity from legal process.[29] The IEA is an autonomous agency of the OECD which not only has the legal capacity and standing to appear in judicial as well as arbitral proceedings, but also enjoys the full immunity from legal process which is customary for international organizations.[30] These immunities could be waived, of course, as could the immunities of governments under public international law, but there are no indications of any disposition to request or effect such waivers either generally or on a case-by-case basis.

On the international level, no institutional device has been established for the IEA (or the OECD generally or any OECD body) to participate in judicial proceedings such as the advisory opinion process available in the International Court of Justice for United Nations institutions. No agreements have been made for arbitration of the types of issues now under consideration, not even in the IEA's Dispute Settlement Centre which offers, under carefully designed conditions and limitations, a highly developed instrument of arbitration.[31] Great care was exercised to limit the jurisdiction of the Centre in such a way as to exclude consideration of these issues and to prevent the IEA, its organs, the Secretariat, or member governments from being parties to arbitration proceedings conducted under the auspices of the Centre. With this avenue foreclosed and with other judicial and arbitration possibilities excluded for various reasons, it should be con-

29. Privileges and immunities of the IEA as such, the Secretariat, including the Executive Director, and representatives of IEA governments are derived on the basis of their OECD status. *See* Supplementary Protocol No. 2 to the Convention on the Organisation for Economic Co-operation and Development, Paris, Dec. 14, 1960, 12 U.S.T. 1728, 1748-49, T.I.A.S. No. 4891, 888 U.N.T.S. 179, 197 (with protocols 1 and 2).

30. *See id.*.

31. For a discussion of the IEA Dispute Settlement Centre see Part V of this article.

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cluded that issues involving "finding" actions or the activation or non-activation of the IEA Emergency Sharing System are subject to conflict resolution solely by means of a political process.

IV. Possible Disputes Concerning Obligations of Member Governments

The International Energy Program (I.E.P.) is contained in a multilateral international agreement to which twenty parties are now bound by their signature or by accession and consents to be bound.[32] In addition to institutional arrangements and Secretariat provisions, the I.E.P. Agreement contains a body of obligations directly binding on the member governments of the Agency in accordance with international treaty law. These obligations include the basic elements of the IEA Emergency Sharing System and other provisions directly bearing upon the implementation of the system:

(1) *Stocks*: There is an emergency reserve commitment for each country to maintain stocks at a level sufficient to sustain consumption for at least ninety days with no net oil imports;[33]

(2) *Demand Restraint*: Each country is required at all times to have ready a program of contingent oil demand restraint measures enabling it to reduce its oil consumption to the seven per cent, ten per cent or higher level as required by the I.E.P.;[34]

(3) *Activation*: When requisite oil supply reductions occur, each country is obligated to implement mandatory demand restraint measures to reduce consumption by the amounts required under the I.E.P. Agreement (seven per cent, ten per cent or more as the case may be) and to carry out the allocation of oil;[35]

(4) *Allocation*: When the System is activated, each country agrees to "take the necessary measures in order that allocation of oil will be carried out" pursuant to the relevant chapters of the I.E.P. Agreement;[36]

(5) *Emergency Meetings*: Representatives of all IEA governments are

32. *See* I.E.P., 27 U.S.T. at 1799-1801, T.I.A.S. No. 8278, 14 I.L.M. at 1; *see also* Office of the Legal Advisor, U.S. Dept. of State, Pub. No. 9433, Treaties In Force 241-42 (1987). Including Norway, which has special status, the total number of IEA countries is 21. *See* Agreement Concerning the Participation of Norway in the Work of the International Energy Agency, Feb. 7, 1975, 14 I.L.M. 641, 641 (1975); *see also supra* note 1 (recognizing Norway's special status).

33. *See* I.E.P., arts. 2-4, 27 U.S.T. at 1692-93, T.I.A.S. No. 8278, 14 I.L.M. at 5-7.

34. *See id.* at art. 5, 27 U.S.T. at 1693, T.I.A.S. No. 8278, 14 I.L.M. at 6-7.

35. *See id.* at arts. 12-17, 27 U.S.T. at 1697-98, T.I.A.S. No. 8278, 14 I.L.M. at 10-11.

36. *Id.* at art. 6, 27 U.S.T. at 1693-94, T.I.A.S. No. 8278, 14 I.L.M. at 7. The allocation

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required to meet to consider issues raised by the emergency oil situation; following the making of the emergency "finding" by the Secretariat, the Governing Board is required to meet promptly (within two to six days);[37]

(6) *Information*: Each country is required to "make available to the Secretariat all information which is necessary to ensure the efficient operation of emergency measures" and "to ensure that oil companies operating within its jurisdiction make such information available to it as is necessary to enable it to fulfil its obligations" under the emergency information provisions;[38]

(7) *Financial Contributions*: Each country has accepted a legal obligation to make its contribution to the common expenses of the Agency which are shared on the basis of an agreed scale;[39]

(8) *Legislative and Other Measures*: Each country has agreed to take "the necessary measures, including any necessary legislative measures, to implement this Agreement and decisions taken by the Governing Board";[40]

(9) *Agency Support and Development*: Going beyond the specific obligations referred to above, each country has taken a commitment, inferred from I.E.P. Agreement provisions in the aggregate and from the responsibilities generally resulting from Agency membership, to use its best endeavors in a constructive and cooperative spirit to support and develop the Agency as required to realize its objectives.[41]

The foregoing compilation indicates the principal types of intergovernmental obligations found in the I.E.P. Agreement. As refined and supplemented in the I.E.P. Agreement and Governing Board decisions, they constitute legally binding promises which each member has given to each other member of the Agency. A number of the commitments, such as those relating to staffing, facilities, infrastructure and financing, have as their object the normal functioning of the

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obligation is further developed in Articles 7-11. *See id.* at arts. 7-11, 27 U.S.T. at 1694-96 T.I.A.S. No. 8278, 14 I.L.M. at 7-9.

37. *See id.* at art. 19, 27 U.S.T. at 1698-99, T.I.A.S. No. 8278, 14 I.L.M. at 11-12.

38. *Id.* at arts. 32.1, 32.2, 27 U.S.T. at 1705, T.I.A.S. No. 8278, 14 I.L.M. at 17; *see also id.* at arts. 33-36, 27 U.S.T. at 1705-06, T.I.A.S. No. 8278, 14 I.L.M. at 17-18.

39. *See id.* at art. 64, 27 U.S.T. at 1718, T.I.A.S. No. 8278, 14 I.L.M. at 28-29; *see also* Decision of the Council Establishing an International Energy Agency of the Organisation, Nov. 15, 1974, [C(74)203 (Final)], 14 I.L.M. 789 (1975); Convention on the Organisation for Economic Co-Operation and Development, Dec. 14, 1960, art. 20, 12 U.S.T. 1728, 1739, T.I.A.S. 4891, 888 U.N.T.S. 179, 189.

40. I.E.P., art. 66, 27 U.S.T. at 1719, T.I.A.S. No. 8278, 14 I.L.M. at 29.

41. *See id.* at art. 1, 27 U.S.T. at 1691, T.I.A.S. No. 8278, 14 I.L.M. at 5.

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Agency itself. They also include the broad commitment of each member to carry out its I.E.P. obligations in a constructive, cooperative spirit, a vitally important commitment which is difficult to define precisely. In the absence of concrete Governing Board decisions, disputes arising in those areas would quite clearly be difficult to manage under formal dispute settlement procedures. There are, however, other more specific obligations with immediate impact upon members' readily identifiable interests. The latter commitments, including those applicable to stocks, demand restraint and emergency allocation under the IEA Sharing System, appear *a priori* to be sufficiently concrete for the useful application of such procedures.

A. *Stocks*

Under the emergency reserve commitment, which is essentially an oil stock-holding commitment, there are a number of factors which could lead to disagreement in the application or interpretation of the relevant I.E.P. provisions and Governing Board decisions. Important interests are at stake in maintaining stocks at the ninety-day I.E.P. level because of the costs incurred in acquiring, financing and holding stocks. Any significant upward variant on the ninety-day rule could prove quite expensive to governments or industry or both, for the stock level concerns industry as well as government administrations, and not all governments have been able to meet their commitments at all times. Moreover, the stock obligation is continuous, indeed, it arose immediately when the I.E.P. was signed in 1974 and, as modified, continues to the present day. Each of these considerations, combined with the need to resort to interpretation of the relevant I.E.P. provisions, complicates the resolution of disagreements of governments concerning the appropriate levels and uses of stocks. Despite this potential for conflict, the Agency work on stocks has proceeded harmoniously without need to resort to any formal settlement procedures. A number of the technical but important questions concerning definitions and the like have been worked out in the Governing Board.

The initial commitment to maintain sixty days of stocks was enlarged first to seventy days on January 1, 1976 and then later in the same year to the full ninety days effective January 1, 1980 under a Governing Board decision which also determined that during the intervening years the stocks should be built up progressively. This result was reached through a patient process which accomodated

conflicting concerns of members and the need for flexibility, notwithstanding that only a special majority—rather than unanimity—was formally required for this measure to be adopted in binding terms.[42]

In making decisions concerning stocks, the Governing Board has recognized that not all members need to reach the requisite levels at precisely the same moment. Exceptions have been made in some cases and unusual situations have been acknowledged. Legal disputes in this area have been avoided entirely by a progressive step-by-step process and by the formulation of actions under the practice of consensus which ensures that the final outcomes are virtually free from legal doubts or controversy.

An example of this process can be seen in the effort to bring about, in legal terms, a modest adaptation of the stock obligation to changed circumstances in 1982. As written in the I.E.P. Agreement, the obligation is to maintain stocks sufficient to sustain consumption for ninety days with no net imports, with both consumption and net oil imports to be reckoned at the average daily level of "the previous calendar year."[43] It was found that during the period following 1979 the stock commitment could decrease as a result of a fall-off in both consumption and net imports, whereas during an expected later period of increases in consumption and net imports the commitment, based on the lower earlier numbers, would be insufficient to meet the expectations of the Sharing System. In order to reduce that risk, stocks could be calculated on the basis of average net imports during the preceding three calendar years, if higher than the commitment calculated on the previous calendar year (not counting consumption reductions based on long-term structural change). With this objective foreseen as a policy matter, a question was then presented as to how that policy could be achieved under the apparently strict language of the I.E.P. text referring only to "the previous calendar year."

The logical procedure would have been to amend the stock provision pursuant to the Governing Board's general power to amend the I.E.P. Agreement under the rule of unanimity.[44] Proceeding by formal amendment has the advantages of: (1) avoiding any doubt con-

42. *See id.* at art. 2.2, 27 U.S.T. at 1692, T.I.A.S. No. 8278, 14 I.L.M. at 6. The applicable special majority rule, contained in Article 62.4(a) of the I.E.P. Agreement, requires the affirmative vote of at least 15 countries. *See id.* at art. 62.4(a), 27 U.S.T. at 1716, T.I.A.S. No. 8278, 14 I.L.M. at 27-28. The actual decision was reached by consensus.

43. *See id.* at art. 2.1, 27 U.S.T. at 1692, T.I.A.S. No. 8278, 14 I.L.M. at 5.

44. *See id.* at art. 73, 27 U.S.T. at 1721, T.I.A.S. No. 8278, 14 I.L.M. at 31.

cerning the validity of a decision if made by interpretation; (2) being directly binding under the law of treaties, and (3) enjoying the permanence of a formal amendment and attracting greater public notice. However, those advantages were found to be outweighed by the burdens of a formal amendment procedure: (1) the need to resort to a "consent to be bound" procedure with attendant delay and reliance upon provisional application; (2) the possible political problems of raising such a question in the parliaments of twenty members, and (3) the difficulty of effecting future adaptations. These burdens seemed disproportionate to what was, in reality, a minor technical adaptation in a System containing much more far-reaching obligations.

Another possibility was for the Governing Board to act under more general operational powers conferred upon it by the I.E.P. Agreement. Under Article 51.2, the Governing Board is empowered to: "review periodically and take appropriate action concerning developments in the international oil situation, including problems relating to the oil supplies of any Participating Country or Countries."[45] These are quite broad powers which could fairly and confidently be considered to cover the type of measure under consideration, particularly in view of the specific reference in the quoted text to ". . . problems relating to the oil supplies of any Participating Country or Countries."[46] Many IEA actions have been taken under these powers, which are broad enough to apply to measures applicable either before, during, or after an oil supply emergency.

Although the application of Article 51.2 would have been most in keeping with the spirit of the I.E.P. Agreement, another possible procedure is provided in Article 22 as follows: "The Governing Board may at any time decide by unanimity to activate any appropriate emergency measures not provided for in this Agreement, if the situation so requires."[47] Article 22 is thus intended to give the Governing Board, acting by unanimity, authority to adapt the measures which are provided in the Agreement to situations not specifically foreseen in the text, as well as to adopt altogether novel measures. Article 22 may be invoked for "appropriate emergency measures" and "if the situation so requires," which involves assessments to be made by the

45. *Id.* at art. 51.2, 27 U.S.T. at 1712, T.I.A.S. No. 8278, 14 I.L.M. at 23.

46. *Id.*

47. *Id.* at art. 22, 27 U.S.T. at 1700, T.I.A.S. No. 8278, 14 I.L.M. at 13.

Governing Board with a certain amount of discretion and flexibility.[48] Any measure which would adjust the technical emergency system calculations to reflect an increased commitment to maintain stocks can be viewed by the Governing Board as a measure required by the situation, as foreseen by Article 22. Under the terms of that Article, the Governing Board can make the requisite decision "at any time," i.e., as a precautionary measure in advance of or during the emergency itself.

The decisions of the Governing Board adopted pursuant to the Agreement are "binding on the Participating Countries" as provided in Article 52.1.[49] In order to become legally binding, a measure must, whatever it is called, be made pursuant to the I.E.P. Agreement in terms of subject matter and voting rule. The measure must fall within the Program, which includes Article 51, and must be adopted unanimously if new obligations are imposed.[50] The measure must also be framed unmistakably in terms of a legal obligation, rather than as a recommendation or declaration.

Thus, the Governing Board can make the necessary decision in a legally binding form without resort to the burdensome formal amendment procedure. Nevertheless, the Board's general powers may be limited to dealing with situations not specifically provided for in the I.E.P. Agreement. Since, for the change in the stocks reference period, "the previous calendar year" text appears explicitly in the I.E.P. Agreement, the use of general powers to apply a three year average type of formulation may be seen as conflicting with the original text or as an attempt to amend it indirectly. This might open the measure to challenge on legal grounds, weak as those grounds might be, with consequential uncertainty and the possibility of an *ultra vires* type of legal dispute.

Hence, the objective of a dispute-free solution under a working rule of consensus suggests the need for a different formulation. That and other objectives were achieved by the Governing Board adopting not a legally binding commitment to apply the three calendar year average, but by deciding by consensus that all IEA member countries would "make efforts" not to let stocks fall below ninety days of the average net imports during the preceding three calendar years where

48. *Id.*
49. *Id.* at art. 52.1, 27 U.S.T. at 1712, T.I.A.S. No. 8278, 14 I.L.M. at 24.
50. *See id.* at art. 61.1(b), 27 U.S.T. at 1715, T.I.A.S. No. 8278, 14 I.L.M. at 26.

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the commitment would be higher than that resulting from the "previous calendar year" text and subject to the exception concerning structural change. In that way, the Governing Board all but eliminated any risk of legal disputes arising out of its decision.

At times there have been questions regarding the compliance of members with the ninety-day stock level rule. In that context legal disputes concerning the scope of the stock obligation could theoretically arise, particularly under the somewhat complex IEA definitions employed in the stock obligation,[51] but so far this has not been the case in any significant way. When compliance questions have arisen within IEA bodies, the government concerned has not defended its position on the basis of controversial views of the stock obligation which could lead to disagreement as, for example, over the stock definitions or other legal elements.

The Agency's approach to stock rule compliance has been pragmatic. Information on stocks in all member countries is reported monthly to the Agency for analysis and information for all members. The information is distributed in a format which shows clearly the number of days of stocks held, country by country, in accordance with IEA definitions and, since 1982, under both the "previous calendar year" and the "preceding three calendar years" formulations. Member countries meeting in the IEA Standing Group on Emergency Questions and the Governing Board are thus well-informed as to members' stock situations and would consequently be able to take action if the need arose. Inquiries may be made to countries about stock levels and the Governing Board has sometimes made recommendations concerning general stock actions. With all countries so informed, there are no surprises to be anticipated in this area and such early warning may lead, if necessary, to certain members making compensatory adjustment to their own stocks in cases where others might not be able to fully meet their obligation.

There is substantial stock compliance incentive built into the Emergency Sharing System. Whatever the actual level of stocks may be in a particular country, the Secretariat will, in making the calculation of that country's supply right and allocation right or allocation obligation under the System, take into account that country's stock obligation rather than true stock level. Thus, the calculations will be made

51. *See id.* at Annex, arts. 1-9, 27 U.S.T. at 1802-05, T.I.A.S. No. 8278, 14 I.L.M. at 32-35.

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on the basis of the required ninety-days of net oil imports for each country as if in fact the ninety-day obligation were fulfilled. In an emergency each of those countries will have a national "emergency reserve drawdown obligation" which refers to the quantity of oil equal to that country's share of the group shortfall in the emergency. That amount of loss of supply for a particular country is assumed to be made up from the drawdown of stocks, and will not be compensated for in the process of allocation of available oil. A country which is not in compliance with its stock obligation accordingly has its supply right and allocation right or obligation calculated as if the full amount of stocks were available. The risk of non-compliance with the stock obligation therefore falls squarely on the country which fails to comply.[52] This increases the incentive to maintain stocks, for there is no provision requiring non-compliance stock losses to be distributed among other members.

Disputes arising in connection with stocks are expected to be kept to a minimum or not to arise at all. Special care is taken by the Governing Board to ensure that stock initiatives which might increase the burden on members are adopted by consensus. The particular needs of members from time to time are recognized and accommodated. The information system prevents surprises through early warning of worrisome stock developments. The main risks of non-compliance fall directly on the non-complying member. In these ways the System is designed and applied to minimize or avoid altogether disputes among governments with respect to their IEA stock commitments. As in the case of possible disagreements over the Secretariat's "findings" under the allocation trigger rules, the foreseeable disagreements over stocks would seem to require IEA internal and political type preventive or settlement arrangements, rather than judicial or arbitral procedures.

B. *Demand Restraint*

In much the same way as stock obligations, the continuing demand restraint obligations do not seem to lend themselves readily to judicial

52. When a member country fails to comply with its stock obligation, a measure of risk falls upon the other members as well as upon the non-complying member because the vulnerability of the entire group is increased as a result of the failure of the non-complying member to maintain the minimum required stocks. This is a reflection of the worldwide market for oil and the interrelations of the energy economies of all IEA countries.

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or arbitral determinations. The obligation to maintain demand restraint readiness is stated as follows in Article 5.1 of the I.E.P.:

> Each Participating Country shall at all times have ready a program of contingent oil demand restraint measures enabling it to reduce its rate of final consumption in accordance with Chapter IV.[53]

The level of demand restraint imposed by Chapter IV varies with the level of the oil supply shortfall. If the shortfall reaches seven per cent, the demand for oil in each country must be reduced by seven per cent; if the shortfall reaches twelve per cent, the demand restraint level rises to ten per cent. In extreme and lengthy emergencies, the Governing Board is empowered, by special majority, to increase the mandatory demand restraint level beyond ten per cent as may be required for meeting the necessities of the situation.

Demand may be restrained by a great variety of measures in each of the consumption sectors as well as by limitations on the amount of oil made available to consumers. The effectiveness of particular measures will necessarily vary from country to country as a consequence of differences in consumption patterns and expectations of consumers. In each country the choice of measures may have significant political impacts. For these reasons, the I.E.P. leaves to each government the choice of particular measures, the mix of demand restraint; and the use of excess stocks in lieu of demand restraint. The demand restraint obligation may thus be characterized as an obligation of result rather than as an obligation of means. In other words, members are required to achieve the seven per cent or ten per cent or other applicable level of reduced oil consumption, but there are no legal commitments as to the specific means by which the required result must be achieved.

One exception to this characterization can be found in the demand restraint readiness obligation which requires that a program of contingent measures be ready *at all times*.[54] That formulation refers not only to a period of emergency, but also to periods of time when the Emergency Sharing System has not been activated.[55] Disagreements could arise during non-emergency periods as to whether or not a particular country's "program" is in fact sufficient to meet emergency requirements. The sufficiency of a particular program is an often difficult and subjective matter of judgment, for it requires an assessment

53. I.E.P., art. 5.1, 27 U.S.T. at 1693, T.I.A.S. No. 8278, 14 I.L.M. at 6.
54. *See id.*
55. *See id.*

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of possible future results under unforeseeable circumstances. Reliable judgments of this kind are difficult to make before the measures are actually implemented, and even then there may be room for disagreement. During periods of preparation, draft programs may be exchanged, analyzed, discussed and criticized. Such programs may be the subject of conscientious consultation and review, but they cannot be tested realistically or put into operation before the emergency arises. If tested, they could not be expected to yield reliable elements for analysis as to probable outcomes in an emergency arising under different conditions at a later time. In this respect, the Agency's demand restraint information exchange, review, and assessment, regularly carried out by the SEQ in accordance with Article 5.2 of the I.E.P. Agreement, might produce more realistic results than those which could be obtained from rigorous legal interpretations of the demand restraint concept.[56]

The scope of the demand restraint obligation *during an emergency* is perhaps easier to evaluate, because the obligations are much clearer. The obligation to restrain demand to the seven per cent or ten per cent level is triggered by the activation process which makes operational the rule that "Each Participating Country shall implement demand restraint measures sufficient to reduce" consumption to the applicable I.E.P. level.[57] When the Sharing System is activated, the actual conditions under which demand restraint measures are to be applied will be known or determinable. The existence of a clear standard should facilitate the assessment of the measures in terms of the results achieved and to be achieved pursuant to the I.E.P.

The control function of the SEQ also applies during an emergency, since the SEQ is required on a continuing basis to review and assess "the effectiveness of measures actually taken by each Participating Country."[58] In providing to all members detailed information on the measures taken by the other members, this process lays the foundation for critical review by the members as well as for remedial actions

56. *See id.* at art. 5.2, 27 U.S.T. at 1693, T.I.A.S. No. 8278, 14 I.L.M. at 7. The compliance judgments are further complicated by the I.E.P. provision authorizing a member to substitute for demand restraint measures in an emergency the use of stocks held in excess of the 90-day emergency reserve commitment. *See id.* at art. 16, 27 U.S.T. at 1698, T.I.A.S. No. 8278, 14 I.L.M. at 11.

57. *See id.* at art. 5.1, 27 U.S.T. at 1693, T.I.A.S. No. 8278, 14 I.L.M. at 6.

58. *Id.* at arts. 5.2, 5.3, 27 U.S.T. at 1693, T.I.A.S. No. 8278, 14 I.L.M. at 7.

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by the Governing Board as necessary to deal with the demand restraint during the course of the emergency.

The objective of the demand restraint provisions is to decrease consumption levels at least to the desired amounts, as a means of absorbing part of the shortfall in oil supplies. In the same way that the I.E.P. process concerning the "finding" contain subjective and elusive elements, the demand restraint concepts would be difficult to apply in rigorous legal terms and legal challenge would probably not yield worthwhile results, especially if those challenges were made in outside courts or arbitration tribunals. For those reasons the corrective process for dealing with disagreements will be developed within the IEA structure through information exchanges, consultations, deliberations, and recommendations of the Governing Board. Political accommodation will be one of the major elements to be developed in that process.

The ultimate sanction of the demand restraint obligation, as for the stock obligation, is contained in the rule that the effectiveness of each country's measures is to be taken at one hundred per cent for purposes of the Emergency Sharing System calculation of the country's supply right and its allocation right or allocation obligation. If a country fails to reach its demand restraint level, that fact is not to be taken into account in determining the amount of oil to be supplied to that country; the oil lost through failure to reach the required demand restraint level will not be replaced by the System.

Hence, the ultimate demand restraint measure applied in the course of the emergency will be the absence of the oil from the country's supply system, which should provide a prompt and effective incentive for correcting failures of performance. Disputes arising among governments in this area will have to be resolved promptly, as a practical matter, by a consensus process within the political bodies of the Agency.

C. *Allocation*

The allocation of available oil, supported by demand restraint to reduce consumption and the availability of stocks, is the heart of the IEA Emergency Sharing System. Allocation is intended to balance allocation rights and obligations periodically to ensure that each member country receives the volume of oil to which it is entitled pursuant to its supply right. Insofar as possible, this would be achieved by redirecting oil cargoes which, at the time of allocation, have yet to

reach their destinations. However, oil cargoes which have already arrived at their destinations and oil held in member countries would also be subject to allocation or exchange in the unlikely event that this should be necessary. In the course of an emergency, supply rights as well as allocation rights and obligations will be recalculated each month on the basis of fresh information to ensure that changing conditions and supplies are factored continuously into the System.

Allocation decisions are made within the Emergency Management Organization, the IEA's emergency operational structure in Paris. IEA governments, the Secretariat, and the oil companies are represented in the Emergency Management Organization. The IEA Executive Director, as Allocation Coordinator, is responsible to the SEQ Emergency Group which is composed of all IEA members, takes decisions on inter-governmental actions during the emergency, and maintains regular communication links with member governments.[59] The oil industry is represented by the Industry Supply Advisory Group (ISAG) composed of some seventeen to twenty oil industry supply experts responsible, under the authority of the Allocation Coordinator, for maintaining communication links with the companies and for advising the Allocation Coordinator on allocation actions.[60]

The three types of allocation actions are: (1) the independent actions by oil companies in rearranging supply (Type 1); (2) companies' voluntary actions approved by the Allocation Coordinator (Type 2), and (3) mandatory actions (Type 3).[61] Disputes might arise among the parties to each of these three types of actions, but Types 1 and 2 consist of voluntary actions which may lead to disputes between the oil companies involved, but probably not to disputes among governments, except in cases where governments are themselves active as buyers or sellers of oil for their own account. Type 3 mandatory actions involve direct government measures applicable to companies, pursuant to inter-governmental agreement within the Agency. Gov-

59. The Standing Group on Emergency Questions (SEQ), which is composed of all IEA members, is responsible primarily for the preparation of recommendations to the Governing Board on the development of the System and for the state of emergency preparedness in general. The SEQ Emergency Group was established by the Governing Board as the operational body charged with the specific responsibilities to be carried out during an emergency and in connection with tests of the System.

60. The Industrial Supply Advisory Group (ISAG), also established by the Governing Board, carries out its functions during emergencies and tests of the System.

61. The three types of allocation actions are discussed in Part II of this article.

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ernment measures instituting mandatory actions could, but probably would not in practice, generate disagreements among the government members involved in the transactions.

Type 3 mandatory actions should not normally be required to be taken during an emergency. They offer an available procedure, however, when the voluntary efforts of industry fail to bring about the fulfillment of all countries' supply rights. Should that transpire, the Type 3 actions could be initiated by the Allocation Coordinator who reports the situation to the SEQ Emergency Group, indicates the voluntary actions which companies have not taken, and suggests corrective actions. In turn, the SEQ Emergency Group consults with the governments concerned in an effort to persuade them to resolve the problems voluntarily. If that effort does not succeed, and the SEQ Emergency Group finds that the necessary corrective action can be taken only by direct instructions from governments to oil companies involved, mandatory action becomes obligatory for those governments.

Where the mandated oil is physically present in a member country the government of that country must instruct the company owning the oil as to the disposition which must be made, and if the owning company is under the jurisdiction of another government, there must be a full understanding between that government and the government issuing the instruction. When the mandated oil is at sea or is otherwise under the control of the company concerned, the final instruction is given by the government having jurisdiction over that company. By these procedures, a determination in the nature of a "finding" by an inter-governmental body, the SEQ Emergency Group establishes a binding obligation on the appropriate government to issue mandatory instructions to an oil company to make the necessary disposition of a specific volume of oil. It is important to note that the instruction to the oil company is made by its government and not by the Agency.[62] In this process the Agency does not act directly upon a

62. Legislative authority for government instructions to the oil companies is presumably required in all IEA countries. Such authority may be established by legislative acts adopted in connection with authorization for the consent to be bound by the I.E.P. or by special legislation. In the United States, for example, the allocation authority is found in the Energy Policy and Conservation Act of 1975, § 251, Energy Mgmt. (2 CCH) ¶ 10,878, at 10,883. Specific regulatory authority for mandatory supply orders to companies under IEA allocation is contained in the Standby Mandatory International Oil Allocation, Energy Mgmt. (3 CCH) ¶ 15,850 at 15,861, 44 Fed. Reg. 27,969 (1979), *codified at* 10 C.F.R. §§ 218.1-218.43 (1988).

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private company but functions as a vehicle for inter-governmental co-operation and agreement. In this respect the Agency has no supra-national powers to require actions by private companies; only governments exercise such powers under the IEA System.

In the allocation process disagreements among governments might arise over a number of possible issues, for example: (1) questions concerning the suitability of the particular disposition of the oil in terms of the IEA rules;[63] (2) the fair treatment of all members;[64] (3) failure to respect the rule against increasing the group's share of world oil supplies;[65] (4) the preservation of historical oil trade patterns;[66] (5) the appropriateness of price[67] and other terms of the transfer of oil, and (6) liability for losses suffered by a company carrying out the mandated transfer where such losses result from commercial or political risks. If the mandated action is not carried out, a question of compliance with the applicable IEA rules requiring the mandated action and a further question of sanctions for failure to respect a vital IEA obligation could arise. As will be discussed in Part V, disagreements might also arise between the oil companies involved.

Disagreements among governments over these kinds of issues are expected to be resolved within the political bodies of the Agency. The SEQ Emergency Group, composed of all IEA governments, is specifically empowered to make the determinations instituting mandatory supply actions. Those determinations would presumably be made by consensus, but could be made by majority if necessary, and would be fully binding upon the dissenting minority. In addition, serious questions of interpretation of the I.E.P. Agreement may be raised in the Governing Board at a higher political level, but necessarily with participation of the same governments which would have acted in the SEQ Emergency Group.

The Governing Board could also expect, as the supreme body of the Agency, to examine any member's challenge to any action by the subordinate SEQ Emergency Group, subject again to the practical constraint of identity of government membership in the two bodies, but probably not identity of individual representation. There is no

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63. *See* I.E.P., art. 7, 27 U.S.T. 1685, 1694, T.I.A.S. No. 8278, 14 I.L.M. 1, 7-8 (1975)(concerning establishment of supply rights, allocation rights and allocation obligations).

64. *See id.* at art. 10, 27 U.S.T. at 1696, T.I.A.S. No. 8278, 14 I.L.M. at 9.

65. *See id.* at art. 11.1, 27 U.S.T. at 1696, T.I.A.S. No. 8278, 14 I.L.M. at 9.

66. *See id.*

67. *See id.* at art. 10.1, 27 U.S.T. at 1696, T.I.A.S. No. 8278, 14 I.L.M. at 9.

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provision in the I.E.P. Agreement or Governing Board decisions for reference of any disputes between members to any outside body, not even to the IEA Dispute Settlement Centre Tribunals of Arbitration discussed below. From a practical standpoint, there seem to be no other viable procedures to be invoked outside of the IEA. The International Court of Justice would not be available to IEA bodies for advisory opinion requests. Assuming jurisdiction could be found, the contentious procedure of the Court, which might theoretically be invoked, would probably prove to be unworkable in cases involving disputes arising out of the I.E.P. Agreement or involving actions taken pursuant to it.[68]

IEA governments would be better served by relying upon the assumption that the plenary bodies of international organizations, particularly the highest bodies, are empowered to interpret and broadly apply the terms of the organizations' constituent instruments as reasonably required to meet their stated objectives.[69] This reflects the IEA governments' expectation at the time the Agency was established and is confirmed by the absence of specific provisions for settling disputes among governments. Their intention was to leave the resolution of such disputes to the final and binding decisions of the Governing Board. That would leave only procedural error or the most clearly *ultra vires* type of decision, taken in the face of a known opposition, to be without a remedy. Such a situation is most unlikely in a body established for political cooperation and which normally acts on the basis of consensus.

The I.E.P. Agreement contains no express provision pertaining to the unexcused failure to allocate oil, one of the most far-reaching areas of potential dispute among IEA governments. The founders of the Agency were aware of the possible question of sanctions, but compliance with the I.E.P. Agreement was left to natural inducements resulting from the economic and political consequences of non-performance. The risk of possible non-performance doubtless would be reduced and the case for responsive action could be enhanced by care-

68. *Cf.* Ciobanu, *Could the Use of the Contentious Procedure of the International Court of Justice Have Any Significant Impact Upon the Practice of the United Nations? A Reply to Professor Louis B. Sohn*, 70 AM. J. INT'L L. 328, 329 (1976)(discussing problem of disputes between member countries in different context). The authorities cited within this article should also be referred.

69. *See generally* Osieke, *The Legal Validity of Ultra Vires Decisions of International Organisations*, 77 AM. J. INT'L L. 239, 239 (1983).

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ful preparation of the allocation decisions. Certainly, great effort would be expended to obtain the widest possible agreement of all IEA countries, through the consensus process, in order to avoid proceeding to a vote or to avoid the intentional isolation of a minority. Preliminary consultations could be undertaken with any country evidencing potential performance problems, and any non-performing party would be informed of the effects of non-performance on the group as a whole and on the credibility of the Agency.

The Governing Board is empowered to respond in a number of ways in order to induce compliance with allocation decisions. Such inducements include: (1) the re-allocation of oil destined for the non-performing country, but under the control of another IEA country; (2) denial of access to oil held in another country in stock for the non-performing country, or its allocation under the System to another country, or (3) denial in whole or in part of an allocation right to which the non-performing country might be entitled at a later stage.[70] The Agency could also respond by adopting measures concerning the participation of the non-performing member in other areas of the Agency's program, and individual IEA governments might also have other political or economic options to consider. Probably the most compelling inducement to full compliance is the recognized need to maintain, in the interest of all IEA members, the overall credibility of the Emergency Sharing System and of the Agency's program as a whole.

V. Disputes Concerning Cooperating Oil Companies: The IEA Dispute Settlement Centre

As is evident from the foregoing discussion, the IEA depends quite heavily upon assistance the oil industry provides directly to the Agency. In quiet times as well as during periods of oil supply emergencies, the cooperation of oil companies is essential to the development and operation of the Emergency Sharing System.

The governments of the major oil consumer countries learned during the 1973/1974 oil crisis that they were dependent upon oil companies for assistance with respect to oil supply emergencies because the companies alone had:

70. Article 22 of the I.E.P. Agreement empowers the Governing Board, acting by unanimity, to activate appropriate emergency measures not provided in the agreement. *See* I.E.P., art. 22, 27 U.S.T. at 1700, T.I.A.S. No. 8278, 14 I.L.M. at 13.

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(a) The information on oil imports, exports, indigenous production, inventories, etc. which would be necessary to make an allocation system function properly in an emergency;

(b) The oil industry expertise necessary to design in detail a workable system of allocation in the complex oil market serving consuming countries;

(c) The knowledge of the industry and markets necessary to advise the Secretariat, when making the emergency "finding", about the actual state of the oil supply situation and the appropriateness of the measures which might be taken;

(d) The expertise to operate an international allocation system and to advise on particular movements of oil that would become necessary in the course of allocation;

(e) Control over a large part of the oil itself as well as the relevant transport, refining, and distribution systems.

A. *Company Cooperation*

Industry cooperation has been established, upon the invitation of IEA governments, with respect to each of the foregoing elements largely on a voluntary basis. The group of cooperating oil companies, which now consists of over forty companies covering an estimated seventy per cent of the international oil supply, provides data in normal times to IEA governments for compilation and transmission monthly to the IEA. In times of supply disruption, the companies will supply data directly to the Agency and to the governments which, in turn, will supply data received from those and other companies operating within their territories to the Agency. By these channels the Agency will receive confidential and proprietary data concerning consumption, supply movements, indigenous production and stocks necessary for the operation of the Sharing System. General advice on the design of the Sharing System and related matters is provided to the IEA regularly by the Industry Advisory Board (IAB).[71] The IAB has systematically aided the Agency in developing the mechanics of allocation, including the development of the the Dispute Settlement Centre.

71. Establishment of the Industry Advisory Board (IAB) was foreseen in Article 19.7 of the I.E.P. Agreement. *See id.* at art. 19.7, 27 U.S.T. at 1699, T.I.A.S. No. 8278, 14 I.L.M. at 12. The IAB was established by the Governing Board in 1975 to group together within the Agency 16 of the major oil companies. *See id.*

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The Industry Supply Advisory Group (ISAG) provides the principal industry assistance in the course of an emergency.[72] The ISAG oil company supply experts provide operational and technical expertise to the IEA in Paris to operate the Sharing System under IEA direction. They retain their status as company employees but are solely responsible to the IEA while carrying out their ISAG functions. These functions include analyzing data and supply problems, developing voluntary offers of companies to meet allocation rights and allocation obligations, providing advice to the IEA Allocation Coordinator on the acceptability of voluntary offers, and monitoring company implementation of approved voluntary offers.

The most visible and important industry function in the System consists of company supply actions, the execution of IEA approved voluntary offers (Type 2 activity), as well as independent trade operations which may take into account countries' allocation rights, and obligation information supplied by the Agency (Type 1 activity). These company activities ultimately involve the diversion of oil cargoes from destinations in allocation obligation countries toward destinations in allocation right countries. All of the industry functions and supply activities described above are carried out on a voluntary basis and may be supplemented by mandatory supply activity (Type 3) as necessary.

Disputes could well arise out of any of the foregoing oil company activities, particularly out of supply actions taken by the companies, whether voluntary or mandatory. In some cases, the supply actions may require companies to terminate existing commercial arrangements and to enter into new ones, with some degree of political as well as commercial risks. Disputes could also arise out of the application of rules governing competition under the Treaty of Rome, the antitrust laws of the United States, and similar measures in other countries.[73]

While the I.E.P. Agreement contains specific provisions for the establishment of an international legal basis for the cooperation of the oil companies within the IEA Emergency Sharing System,[74] there is

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72. The Industry Supply Advisory Group (ISAG) is an ad hoc group of the IAB.

73. *See generally* Holley, *The IEA and EEC Emergency Oil Allocation Systems: Legal Problems*, 1 J. ENERGY & NAT. RESOURCES L. 73, 73 (1983).

74. *See* I.E.P., arts. 19.6 & 19.7, 27 U.S.T. at 1699, T.I.A.S. No. 8278, 14 I.L.M. at 12; *id.* arts. 32-36, 27 U.S.T. at 1705-06, T.I.A.S. No. 8278, 14 I.L.M. at 17-18; *id.* art. 55.3, 27 U.S.T. at 1713, T.I.A.S. No. 8278, 14 I.L.M. at 25.

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no provision concerning the settlement of disputes which might arise out of company relationships with IEA governments, the Agency, or with other companies. Furthermore, the Agency itself is not well placed from a juridical standpoint to impose settlements on oil companies. The institutional problem of ensuring both company cooperation and the resolution of disputes involving companies theoretically could have been resolved by making the relevant I.E.P. Agreement provisions and Governing Board decisions directly applicable to oil companies, which was not done. None of the I.E.P. Agreement provisions concerning oil companies is directly addressed to them. Like other provisions of the I.E.P. Agreement, they are directed either to governments, IEA bodies, or the Secretariat. Under Article 52.1, Governing Board decisions are explicitly made binding on Participating Countries, but not upon oil companies.[75] Moreover, Article 66 requires members to take the necessary measures, including any necessary legislative measures, to implement the Agreement and Governing Board decisions.[76] Since the Agency relationship is one of voluntary cooperation with the companies, except insofar as they may be compelled to act under national legislation or by agreement, it is clear that the I.E.P. Agreement was not intended to apply directly to the oil companies. The result of the I.E.P. and Governing Board texts is a high expectation of company cooperation, but no international legal obligation exists for them to participate in either the System or in dispute settlement procedures or to abide by any dispute settlements, except on a voluntary basis.

Dispute settlement mechanisms under the applicable national law presumably will always be available to oil companies regarding disputes with other oil companies. However, the companies cooperating with the IEA have found that the remedies available under those mechanisms are not fully satisfactory. Hence, those companies, very early in the life of the IEA, made suggestions as to the development of an alternative and specialized dispute settlement mechanism to be established as part of the IEA system.

B. *Early Suggestions Made by the Oil Industry*

The oil industry group's initial suggestions to the Agency concerned the special risks inherent for companies in taking supply ac-

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75. *See id.* at art. 52.1, 27 U.S.T. at 1712, T.I.A.S. No. 8278, 14 I.L.M. at 24.
76. *See id.* at art. 66, 27 U.S.T. at 1719, T.I.A.S. No. 8278, 14 I.L.M. at 29.

tions under the Emergency Sharing System, especially in respect to mandatory supply actions (Type 3). This concern stemmed from the fact that company compliance with mandatory supply action directives could bring the company into conflict with non-IEA governments, private commercial partners, or both.

These concerns led to the development of two suggested solutions. The first sought to avoid or minimize the risks of loss by taking such risks into account in the decision-making process within the IEA leading up to the mandatory action. The second was the development of a mechanism for assessing and allocating the resulting financial responsibility when the risks could not be avoided or when decisions were made in the face of known risks. Companies anticipated claims for damages, termination of advantageous contracts, or seizure or expropriation of assets. Expropriation of assets could hypothetically occur where, for example, the company complied with an IEA-originated direction to divert a cargo from a permitted destination under the law of the country in which the oil is produced to a destination forbidden under that law. Cases of commercial breach of contract might also result from diversion of a cargo from one contract destination to another for a different buyer. The cooperating companies' suggestions ultimately led to the establishment of the IEA Dispute Settlement Centre.

There were also suggestions that the Agency adopt procedures for resolution of disputes arising under the I.E.P. Agreement involving a broad category of parties, including disputes between: (1) two or more cooperating companies; (2) cooperating companies and other companies; (3) cooperating companies and IEA member countries, and (4) two or more IEA member countries, although the particular focus of company suggestions was on disputes between companies, and other companies or governments. A broad subject matter jurisdiction was also foreseen. The disputes to be settled under the IEA System would include questions of interpretation of emergency allocation and sharing provisions, commercial disputes arising out of the Emergency Sharing System, and the recovery of losses suffered by cooperating companies under circumstances such as those mentioned in the preceding paragraph.

Early in 1977, the IAB[77] developed a systematic proposal for the

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77. *See supra* notes 71 & 72 and accompanying text.

Dispute Settlement Centre modelled after the World Bank's International Centre for Settlement of Investment Disputes.[78] It was proposed that jurisdiction of the Centre and Arbitration Tribunals convened by the Centre extend to any dispute arising directly out of the emergency allocation of oil pursuant to the I.E.P. Agreement and that the disputes subject to the Centre's jurisdiction involve Participating Countries of the IEA as well as oil companies domiciled in those countries or elsewhere as parties. Jurisdiction would also be based upon the written consent of the parties to arbitration by the Centre. IEA Governments would be asked to agree to seek whatever enabling legislation might be necessary to permit each country to consent to arbitration, comply with awards, and provide for enforcement of awards of the Centre's Tribunals.

The initial suggestions of the oil companies did not attract full support within the Agency. However, the Governing Board found no difficulty in adopting the suggestion to consider the potential impact upon the companies concerned before a mandatory supply action would be taken. This would be done by advice to be given to the SEQ Emergency Group as to whether costs might be incurred and the amounts of such costs. There were a number of problems which prevented governments from going so far as to accept the principle of their incurring liability for such costs or for the establishment of a dispute settlement mechanism for companies' claims against them.

The potential loss in such cases would, in any case, be minimized by the SEQ Emergency Group in making the mandatory decision. Moreover, the risks could be considered part of companies' normal commercial risks taken in periods of severe oil supply disruption, and such risks could be reduced or avoided by an application of *force majeure* clauses and contract breach defense legislation, where available.[79] Otherwise, the adversely affected companies might deal directly with their own governments on a case-by-case basis. Any compensation plan for dealing with losses resulting from retaliatory

78. The World Bank's International Centre for Settlement of Investment Disputes provided a precedent for a mechanism within an existing international organization, with jurisdiction over disputes between governments and private parties.

79. *See* Australia, Liquid Fuel Emergency Act, 1984, Part V; Canada, Energy Supplies Emergency Act, 1979, section 21; Germany, 1975 Energy Security Act, 1974, sections 11 and 12; New Zealand, International Energy Agreement Act 1976, section 5; Sweden, Oil Crisis Act, 1975, Art. 6; United Kingdom, Energy Act, 1976, section 4(1); United States, Energy Policy and Conservation Act of 1975, § 252(k), Energy Mgmt. (2 CCH) ¶ 10,879, at 10,887.

actions of producers could be viewed as an encouragement for such actions or as a step which might make them inevitable.

The oil companies eventually modified their proposals by removing the provision for jurisdiction over IEA Participating Countries, by eliminating the compensation liability for the mandatory action risks described above, and by avoiding the need for other formal commitments by governments. These developments also simplified the procedure for adopting the Centre's Charter. While the government commitments in the earlier proposals would have required a separate international convention, formal amendments to the I.E.P. Agreement, or legislation and internal ratification procedures to be undertaken, the modified, simplified proposals could be adopted by decision of the Governing Board acting under powers already established in the I.E.P. Agreement.

C. *Establishment of the Centre*

The IEA Dispute Settlement Centre (DSC) was established by the Governing Board on July 23, 1980 on the basis of modified IAB proposals, made after extensive consultations with governments, oil companies, the Secretariat, and the SEQ, the responsible IEA technical body.[80] As finally presented, the modified proposals were designed principally to meet industry concerns about the resolution of commercial-type disputes which might arise out of the application of the Emergency Sharing System. Commercial-type disputes could arise from termination of existing supply contracts in some cases, the rapid conclusion of new contracts, and commercial situations where buyers and sellers might deal with new and unfamiliar partners, and where questions of the buyer's credit might arise, all occurring under strong pressures for rapid action in the course of the emergency. Under these circumstances, disputes of a commercial nature might arise issues such as price, liability, damages for failure of delivery or untimely delivery, responsibility for freight, insurance, port and demurrage costs, responsibility for costs of vessel diversion, breach of contract, and so forth.

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80. *See* Charter of the International Energy Agency Dispute Settlement Centre, 20 I.L.M. 241, 241 (1981); Manin, *Le Centre pour le Reglement des Differends de l'Agence Internationale de l'Energie*, ANNUAIRE FRANCAISE DE DROIT INTERNATIONAL 231 (1981); Holley, *The IEA and EEC Emergency Oil Allocation Systems: Legal Problems*, 1 J. ENERGY & NAT. RESOURCES L. 73, 80 (1983).

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The Centre was established to offer a system of binding arbitration for the kinds of disputes described above in cases where the jurisdictional requirements of the Centre are satisfied. Full opportunities remain for negotiation, mediation and consultation, either entirely outside of the DSC or with such assistance as the Centre or other elements of the IEA might provide.[81] While arbitration for commercial-type disputes may be obtained under facilities available in Paris, Stockholm, London or New York, there are a number of advantages to be found in specialized arbitration conducted under the auspices of the Agency. The particular advantages of the Centre include the availability of an expert panel of arbitrators with specialized experience in IEA matters, a greater uniformity of decision, the promise of greater speed, and the availability of IEA facilities and support staff. The IEA system is also less expensive than other alternatives. Overall, the DSC provides a rapid, coherent and knowledgeable system of arbitration specifically designed to meet the needs of the cooperating oil companies.

The jurisdiction of the Centre and tribunals has, however, been restricted to a relatively narrow category of disputes. The subject matter jurisdiction is provided in Article II(a) of the Charter, which provides as follows:

> The jurisdiction of Arbitration Tribunals convened pursuant to the Charter extends to any dispute between a seller and a buyer of oil, or between the parties to an exchange of oil, arising out of an oil supply transaction during implementation of the emergency allocation of oil and under the International Energy Program and as between the parties to a particular supply transaction but not to decisions or rights or obligations of I.E.A. Countries under the International Energy Program, including allocation rights and allocation obligations of I.E.A.

81. The Secretariat is particularly well placed to act in cases where mediation or conciliation would expedite settlement of disputes arising between companies under the Emergency Sharing System. This was recognized in 1977 when the Governing Board adopted guidelines on oil price disputes, making the IEA Allocation Coordinator, that is to say the Executive Director, available to advise the parties in the interests of an amicable and expeditious settlement, and in order to minimize a potential hindrance to the System; for that purpose the Governing Board also concluded that undisputed amounts of money should be paid when due and disputed money should be set aside with a neutral third party pending settlement. The Secretariat would in fact be expected to provide mediation or conciliation services with respect to a much broader spectrum of issues as well as in price dispute cases.

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Countries.[82]

Jurisdiction of arbitration tribunals is also limited to disputes where the parties to the arbitration have consented in writing to arbitration pursuant to the Charter.[83] Consents to arbitration are made in much the same way that they are made in systems of private arbitration. An exceptional inducement for a party to accept arbitration in Type 3 mandated oil supply actions is foreseen under the Dispute Settlement Centre. A government issuing the supply order may authorize the supplier to require the other parties to the transaction to accept Dispute Settlement Centre or other means of dispute settlement and in that case the supplier would be free to do so.[84] Conditioning receipt of the oil on such a requirement may provide a significant inducement to accept Dispute Settlement Centre arbitration.

In accordance with commercial arbitration practice, the Dispute Settlement Centre Tribunals decide cases "in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."[85] The parties are free to choose the law to be applied by the Tribunals. In the absence of such choice, the Tribunal applies the substantive law of the country in which the supplier maintains its principal offices, if its principal offices are maintained in an IEA country. Otherwise, the Tribunal applies such rules of law as it may determine.[86]

Institutionally, the Centre is organized on a standby basis to be activated when the Emergency Sharing System is operating and disputes arise. The Panel of Arbitrators has, however, been selected in advance and is now in place. The Procedures for Arbitration, also in place, are based principally on the UNCITRAL rules developed in the United Nations General Assembly. Awards of the Tribunals are, by virtue of the parties' consents to arbitration, final and binding as

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82. *See* Charter of the International Energy Agency Dispute Settlement Centre, 20 I.L.M. 241, 241 (1981).

83. *Id.* at art. II(b), 20 I.L.M. at 243; DSC Procedures for Arbitration and Additional Rules, Additional Rule 1, 20 I.L.M. 1307, 1336-37 (1981).

84. This has been recognized by the Agency and formal implementing rules have been adopted in the United States. *See* Standby Mandatory International Oil Allocation, Energy Mgmt. (3 CCH) ¶ 15,850 at 15,882, 44 Fed. Reg. 27,969 (1979), *codified at* 10 C.F.R. §§ 218.1-218.43 (1988).

85. *See* DSC Procedures for Arbitration and Additional Rules, Additional Rule 17.3, 20 I.L.M. 1307, 1319 (1981).

86. The applicable law provisions are contained in DSC Procedures for Arbitration and Additional Rules, Additional Rule 17.1. *See id.*

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between the parties, to the exclusion of any other remedy.[87] A final or interim award is enforceable in accordance with the applicable law of the state where enforcement is sought or in accordance with international obligations, including the principal conventions on foreign arbitration awards.[88]

D. *Additional Categories of Disputes*

Important as the settlement of commercial-type disputes may be, the possibility of arbitration for other categories of disputes and for a broader category of parties remains to be examined. Any dispute considering the rights or obligations of Participating Countries under the I.E.P. Agreement, including their allocation rights and allocation obligations, is expressly excluded from DSC arbitration.[89] This exclusion accordingly applies to all government versus IEA and government versus government disputes discussed in Parts III and IV above. It appears that governments can participate in DSC arbitration only in cases where the government acted as a buyer or seller in a supply action qualifying under the jurisdiction provision. By implication, a number of other categories of disputes would also be excluded: (1) any disputes among oil companies arising out of relationships other than between buyers and sellers or parties to an exchange of oil; (2) disputes arising out of that relationship but not in connection with the IEA supply actions referred to in the jurisdiction provision; (3) disputes to which the IEA is a party; (4) disputes between oil companies and governments concerning such matters as losses incurred as a consequence of carrying out a voluntary or mandatory supply action

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87. *See* Charter of the International Energy Agency Dispute Settlement Centre, art. II(b)(3), 20 I.L.M. 241, 243 (1981); DSC Procedures for Arbitration and Additional Rules, Additional Rule 1(b) and (c), 20 I.L.M. at 1336.

88. DSC Charter, art. XI, 20 I.L.M. at 249. Article XI provides as follows:

> A final or interim award rendered pursuant to this Charter is subject to enforcement in accordance with the applicable law of the State where enforcement is sought or in accordance with any applicable international obligation, including obligations undertaken by that State in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York on 10th June, 1958 or the Convention for the Execution of Foreign Arbitral Awards, signed at Geneva on 26th September, 1927. Recognition and enforcement of an award may be refused if the award is contrary to the public policy of the State in which recognition or enforcement is sought, including the law of the European Communities insofar as it forms part of the public policy of that State, being a Member State of the European Communities.

Id.

89. *See id.* at art. II(a), 20 I.L.M. at 242.

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pursuant to the Emergency Sharing System, or (5) disputes over provisions of national law bearing on IEA emergency actions such as the competition rules of the European Economic Community and the antitrust laws of the United States. In all such matters the IEA Secretariat can provide informal advice, information and assistance, but disputes as such cannot, under the present jurisdictional rules, be submitted to Arbitration Tribunals of the Centre.

There is always a possibility that the jurisdiction provisions of the DSC Charter will be amended to extend the jurisdiction of Tribunals to additional categories of disputes. Since there is no express provision regarding an amendment procedure in the text of the Charter, the Governing Board's power to amend would derive from the Board's general powers of decision which were invoked for the adoption of the Charter in 1980.[90] The Charter amendments would be adopted by consensus, following the uniform practice of the Board, although a majority, as defined in the I.E.P. Agreement, would suffice so long as governments were not asked to take new commitments.[91] The I.E.P. Agreement contains no explicit constraints on action the Board might take in developing additional dispute settlement procedures or in extending the jurisdiction of DSC Tribunals in connection with the Emergency Sharing System or otherwise. New commitments of governments would, of course, require unanimity in the Governing Board and a question might arise concerning the need for implementing legislation to support new measures. With those constraints, there is full potential for the DSC to be adapted or further developed as required in order to meet the broader dispute settlement requirements of the Agency when the requisite political conditions manifest themselves.

VI. Conclusion

The foregoing analysis demonstrates that, at least from a theoretical viewpoint, considerable potential exists within the Emergency

90. Article 6.4 of the I.E.P. Agreement provides: "The Governing Board shall, acting by majority, decide promptly on the practical procedures for the allocation of oil and on the procedures and modalities for the participation of oil companies therein within the framework of this Agreement." I.E.P., art. 6.4, 27 U.S.T. 1685, 1694, T.I.A.S. No. 8278, 14 I.L.M. 1, 7 (1975). Article 51.1 of the Agreement states: "The Governing Board shall adopt decisions and make recommendations which are necessary for the proper functioning of the Program." *Id.* at art. 51.1, 27 U.S.T. at 1712, T.I.A.S. No. 8278, 14 I.L.M. at 23.

91. *See id.* at art. 61.1, 27 U.S.T. at 1715, T.I.A.S. No. 8278, 14 I.L.M. at 26.

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Sharing System for disputes among the various participants. That potential derives from the textual considerations, since the I.E.P. Agreement was negotiated from the perspective of political cooperation rather than from the perspective of legal precision. There is also the expectation that a multitude of actions would have to be taken pursuant to the complex I.E.P. provisions in an emergency and that the interests at stake are quite significant in political and financial terms. Notwithstanding this potential for disputes, circumstances which could have led to disputes within the Agency have been adjusted in a satisfactory way without any requests for a reference to a formal dispute settlement procedure.

The IEA member governments clearly prefer the maintenance of a political rather than a legal approach to dealing with situations which might evolve into more formal disputes. Policy choices must be made in the course of resolving disputes which might arise under the System. At the outset, the Emergency Sharing System was designed in terms of broad concepts requiring definition and development. Even with the advantage of nearly thirteen years of refinement, in which the Emergency Sharing System has been quite well-developed, tested, and understood, the key concepts are still sufficiently broad to require policy choices in their application and thus to raise policy issues in potential dispute situations. IEA governments have preferred that those choices be made, not by judges or arbitrators, but by policy authorities in the national administrations represented in the IEA. Under the inchoate state of international institutions in the twentieth century, there was no compelling reason for the framers of the I.E.P. Agreement to submit to the discipline of greater legal precision in the Emergency Sharing System or to foresee a systematic submission of I.E.P. Agreement disputes to judges or arbitrators.

There were also more practical considerations which led to the political approach to conflict resolution. If the Emergency Sharing System is to serve its purposes promptly and effectively, the dispute settlement process cannot be allowed to endanger the System. Therefore, the System must be kept free of the risks of legal constraints, delays or blockages. This is reflected in the assumed preference in the I.E.P. Agreement for those advantages of the political process, rather than the advantages of certainty, precision, and the more ideal justice that legal procedures might bring.

Under those circumstances, it became necessary for the IEA to employ all available means to avoid situations in which disputes might

arise under the Emergency Sharing System. The most important of those means was the substitution of consensus for formal voting procedures. Consensus avoids the polarization and isolation of the minority, makes workable compromises possible, and enhances the atmosphere of cooperation in the general interest. The successful application of the consensus procedure also provides a remarkable means for strengthening institutional development overall.

However, the disadvantages of the consensus procedure cannot be ignored. Consensus means that the content of the decision may suffer from a softening which reduces its scope or application. The softening process can be so severe as to bring about the reduction of a proposal, from one taken as legally binding as to a stated result or particular measure, to one which might constitute only "best efforts" commitments or a recommendation, declaration, or statement of intent or desirability; in short, a legal-type commitment may be reduced in effect to a political one. At worst, this familiar process leads to the "lowest common denominator" from which no international organization can aspire to be completely free, but this reduced result may be all that is realistically attainable. The "soft" outcome is preferable to a complete failure resulting from the application of a formal voting process, particularly where unanimity or a strong majority is required. In the case of the IEA, the softening process undoubtedly has made possible a number of political measures which are of very great importance in themselves in the short term and which are part of an evolving process leading to the establishment of more vigorous levels of commitment in the longer term.[92]

The reluctance of IEA members to foresee more comprehensive settlement procedures stems in part from an assumption that settlement procedures could be disruptive to the Emergency Sharing System. Certain categories of disputes, like those concerning supply rights, allocation rights and obligations could indeed be disruptive, unless a means were found for maintaining the integrity of the System while the settlement procedures were being undertaken. Other categories of disputes which might not interfere with the smooth operation of the

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92. *See generally* Schachter, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296, 296 (1977); Weil, *Vers une normativité relative en droit international?*, 86 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5, 5 (1982); Gold, *Strengthening the Soft International Law of Exchange Arrangements*, 77 AM. J. INT'L L. 443, 443 (1983). The authorities cited in these articles should also be referred.

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System, such as those concerning matters arising before the System is activated (if allocation is not delayed) or those concerning the failure of a member to take actions under the System once it has been activated, could be considered as appropriate for the application of settlement procedures. As the System evolves further, particularly with increasing precision of the applicable concepts, there might well be other categories of disputes, under definable circumstances, which could also be referred with advantage to judges or arbitrators. Over the longer term the political handling of disputes might itself prove to be the more disruptive process. Thus, the future might bring a greater willingness of governments to accept formal settlement procedures, either case-by-case, by specific category, or generally.

This possibility gives the IEA Dispute Settlement Centre an appreciably greater potential utility than might be apparent from its current jurisdictional limitations on both subject matter and parties. Constituted as a center for resolving a relatively narrow category of commercial-type disputes arising between buyers and sellers of oil under the System, the Centre has a readily discernible institutional capacity for undertaking wider responsibilities. The Centre has already been established within the IEA and is available for dealing expertly, coherently, and rapidly with broader categories of disputes which might arise out of the System. Indeed, there have been suggestions within the Agency that particular issues, now clearly outside of the Centre's jurisdiction, might be submitted to DSC Tribunals, but these suggestions have not yet evolved into formal proposals. For the Tribunals to be competent to hear such matters, the jurisdiction of the Tribunals would have to be enlarged. There might also be a need for changes in the Panel of Arbitrators or perhaps a second Panel might be constituted in order to provide for individual arbitrators having the requisite qualifications for dealing with wider categories of disputes. This "second panel" may be invisioned if governments or the Agency were to be admitted as parties before Tribunals or if jurisdiction were extended to interpretations of the I.E.P. Agreement or other matters of more direct governmental or Agency interest.

Disputes which embody predominantly political elements may, of course, never become fully subject to resolution pursuant to formal settlement procedures. Cases challenging decisions concerning the trigger "finding", for example, have been found to be extremely difficult to control by such procedures. Cases which present issues of enforcement of legal obligations under a cooperative arrangement like

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the Emergency Sharing System may require, in the larger interests of the international institutions which may be adversely affected by such cases, the most careful political consideration and natural inducements to performance rather than authoritative legal actions. These and other predominantly political issues under the IEA Emergency Sharing System are, at this stage at least, more advantageously resolved, or not resolved as the case may be, in the Governing Board and subordinate bodies of the Agency.

It is important that a workable and respected institutional framework exist for the purpose of managing these more difficult issues. The parties now meet together regularly in the IEA forum. They exchange information and make known to each other their respective policies, problems and views concerning matters on which disputes might arise. They do this in a cooperative spirit, avoiding disputes by the various mechanisms which have been seen in the foregoing discussion, such as consultations, early warning, review, assessments, recommendations and accommodation, all in a permanent forum which encourages regular contacts, reciprocal understanding and, ultimately, agreements by consensus on common actions. However imperfect these actions may be in some instances, they move the participants towards their common goals in conditions which should be as dispute-free as possible under the present state of international institutions and expectations. In the final analysis, precisely these intangible elements could create future opportunities for bringing to more inter-governmental and institutional-type issues the advantages of more formal settlement procedures.

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