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INTERNATIONAL ENERGY AGREEMENT, S. 1413

GOVERNMENT

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HEARINGS BEFORE THE SUBCOMMITTEE ON ANTITRUST, MONOPOLY AND BUSINESS RIGHTS OF THE COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

NINETY-SIXTH CONGRESS

FIRST SESSION

ON

S. 1413

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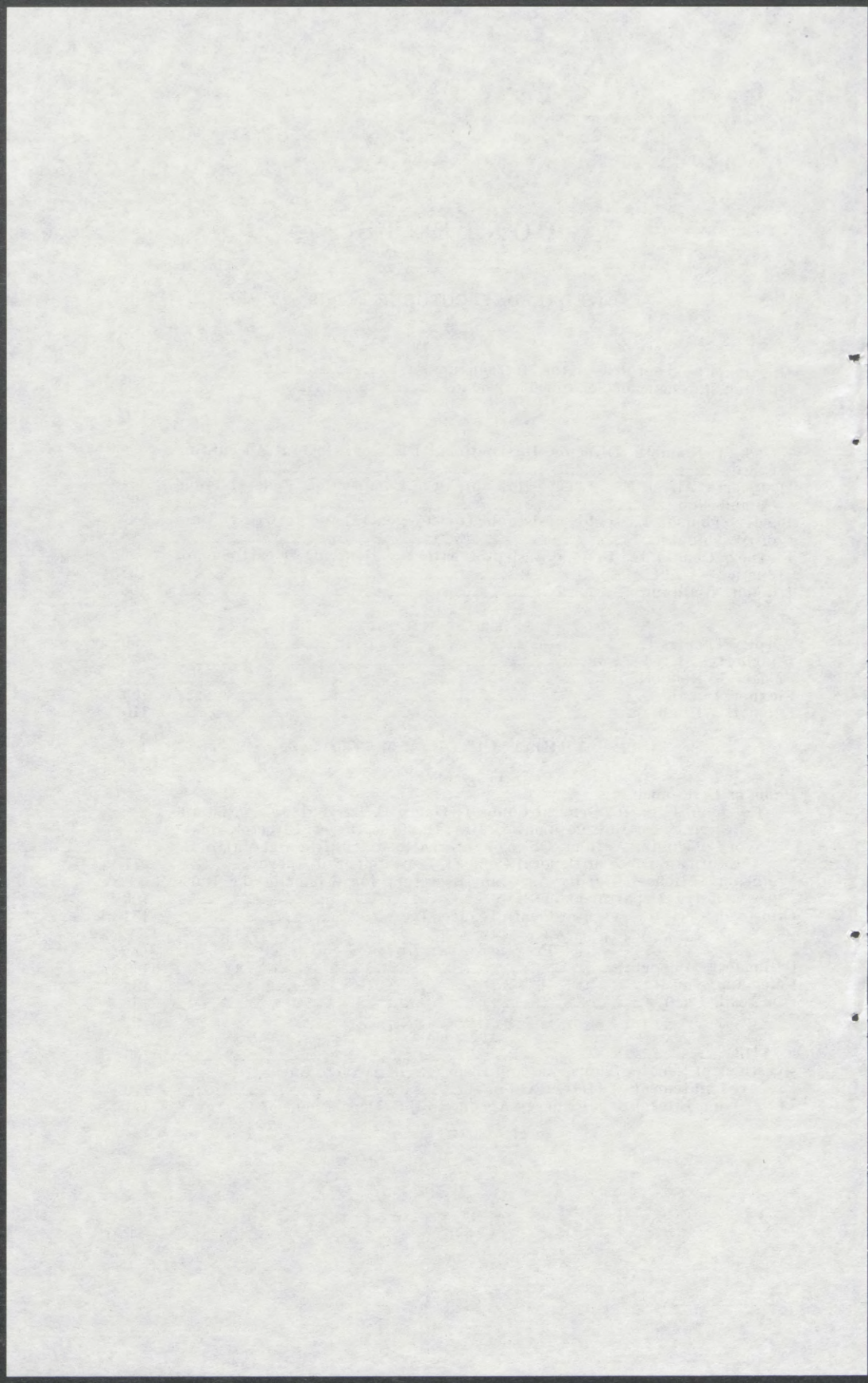
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INTERNATIONAL ENERGY AGREEMENT, S. 1413

WEDNESDAY, OCTOBER 3, 1979

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST,
MONOPOLY AND BUSINESS RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The committee met, pursuant to notice, at 9 a.m. in room 1318, Dirksen Office Building, Senator Howard M. Metzenbaum (chairman of the subcommittee) presiding.

Present: Senators Metzenbaum and Thurmond.

Also present: Margery Baker, counsel; Walter Measday, chief economist; J. Michael Cooper, counsel; Terri S. Meidlinger, chief clerk; Marilyn Falksen, staff assistant; Peter Chumbris, chief minority counsel; Joseph Lanham, minority chief economist.

OPENING STATEMENT OF SENATOR METZENBAUM

Senator METZENBAUM. Today, we begin hearings on S. 1413, legislation that would extend for 7 years an antitrust exemption for oil companies that participate in the International Energy Agency.

Not many people know about the IEA or for that matter about the international agreement that gave rise to IEA. That lack of knowledge is itself a matter of great concern. For IEA has been charged with the vital task of distributing scarce oil supplies in times of severe shortage. In doing so, it has involved the world's most powerful oil companies in the intimate details of the allocation process. And on top of that, the companies have been shielded from prosecutions under State and Federal antitrust laws through a defense which is ambiguous and open to interpretations that could seriously stifle prosecutions against the companies involved.

Before we routinely extend the authority for domestic company participation in the IEA, we must ask some hard questions about the price this country is paying and about the benefits we receive. Before we effectively immunize potentially anticompetitive actions from suit, we must be convinced that the companies' participation in IEA is essential. We must be convinced that IEA itself can achieve a more ordered and equitable response to oil supply emergencies than in the past.

The burden of proof on these issues lies squarely with those who advocate the continuance of our participation in IEA. I would like to repeat that statement. The committee feels that the burden of proof on these issues lies squarely with those who advocate the continuance of our participation in IEA. I believe it is the responsibility of those

who are the advocates, because this country, as a result of participation in IEA, may bear the greater share of shortages. This is true because in the initial allocation stages, countries must absorb the IEA-wide shortage in proportion to their total oil consumption, not just to their imports. Such a formula almost inevitably works to the disadvantage of countries like the United States which have sizable domestic production.

One company, Exxon, has already announced its intent to allocate its oil according to this formula, basing its distributions on relative shortfalls in total supplies available to each country as opposed to total imports. Even a casual observer can understand why Exxon would opt for such an allocation. Under the purifying cloak of IEA, the company can divert its oil from the United States which still has a lower priced controlled market, to higher priced markets overseas. And apparently, five other companies have done likewise.

There was no great public debate over the appropriateness of this allocation formula. Nor was there a great public debate over the appropriateness of triggering the allocation mechanism on a 7-percent shortfall in supplies. Why is 7 percent appropriate for triggering international allocations of oil, when under legislation awaiting final congressional action, a 20-percent shortfall triggers domestic gas rationing systems?

These decisions were simply made for us by the executive, without even an explanation to the Congress.

IEA has no public, no true public representation from this country. As a matter of fact, I, as a member of the U.S. Senate Energy Committee, was only able to attend after I first had been told "no" by the State Department. It took the White House and Secretary Vance to get the doors open for me. I don't think the State Department or the Energy Department adequately represents the public will on our Nation's energy policy.

I don't accept a system that permits the world's most powerful oil companies to sit behind closed doors, formulating international energy programs and policies. In many instances the oil companies are representing the very countries for whom they are agents in the world market.

In the absence of any significant public debate or participation in IEA, the burden of justifying the necessity of our participation in this agency is even greater. And thus far, frankly, it is difficult for me to see what IEA has contributed.

For example, the collection of accurate and timely information on the world oil market was to be one of IEA's primary functions. Accurate information in the midst of a crisis, it was felt, would help the governments to respond quickly and decisively to correct supply shortages and imbalances as they developed.

Yet, during the height of the Iranian disruption, IEA supply data was essentially worthless. Discrepancies ranged from 9.5 percent for the IEA as a whole to 13.5 percent for the United States. To put this into perspective, the data was so bad that the error rates exceeded the 7-percent shortfall needed to trigger IEA's emergency mechanism.

Import data errors have been even more alarming. For the first half of 1979, the error rate for U.S. crude oil imports ranged from 6 per-

cent to 21 percent. U.S. product imports have been overestimated an average of 19 percent.

If providing accurate data is a key function of the IEA, then what purpose does it serve if it does such a poor job of it?

Nor was IEA's stabilizing influence on the oil market apparent during the recent Iranian disruption. The emergency allocation system was not triggered and my information is that the IEA framework was virtually ineffective in moderating the scramble for oil in the spot markets, which helped contribute to the huge escalation in prices that we saw.

No one disputes the need for systematic allocation of supplies during the emergency or the need for better information. It may well be that we need IEA or something like it. But what commitment are we being asked to make, and what returns can we reasonably expect from that commitment? Is the present structure and operation of IEA as good as it should be? And is there a logical reason for the antitrust exemption, particularly in its present form?

The experience to date is not reassuring and raises more questions than it answers. These hearings will explore those questions.

Senator Thurmond, I understand you have an opening statement, which we will place in the record.

OPENING STATEMENT OF SENATOR THURMOND

Senator THURMOND. Mr. Chairman, I am pleased that arrangements have been made to hold this and other hearings on S. 1413, a bill to extend the existing antitrust exemption for oil companies that participate in the agreement on an international energy program.

While the enactment of Public Law 94-163, the Energy Policy and Conservation Act of 1975, has been helpful, we are aware of the sharply increasing international problems that the United States continues to experience with respect to worldwide oil-sharing obligations.

The creation of the International Energy Agency (IEA) in 1974-75 was a positive step by 16 nations, including the United States, to help stabilize the international oil marketing situation. Authorization by the Congress to allow U.S. international oil companies to participate in the IEA information and oil-sharing plans without violating antitrust regulations was an important provision in the 1975 act.

Under the provisions of section 252 of the Energy Policy and Conservation Act of 1975, 21 international oil companies are now able to carry out voluntary agreements and plans of action without fear of antitrust charges. This antitrust exemption allows U.S. oil companies to avoid some risks and thus participate more fully in the international energy program (IEP).

With this extension, as provided in S. 1413, companies can continue to cooperate to help the United States restrain petroleum demand and meet our IEP commitments.

In order to provide background information on the exemption, I quote two paragraphs from the Department of Energy's comments regarding this particular section of the act. Quoting from the Department of Energy comments concerning section 201 of the DOE House-keeping Act of 1979:

Section 252 of the Energy Policy and Conservation Act (EPCA) sets out procedures applicable to the development or carrying out of voluntary agreements to implement the allocation and information provisions of the international energy program. Pursuant to this authority, effective March 21, 1976, U.S. oil companies entered into the Voluntary Agreement and Plan of Action to Implement the International Energy Program [41 F.R. 13998, April 1, 1976] [the Voluntary Agreement]. At present, 21 U.S. oil companies, including both major international oil companies and independent oil companies, are participants in the Voluntary Agreement. The procedures provided in Section 252 are the only means by which a defense to the antitrust laws can be made available with respect to U.S. oil company participation in the development or carrying out of voluntary agreements.

The antitrust defense made available by Section 252(f) is essential to the participation of U.S. oil companies in the Voluntary Agreement and, through it, in the IEP. The IEP, in turn, can effectively function only with participation by U.S. and foreign oil companies which are primary sources in information about conditions in the international oil market and would be the primary actors in redistributing oil if the IEP's emergency sharing provisions were activated. The Department of Energy, the Department of Justice, and the Federal Trade Commission have closely monitored industry participation in the IEP. In their reports to Congress, the Justice Department and the Federal Trade Commission have concluded that no anti-competitive activities have been carried out and no anticompetitive effects have been incurred by reason of industry activity under the Voluntary Agreement.

* * * The bill does no more than extend the time Section 252 is effective. All of the other conditions and safeguards presently incorporated in that Section, and which have proven to be effective, including reports to Congress by the antitrust enforcement agencies, public notice of industry meetings, attendance at industry meetings by U.S. Government representatives and taking of verbatim transcripts or full and complete minutes, will remain unchanged.

Mr. Chairman, our concerns about the supply of energy are, obviously, of great importance to the United States, and also to those other nations with whom we are participating in this international energy program. These hearings should be most beneficial to us as we consider S. 1413 and the extension of the Energy Policy and Conservation Act of 1975.

Senator METZENBAUM. Today our witnesses are Ken Fasick, Director, International Division of the U.S. General Accounting Office; Alfred Dougherty, Director of the Bureau of Competition, Federal Trade Commission; Thomas L. Boeder, assistant attorney general for antitrust; Donald Flexner, Deputy Assistant Attorney, Department of Justice; and John Lamont of Lobel, Novins & Lamont.

When I was describing Mr. Boeder, I failed to state that he was assistant attorney general for antitrust for the State of Washington.

Our first witness will be Mr. Fasick. We are glad to have you with us, sir. I know that you have a rather lengthy statement. Are you in a position to summarize it, or is it necessary to read it in total?

Mr. FASICK. We will summarize it, Mr. Chairman.

Senator METZENBAUM. Your entire written statement will be included in the record at the conclusion of your oral testimony.

STATEMENT OF J. KENNETH FASICK, DIRECTOR, INTERNATIONAL DIVISION, GENERAL ACCOUNTING OFFICE

Mr. FASICK. We do welcome the opportunity to discuss the GAO's work concerning U.S. involvement in the IEA and the relationships of the results of that work to the antitrust defense provided to the U.S. oil companies that participate in IEA.

Before I go on, I would like to introduce my associates. On my far right is Mr. Frank Conahan, Associate Director of the International Division, next to me is Mr. Phillip Thomas, who is the team director on the study that we are making, and on my left is Mr. Richard Springer who is from our Office of General Counsel.

Senator METZENBAUM. We are very happy to welcome you gentlemen here with us this morning.

Mr. FASICK. During the past 2 years we issued seven reports that dealt with various elements or aspects of the IEA and the international energy program. These reports are listed in an appendix to the statement in full which I will submit for the record.

Our current review of U.S. participation in IEA is somewhat broader than previous studies and this particular study focuses on a variety of issues, including the relevant legal and antitrust matters, freedom of information issues, and general operational questions of the economic foreign policy and energy policy costs and benefits to the United States.

Mr. Chairman, I would like to point out that we are just in the initial phases of this review. The planning and the field work was not undertaken until about mid-June and the work is being done at the request of a subcommittee chairman.

Senator METZENBAUM. You started it in mid-June?

Mr. FASICK. Mid-June. It is the type of review that is very extensive, an in-depth review, and it is going to be until approximately May 1980 before we have our final product. I will discuss that in more detail as I go along.

Since beginning our review in July 1979, we have had discussions with officials of the Departments of Energy, State, Justice, Treasury, and the FTC. We have selectively reviewed appropriate U.S. IEA records of these agencies. We have also contacted representatives of the U.S. oil companies participating in the IEA, performed a limited verification of IEA information in their files. We have also monitored recent IEA industry advisory board meetings involved with U.S. and foreign oil companies and officials of the IEA Secretariat, European Economic Community, and the U.S. Government.

We intend to complete our review in the spring of 1980. At that time we expect to issue a report with conclusions, recommendations, and other matters for consideration by the agencies and by the Congress.

Senator METZENBAUM. When is that, did you say?

Mr. FASICK. In May 1980.

In the months ahead, we will be contacting the U.S. mission to the IEA Secretariat, foreign oil companies, participating IEA country oil energy ministries, and those in the European economic communities energy and antitrust ministries. We will also more extensively enter our review stage in Washington conducting an in-depth analysis of U.S. Government and U.S. oil companies' participation in the IEA.

Our efforts to date have disclosed that the U.S. Government and U.S. oil company officials are generally of the view that U.S. participation in the program and in the agency has been beneficial to the United States and all member-consuming countries. They maintain that cooperation between consumer countries and these countries and companies has improved. They say this is due, in part, to the establish-

ment of an industry advisory board that advises the IEA on a wide variety of oil market issues. The submission of market information by companies and countries to the IEA has also assisted in the furthering of a cooperative relationship.

U.S. oil companies' participation in the IEA was requested by the U.S. Government shortly after the inception of the agency. Although countries were originally reluctant to participate, they have participated regularly over the past 4 years. They now generally perceive their participation in IEA as beneficial to their own interests and to the interests of oil-consuming countries. They see the IEA, in the event of an emergency short supply allocation as bearing the responsibility for multilateral allocation of oil supplies among participating IEA-consuming countries.

Senator METZENBAUM. May I interrupt for a moment? When the IEA was originally set up—I think it was the creation, the brainchild of Henry Kissinger and Tom Enders—wasn't the purpose announced at that time to devise a means for the consumer nations to join together to have an effective voice against the OPEC nations?

Mr. FASICK. To some extent it was that, but I also think it was designed to be able to react to unanticipated further moves on the part of the OPEC nations.

Senator METZENBAUM. In your investigations to date, have you seen any evidence whatsoever that the first purpose has been served, or has there not been a backing away from that position?

Mr. FASICK. I really can't answer that.

Senator METZENBAUM. Mr. Thomas, would you care to answer that?

Mr. THOMAS. Would you go back to the original point by which the IEA was formed so that I am clear as to what you are asking, Senator?

Senator METZENBAUM. It is my understanding that when the IEA was first formed, that either directly or indirectly it was made clear that Henry Kissinger and Tom Enders acting in his behalf were attempting to create an international organization of consumer nations that could be an effective voice, and an effective force, if you please, in dealing with the OPEC nations.

Mr. THOMAS. I think that is the intention of all the participating nations at this time by the interviews we have had with the companies and the government officials. The interviews seem to indicate that the last 5 years have shown some progress toward that goal. It is hard for us to make any definitive conclusion at this time whether that has been the case.

Senator METZENBAUM. I would appreciate it if you would address yourself to that issue in your study, because the objective reports that I have seen on the subjects indicate that the IEA has failed to achieve that objective and, in fact, has backed down somewhat. I have invited Henry Kissinger to testify at these hearings. He is or will be out of the country but we hope to have him come forward at some point on that subject. I am most interested because, in my own experience in the IEA meeting in Paris, there was no thought at all along that line but rather quite the opposite view—how do we accommodate to the problem, not how do we provide an effective force in connection with the problem.

Mr. FASICK. We will address that issue.

Senator METZENBAUM. I appreciate that.

Mr. FASICK. The companies, during the 1973 Arab oil embargo, contended that they were unjustifiably criticized for allocating decisions that they had made in the absence of a governmentally mandated system. They believed that the IEA mechanism shifts the primary burden of responsibility from their shoulders to a multilateral governmental institution while at the same time upholding the basic historical distribution system utilized by the companies during the 1973 emergency.

The IEA also presents the companies, they say, with a more acceptable form of government intervention than the more direct forms as are reflected in various nationalization schemes and/or emergency mobilization boards.

During the remaining course of our review, we will address the following issues and questions:

The Iranian situation of 1979 resulted in questions concerning the level at which an IEA emergency trigger should be activated and its adequacy in responding to an emergency. The question seems to be whether the trigger should be pulled at the level now established, which is at a 7-percent short-fall level or at some lower level. Also, the question should be raised whether the IEA, at this time would be prepared to carry out an allocation of oil supplies. Mr. Chairman, in that regard, we said at seven or some lower figure, and I think we should also consider whether it should be some higher figure in line with your opening statement.

The IEA is not designed to deal with oil prices but since there is a direct relationship between supplies and prices, it raises the question of whether it should be involved with the price structure. The 1979 Iranian crisis has stimulated a debate concerning whether the IEA can be responsive to a gradually deteriorating world supply situation that never reaches a point where an IEA trigger action becomes necessary under current procedures. Is this a matter for participating countries to take under consideration at an early date?

Out of the recent Tokyo Energy Summit came an agreement to deal with some of the same issues that the IEA was created to handle. What are the interrelationships between the two agreements? France is not a member of the IEA, but is a member of the European Economic Community (EEC). All other EEC member countries are members of the IEA. What is the relationship between France and other EEC member countries concerning oil allocation? What is the interrelationship between the EEC and the IEA allocation systems?

Since January 1979, the IEA Secretariat has required all oil companies to submit monthly information on current, future and immediate past imports, exports, inventories, and domestic production. Does the IEA find this information accurate, complete and useful in determining whether a trigger needs to be activated? Mr. Chairman, you addressed that in your opening statement and we think it is very, very important for us to establish the accuracy or the degree of inaccuracy of such information and the implications it has for the operation of the IEA.

In the case of a serious international shortfall, oil shortfall, requiring international allocation, would the United States stand to gain supplies from other countries or be required to divert oil import to

other IEA countries? I think this needs more pursuit on our part and more depth than we have had an opportunity to do to date.

The management of U.S. participation in the IEA is vested in the Department of Energy and the Department of State. Are the roles of these two agencies well coordinated into a U.S. international energy policy formulation process?

We expect that each of these potential issues are problems and I want to emphasize, Mr. Chairman, that we are not yet in a position to draw a firm conclusion in any one of them but we will expect to have firm conclusions on these and any other issues that are disclosed in the course of our review over the next several months.

That completes my informal statement, Mr. Chairman.

Senator METZENBAUM. Thank you, Mr. Fasick.

[The prepared statement of Mr. Fasick follows:]

PREPARED STATEMENT OF J. KENNETH FASICK

We welcome the opportunity to discuss GAO's work concerning U.S. involvement in the International Energy Agency (IEA), and the relationship of the results of that work to the antitrust defense provided U.S. oil companies that participate in the IEA.

During the last 2 years, we issued seven reports that dealt with various aspects of the International Energy Agency and the International Energy Program and, in July, we started another review which we expect to complete next spring. Before discussing our current review, I would like to briefly touch on some of the points made in our earlier reports. (Attachment 1 is a listing of the seven reports.)

In our October 21, 1977, report on "U.S. Oil Companies' involvement in the International Energy Program", we noted several matters related to the IEA allocation system's test and IEA's emergency management system in general which we believed might pose future problems. These included:

- The potential anticompetitive impact of exchanges of confidential and proprietary data,

- The monitoring responsibility of Federal Trade Commission and Justice Department employees, and

- U.S. Government recordkeeping requirements.

These areas are important because they directly affect the ability of the Federal Trade Commission and the Justice Department to fulfill their major Energy Policy and Conservation Act responsibility—monitoring oil company participation in the International Energy Program (IEP) to minimize anticompetitive effects, while substantially achieving the purpose of the IEP.

Our January 3, 1978, report titled, "More Attention Should be Paid to Making the U.S. Less Vulnerable to Foreign Oil Price and Supply Decisions," concluded that the United States should continue its involvement in the IEA and continue to develop the national emergency sharing organization and demand restraint programs which are prescribed as parts of the emergency allocation system. However, we added that it must be recognized that the IEA emergency allocation system may not work unless the United States and other IEA nations undertake measures to significantly reduce their dependence on Organization of Petroleum Exporting Countries oil supplies.

In that report, we also reviewed information supplied to the IEA by five major U.S. oil companies submitted for the 2nd quarter of 1976 to determine its accuracy and reliability. On the basis of our examination, we concluded the companies were generally reporting accurate information in accordance with government regulations, and the data fairly represented the price and volumes of their acquisitions of OPEC crude oil for that period. We also noted the possibility that important oil producing nations could intimidate IEA nations in such a way as to effectively neutralize the IEA's emergency sharing system once activated.

More recently, our reports on the Iranian oil cutoff—"Analysis of the Energy and Economic Efforts of the Iranian Oil Short Fall," issued March 5, 1979, and "Iranian Oil Cutoff: Reduced Petroleum Supplies and Inadequate U.S. Government Response" issued September 13, 1979—disclosed that, while the Iranian dis-

ruption was significant, it was not serious enough to trigger the IEA emergency allocation system. Six of the 19 U.S.-based oil companies we reviewed, however, did allocate crude oil supplies in a manner similar to that provided for under the IEA agreement. As a result of the methods used to allocate crude oil supplies, the United States lost an additional 200,000 barrels a day.

Concerns about IEA were again echoed in our June 19, 1979, report on Factors Influencing the Size of the U.S. Strategic Petroleum Reserve.

The U.S. Government position is that the IEP oil sharing system will work. However, our discussions with officials of the Department of Energy and State revealed doubt and concern about what would happen in the event of a severe or extended supply disruption. This doubt was based upon:

- a questionable definition of emergency reserves which causes overstatement of available stocks,

- the absence of a mechanism to settle price disputes among oil companies facing potential economic losses in allocating oil from countries with higher prices to countries with fixed prices, and

- insufficient mandatory reallocation procedures.

Mr. Chairman, I would now like to turn to our current review.

CURRENT GAO REVIEW

Our current review of U.S. participation in the International Energy Agency focuses on a variety of issues including relevant legal and antitrust matters, freedom of information issues, and general operational questions concerning the economic, foreign policy, and energy policy costs and benefits to the United States.

Since beginning our review in July 1979, we have had discussions with officials of the Departments of Energy, State, Justice and Treasury, and the Federal Trade Commission and have selectively reviewed appropriate U.S./IEA records of these agencies. We have also contacted representatives of U.S. oil companies participating in the IEA, performing a limited verification of IEA information in their files. We have also monitored recent IEA Industry Advisory Board meetings involving U.S. and foreign oil companies, and officials from the IEA Secretariat, the European Economic Community, and the U.S. Government.

We intend to complete our review in the spring of 1980. At that time we expect to issue a report with conclusions, recommendations, and other matters for consideration. In the months ahead, we will be contacting the U.S. mission to the IEA, the IEA Secretariat, foreign oil companies, participating IEA country energy/oil ministries, and those in the European Economic Community energy and antitrust ministries. We will also more intensively enter our review stage in Washington conducting an indepth analysis of U.S. Government and U.S. oil company participation in the IEA.

BENEFITS OF U.S. PARTICIPATION IN IEA

U.S. Government and U.S. oil company officials have generally conveyed the view that U.S. participation in the International Energy Program and in the International Energy Agency has been beneficial to the U.S. and all member consuming countries. They maintain that cooperation among consumer countries and between these countries and companies has improved. They say this is due in part to the establishment of an Industry Advisory Board that advises the IEA on a wide variety of oil market issues. The submission of market information by companies and countries to the IEA has also assisted in the furthering of a cooperative relationship.

U.S. oil companies' participation in the IEA was requested by the U.S. Government shortly after the inception of the agency. Although companies were initially reluctant to participate, they have participated regularly over the past four years. They now generally perceive their participation in the IEA as beneficial to their own interests and to the interests of oil-consuming countries. They see the IEA, in the event of an emergency short-supply allocation, as bearing the responsibility for multilateral allocation of oil supplies among participating IEA-consuming countries. The companies contend that during the 1973 Arab oil emergency they were unjustifiably criticized for allocation decisions they had made in the absence of a governmentally-mandated system. They believe that the IEA mechanism shifts the primary burden of responsibility from their shoulders to a multilateral

governmental institution while at the same time upholding the basic historical distribution system utilized by the companies during the 1973 emergency.

The IEA also presents the companies, they say, with a more acceptable form of government intervention than the more direct forms as are reflected in various nationalization schemes and/or emergency mobilization boards.

While the overall responsibility of the IEA is to increase cooperation among oil-consuming nations, its primary and most significant function is the allocation of supplies under emergency short-supply conditions. This function distinguishes it from an informational/cooperative type of venture. If it did not have this function, practically all of its responsibilities could be carried out within the Organization of Economic Cooperation and Development organizational setting.

LEGAL ELEMENTS OF THE AGREEMENT

U.S. participation in the IEA began in 1974 when it and 15 other nations signed an international energy agreement designed to carry out a comprehensive program of consumer country cooperation in the wake of the 1973 Arab oil embargo. The Agreement remains in effect for a term of 10 years thereafter, unless and until the Governing Board, composed of member nations and acting by majority vote, decides on its termination. Any nation wishing to withdraw may do so by giving 12 months written notice.

The Agreement calls for a general review of the International Energy Program (Agreement) after May 1, 1980. U.S. officials we contacted knew of no effort underway at this time to fulfill that review requirement.

The instrument of U.S. participation in the International Energy Program (Agreement) and the International Energy Agency is considered by the U.S. Executive Branch to be an Executive Agreement. According to sources we have contacted, most other participating countries perceive the instrument to be an international treaty.

Under the Agreement, member countries are committed to the Program's mandatory emergency allocation system as well as various mandatory information requirements. In the event of a major short-term international shortage, the United States will be committed to whatever decision IEA members make concerning the allocation of oil supplies among themselves, including oil of U.S. multinational oil companies.

"Under the agreement, the United States has substantial formal IEA-voting power as a delegate and considerable informal influence. In addition to this formal and informal influence, the United States, like all other IEA members, does reserve the prerogative to withdraw from the organization whose membership in the final analysis remains essentially voluntary. Of course, withdrawal from the IEA has all sorts of diplomatic and international economic/political ramifications.

ANTITRUST MATTERS

Significant to U.S. participation in the International Energy Program (IEP) and the IEA has been the antitrust defense provided U.S. oil companies to meet as a group, to advise the IEA Secretariat and to participate in the allocation of supplies once a decision by the IEA has been made. This antitrust defense has been authorized over the past five years by section 252 of the Energy Policy and Conservation Act of 1975. It appears that IEA as presently structured cannot effectively function in an international energy emergency without the cooperation and assistance of the oil companies. The U.S. oil companies that we have visited have stated that they will cease participation in all IEA activities if the antitrust defense for such activities is not extended.

Although we have not had an opportunity to review all of the documents at the Departments of Justice, Commerce, and State and the FTC, associated with the IEA, we have found thus far no evidence of U.S. oil companies' committing antitrust violations through their participation in the IEA. We have found, however, that certain aspects of the antitrust safeguards of the U.S. Government have caused some concern among members of the American public, as well as among members of participating companies, both United States and non-United States. These concerns fall into 3 general categories: (1) uncertainties resulting from the absence of a U.S. plan of action; (2) classification of monitoring data; and (3) administrative problems. During the course of our review, we will continue to examine these areas.

LACK OF U.S. PLAN OF ACTION

Under section 252 of the Energy Policy and Conservation Act, in order for a U.S. oil company to obtain the benefit of an antitrust defense for a particular action, the action has to have been taken in the course of developing or carrying out the Voluntary Agreement or a U.S. Plan of Action. The Voluntary Agreement is the document, issued by the Department of Energy with the approval of the Attorney General after consultation with the Federal Trade Commission, which sets forth the procedures and conditions under which U.S. reporting oil companies may voluntarily participate in IEA-related activities. Among its provisions are rules regarding meetings and consultations, the exchange of confidential or proprietary information, general classes of actions that are permissible after the President determines that an international energy supply emergency exists, and recordkeeping requirements. Procedures have been developed and implemented under the Voluntary Agreement for such things as prior clearances associated with industry advisory meetings and consultations. However, these are not effective in the context of a real international energy emergency, where a multiplicity of actions may be required in relatively short time frames. It is contemplated that the U.S. Plan of Action, which has not yet been finalized, would provide rules appropriate for an emergency. Until DOE prescribes a U.S. Plan of Action, clarifying the circumstances in which the antitrust defense would be available during an emergency, the U.S. oil companies have no assurance that they would be in a position to undertake actions necessary to mitigate the international energy emergency without subjecting themselves to antitrust suits. It is therefore critical for the DOE to prescribe the U.S. Plan of Action before the occurrence of an international energy emergency.

CLASSIFICATION OF MONITORING DATA

Under the provisions of the Energy and Policy Conservation Act and the Voluntary Agreement promulgated thereunder, U.S. companies are authorized to participate in advisory bodies created by the IEA, provided a full and complete record is kept of the meetings. These records or transcripts are to be available under the Freedom of Information Act with certain exceptions. The exceptions relate to the protection of the foreign policy interests of the United States and to trade secrets. Because of the application of these exceptions, substantial portions of the transcripts are classified and rendered unavailable to the public.

We were advised that the non-U.S. oil company representatives did not want their statements transcribed verbatim at industry advisory meetings. To mollify this concern it was agreed by the U.S. Government that no statement made at these meetings by a foreign company representative or a representative of the IEA Secretariat would be available to the public. It is our understanding that to fulfill this informal agreement, the Department of State classifies and deletes all such statements from the transcripts before they are made available to the public, regardless of substantive content, on the basis of protecting the foreign policy interests of the United States. Since foreign oil companies chair certain of the industry advisory groups and a representative of the IEA Secretariat is a major participant in the discussions at most meetings, substantial portions are deleted from the public transcripts.

ADMINISTRATIVE PROBLEMS

Under the Voluntary Agreement, the oil companies are required to obtain certain prior clearances associated with industry advisory meetings. These clearances are granted by the Department of Energy, after consultation with the Secretary of State, and with concurrence of the Attorney General after consultation with the FTC. We have been advised by certain U.S. oil companies that clearances are sometimes not received until hours before the beginning of a scheduled Industry Advisory Board or subcommittee meeting, even though representatives are coming from all parts of the world. Government and oil industry officials told us that without the U.S. Government clearances, U.S. oil companies would not participate and the meeting would not be held.

In addition to the administrative delay with respect to advance clearances, there is a very substantial administrative delay in making the verbatim transcripts of industry advisory meetings and consultations available to the public.

In some cases more than a year will have passed before a transcript, with classified portions deleted, appears in the public reading room.

We have not completed our examination of the cause for the delays in granting clearances or making transcripts available to the public. In this latter regard, the classified transcripts are available to congressional committees as soon as they are prepared.

I must reiterate that at this point in our review, our observations are tentative. As we proceed with our review, in addition to completing our examination of the matters discussed above, we will address the following issues and questions:

The Iranian situation of 1979 resulted in questions concerning the level at which an IEA emergency trigger should be activated and its adequacy in responding to an emergency. The question seems to be whether the trigger should be pulled at the level now established which is at a 7 percent shortfall level or at some lower level. Also, a question could be raised as to whether the IEA, at this time, would be prepared to carry out an allocation of oil supplies.

The IEA is not designed to deal with oil prices but since there is a direct relationship between supplies and prices, should it be involved in price structures?

The 1979 Iranian crisis has stimulated a debate concerning whether the IEA can be responsive to a gradually deteriorating world supply situation that never reaches the point where an IEA trigger action becomes necessary under current procedures. Is this a matter for the participating countries to take under consideration at an early date?

Out of the recent Tokyo Energy Summit came an agreement to deal with some of the same issues that the IEA was created to handle. What are the interrelationships between the two agreements?

France is not a member of the IEA but is a member of the European Economic Community (EEC). All other EEC member countries are members of the IEA. What is the relationship between France and other EEC member countries concerning oil allocation? What is the interrelationship between the EEC and the IEA allocation systems?

Since January of 1979 the IEA Secretariat has required all oil companies to submit monthly information on current, future, and immediate past imports, exports, inventories, and domestic production. Does the IEA find this information accurate, complete, and useful in determining whether a trigger needs to be activated?

In the case of a serious international oil shortfall requiring international allocation, would the United States stand to gain supplies from other countries or be required to divert oil imports to other IEA countries?

The management of U.S. participation in the IEA is vested in the Department of Energy and the Department of State. Are the roles of these two agencies well coordinated into a U.S. international energy policy formulation process?

Mr. Chairman, this completes my prepared statement. I would be pleased to answer any questions at this time.

ATTACHMENT I—LIST OF GAO REPORTS DEALING WITH THE INTERNATIONAL ENERGY AGENCY

1. "U.S. Oil Companies' Involvement In The International Energy Program" (HRD-77-154), October 21, 1977.
2. "More Attention Should Be Paid To Making The U.S. Less Vulnerable To Foreign Oil Price & Supply Decisions" (EMD-78-24), January 3, 1978.
3. "U.S. Energy Conservation Could Benefit From Experiences Of Other Countries" (ID-78-4), January 10, 1978.
4. "The United States and International Energy Issues" (EMD-78-105), December 18, 1978.
5. "Analysis Of The Energy And Economic Effects Of The Iranian Oil Shortfall" (EMD-79-38), March 5, 1979.
6. "Factors Influencing the Size Of The U.S. Strategic Petroleum Reserves" (ID-79-8), June 15, 1979.
7. "Iranian Oil Cutoff: Reduced Petroleum Supplies And Inadequate U.S. Government Response" (EMD-79-97), September 13, 1979.

Senator METZENBAUM. I don't know whether Mr. Thomas or Mr. Conahan or Mr. Springer have anything additional to add, and if not, I have some questions.

Mr. FASICK, do you know who decides whether the IEA industry meetings are closed?

Mr. FASICK. I think the agreement calls for certain participation by oil companies, U.S. Government representatives and, indeed, Members of the Congress or their designated representatives.

Senator METZENBAUM. I do not believe that there is any such provision about the Members of Congress being permitted to participate, because as I indicated in my opening statement, the State Department actually originally told me that I would not be welcome to come and I only was able to change that after the White House and Secretary Vance himself interceded and reversed the decision.

Mr. SPRINGER. Senator, if I could respond to that, I believe there is a distinction made between the IEA entities, the bodies and subagencies within the IEA, which are really governmental entities and the industry advisory groups. In the IEA governmental function, the official U.S. Government representatives are the sole representatives of the U.S. Government. Private parties, and I assume also including Congressmen and Senators, are not permitted to attend these official meetings. The statute does permit representatives of congressional committees to attend the industry advisory group meetings.

Mr. FASICK. Along the same lines, I think we had some difficulty.

Senator METZENBAUM. But the question I was asking had to do with the fact that it does provide that meetings of the IEA need not be open to interested persons and need not be initiated and chaired by a regular employee, which means that they may be closed. That is the question that I was asking and that is, who decides whether or not those meetings are closed?

Mr. SPRINGER. I am not certain, Senator, but I believe that that decision is made by the Department of State and the Department of Energy.

Senator METZENBAUM. Do you know how that determination is made?

Mr. SPRINGER. Again, I am not certain, Senator, but I believe that the notice of a pending industry advisory group meeting has to be published in the Federal Register. I believe that this is initiated by the companies, either the chairman of the industry advisory board or the chairman of the subcommittee that is going to be holding the meeting. In that notice is the expected agenda and the expected participants and that notice is forwarded to the Department of Energy and other U.S. Government agencies for their approval. At that time I assume that the Department of State and the Department of Energy can determine whether the meeting would be closed or would not be closed and whether they approve of the location of the meeting.

Senator METZENBAUM. Do they state the reason for closing the meeting at the time they do?

Mr. SPRINGER. I am not aware that the issue has ever arisen. The notices I have seen have indicated that the Department of Energy can authorize other Government agencies to have representatives attend

the meetings—but there was no indication about whether the meeting was closed to members of the public.

Senator METZENBAUM. I would appreciate your looking into this question, that is, who determines whether the meetings are closed, whether the reasons for closing the meetings are stated, and what those reasons are. If the reasons are not stated, who makes the decision not to give reasons. Is it the chairman of the subcommittee? I think Exxon is one of them, or one of the other oil companies that chair a subcommittee. All of these subcommittees are chaired by oil company executives, is that correct?

Mr. SPRINGER. Yes.

Mr. FASICK. We will cover that, Mr. Chairman, in our study, and include the results in our report.

Senator METZENBAUM. The IEP agreement requires a formal evaluation of progress under the agreement, doesn't it?

Mr. FASICK. Yes.

Senator METZENBAUM. Is it your understanding that such an evaluation has been made?

Mr. FASICK. As I understand it, an evaluation is to be made in May 1980 or later. To our knowledge, no effort as yet has been made to undertake that type of evaluation of the program.

Senator METZENBAUM. Has it begun?

Mr. FASICK. Not to our knowledge, sir, no.

Senator METZENBAUM. Would you investigate for us why it has not been begun. It would be almost impossible to complete by 1980 if it has not been started at this point, wouldn't it?

Mr. FASICK. I think it is worded in such a way that it was a study to be undertaken in May 1980 and they didn't talk in terms of a completion.

Senator METZENBAUM. I agree with you. I notice the language.

Was IEA created pursuant to a treaty or an executive agreement?

Mr. FASICK. An executive agreement.

Senator METZENBAUM. Do you know why the choice was made to do it by executive agreement?

Mr. FASICK. I do not know, sir, precisely the reason for it but we can inquire and get the official position of the State Department and the U.S. Government.

Senator METZENBAUM. I think that we in the Congress would like to know, since it appears to have all the elements of a treaty except that it was not submitted to the Congress for a two-thirds' ratification vote.

Mr. FASICK. There are a number of agreements that the executive executes with a foreign country and Senator Case introduced a law several years ago—the Case Act—which requires the executive branch to report all executive agreements to the Congress periodically. On the other hand, these are fait accompli when they come to the Congress and the Congress is made aware of them.

Senator METZENBAUM. I think under more recent legislation, it is also required that there be consultation in advance isn't there?

Mr. FASICK. That I don't know, Frank?

Mr. CONAHAN. Yes, sir, that's true. Not in all cases.

Senator METZENBAUM. What is your understanding about the result of the Department of Energy's performance during the second allocation systems test?

Mr. FASICK. Phil, would you answer that?

Mr. THOMAS. During the second allocation test, there were mixed results. I think generally all the U.S. agencies felt that it was a good learning experience—even the IEA Secretariat felt that. But there were problems that existed. There were coordination problems among the U.S. officials present in Washington and in Paris. The antitrust defense entered into the situation concerning clearances.

There was considerable doubt and confusion at AST-2 as to how the clearances could be made, and whether the U.S. Congress could get these clearances. There was confusion between the U.S. officials at the AST-2 and the U.S. NESO, which is the National Emergency Sharing Organization which is designed to implement the national sharing program of the international allocation program.

We intend to more extensively look into the outcome of AST-2 and the potential for a new test when we talk to IEA officials in Paris.

Senator METZENBAUM. Are you aware of the fact that an internal report at DOE characterized the U.S. NESO's performance as a failure?

Mr. THOMAS. That was one view, yes, Senator. We are aware. There were other people, though, that said that generally it was a good learning experience. The basic point is, had it not been a test and a real allocation situation, it would have been very difficult to allocate in a short period of time.

Senator METZENBAUM. Or to put it another way—if it had been a reality and not a test, it would have been a failure, wouldn't it? It would have failed to achieve the objective that was desired.

Mr. THOMAS. I think that is speculation. We have not thoroughly looked into that but, based on that information available, that certainly is one answer.

Senator METZENBAUM. Well, the language that I was reading came from an internal IEA evaluation. Would you consider that speculation? This is the IEA's own evaluation of the U.S. effort in this respect.

Mr. THOMAS. That is one of many IEA evaluations. If you speak to a representative of the Secretariat, they give you a different view. The same with the DOE. There are many papers like that that you have to take into consideration. What we are saying is that we have not made any final determination.

Senator METZENBAUM. I appreciate that you have not. Is it your understanding that some of the responsible U.S. agencies have not fully performed their duties under the IEA?

Mr. THOMAS. Once again, Senator, we are at much too early a stage to comment definitively on that. There has been some coordination difficulties with the agencies involved; some communications problems. The agencies generally tell us that the informal coordination system between State, DOE, Justice, and FTC works very well. Others say that there are some communication coordination problems. We have not reached a point where we can make a definitive conclusion at this time.

Senator METZENBAUM. Is it your impression that those at the highest levels of our Government, responsible for setting our international energy policy, are fully informed about IEA, its purposes and its activities?

Mr. FASICK. We have no reason to believe that they are not at this point in time, sir.

Senator METZENBAUM. Are you aware of the fact that the Department of Justice has not adequately monitored nor issued the required recordkeeping regulations at this point?

Mr. THOMAS. Mr. Springer will respond.

Mr. SPRINGER. I am not sure I understand the question, Senator.

Senator METZENBAUM. I believe that the Department of Justice is required under the statute to issue and have in force and effect a recordkeeping regulation. Is that correct?

Mr. SPRINGER. As I understand what has occurred, both the Justice Department and the FTC participated on an informal basis in the development by the Department of Energy.

Senator METZENBAUM. I am sorry.

Mr. SPRINGER. They participated in the development of the Department of Energy recordkeeping regulations. As I understand their present position, and we haven't verified this fully, my understanding is that they feel that since they did participate informally in the Department of Energy's recordkeeping regulations, there is no necessity for additional formal FTC and Justice Department regulations with respect to recordkeeping.

Senator METZENBAUM. The statute provides that the Attorney General, in consultation with the Federal Trade Commission and the Administrator shall promulgate rules concerning the maintenance of necessary and appropriate records.

Mr. SPRINGER. Yes; that's correct.

Senator METZENBAUM. Have they done that?

Mr. SPRINGER. They have not done that.

Senator METZENBAUM. The Department of State is required to come up with a plan of action. Have they done that?

Mr. SPRINGER. No U.S. plan of action has yet been finally promulgated. I am not sure whether it is the responsibility of the Department of State or the Department of Energy, or, perhaps, it is both of them combined.

Senator METZENBAUM. I said Department of State, but I meant Department of Energy. The Department of Energy has not come up with their plan of action?

Mr. SPRINGER. No; but I believe that one is in process but it has not been finalized.

Senator METZENBAUM. Is it your impression that the companies played a leading role during tests of the allocation system?

Mr. FASICK. Yes; I think the procedures in the IEA for the allocation systems provides for company participation throughout the process and they did participate in the tests.

Senator METZENBAUM. Now one of you attended the industry meetings that were held in New York?

Mr. THOMAS. Mr. Springer and myself attended the 3-day IAB meetings in New York City, September 11, 12, and 13.

Senator METZENBAUM. Is it fair to say that the larger companies dominated those meetings?

Mr. THOMAS. Yes.

Senator METZENBAUM. And the Secretariat personnel are permitted to serve a maximum term of 3 to 5 years, is that correct?

Mr. THOMAS. That is our preliminary understanding.

Senator METZENBAUM. Does that actually make the situation more difficult with respect to having IEA staff who are able to gain the necessary expertise, and does it also provide a means of rolling over these IEA staff into the corporate offices of the oil companies?

Mr. THOMAS. We have not discussed this with IEA Secretariat officials; however, it is logical to conclude that if you are constantly replacing staff at 3- to 5-year periods, you are not going to develop much continuity of expertise by which to make a decision in the event of a short supply situation. We intend to pursue that issue further when we speak with IEA Secretariat officials and other U.S. officials.

Senator METZENBAUM. Would you also be good enough to cover in your report the revolving door question? That is, how many have come from the oil industry into the Secretariat and how many of those that have left have gone into the oil industry and to which oil companies?

Mr. THOMAS. Yes, Senator.

Senator METZENBAUM. To your knowledge, are there conflicts of interests restrictions on these personnel after they leave IEA?

Mr. THOMAS. We have not determined that. We intend to pursue that also.

Senator METZENBAUM. You testified about some problems with classification procedures. Did your investigators talk to at least some Secretariat members and oil companies' representatives who said their remarks did not need to have blanket classification?

Mr. THOMAS. In informal conversations in New York City, out of the context of the IAB meetings, we discussed the classification issue with a few European companies, and an IEA Secretariat official and they generally felt that a blanket classification procedure, totally excluding foreign company comments and IEA Secretariat comments could be reconsidered. They might be more willing to accept something less than total classification.

Senator METZENBAUM. It was not necessary to have a blanket classification?

Mr. THOMAS. That's right. In a more recent discussion with an attorney representing some of the European companies as well as U.S. company, he shared with us a similar perspective.

Senator METZENBAUM. Do you have reason to believe that IEA participants fear that the Tokyo summit has lessened IEA's influence?

Mr. THOMAS. I think that at this time it is hard to determine that. There is some anxiety among participating countries that the Tokyo summit may have conflicted with the IEA's role. But it also appears that the IEA may well work out to be the implementational arm of the Tokyo summit. We are going to take this into consideration.

Senator METZENBAUM. What was the remark made by our Ambassador to Japan, Mike Mansfield, that apparently had other IEA countries concerned?

Mr. FASICK. I think the Ambassador in that particular case was supportive of the Tokyo approach. The fact that the lesser countries in-

volved than the 20 countries in the IEA provided a more effective forum.

Senator METZENBAUM. Weren't his remarks to the effect that the Tokyo summit was more significant than the IEA?

Mr. FASICK. We understand that that was the substance of his remarks.

Senator METZENBAUM. Do you have reason to believe that participating companies are obtaining access through the IEA to data that they would not otherwise get?

Mr. FASICK. Undoubtedly, there is information coming to their attention that they would otherwise wouldn't get.

Senator METZENBAUM. Would you be good enough to look into that question?

Mr. FASICK. Yes, sir.

Senator METZENBAUM. And that question in detail, if you would, please. Give us specifics to the greatest extent possible.

What have you discovered so far about the accuracy of IEA data and its usefulness to the IEA?

Mr. FASICK. We haven't done enough work yet to establish the accuracy or inaccuracy of the data and I did note in your opening statement and we also noted in the internal records of the agency or the U.S. agencies that there is some concern about the accuracy of the data.

Senator METZENBAUM. How does the IEA definition of "strategic reserves" differ from our own domestic definition?

Mr. FASICK. Some of it, I think, is a question of the reserves that are in the pipeline. Mr. Conahan can address more precisely that question.

Mr. CONAHAN. The IEA definition for emergency reserves goes to total oil stocks which, as Mr. Fasick said, includes everything in the pipeline, barges, et cetera, and that, of course, does not constitute pure reserves in as much as, in the case of the Europeans for example, they have determined they need on the average about 45 days for working purposes.

Senator METZENBAUM. According to the IEA, how many days of strategic reserves do we have?

Mr. FASICK. According to IEA, we are supposed to have 70 and until May 1980, when all members are supposed to go to a 90-day supply. Our own computations apply, and you may correct me, that the latest was running in the neighborhood of 128, yet people are questioning the accuracy of that figure.

Senator METZENBAUM. The IEA uses a figure of 128 days which we have, is that correct?

Mr. FASICK. Yes.

Senator METZENBAUM. And according to the National Petroleum Counsel, they indicate that instead of 128, it's 28, is that correct?

Mr. FASICK. That was the difference that I was alluding to, Senator.

Senator METZENBAUM. How do you explain the discrepancy?

Mr. FASICK. It must be in the way you, first of all, the accuracy of the records on the part of the IEA as opposed to the Petroleum Institute, and the other may be in the interpretation of what is a reserve. We need to look into this in more depth.

Senator METZENBAUM. Do you know how U.S. Government policy, with respect to the positions we take at the IEA, is determined?

Mr. FASICK. Phil.

Mr. THOMAS. Mr. Springer was present in some conversations concerning that with the Department of Energy and he may be able to share that.

Senator METZENBAUM. That went down the table and back.

Mr. SPRINGER. I don't know that we are in the position today to make a definitive statement, but my understanding is that it is on many instances on an ad hoc basis, depending upon the degree of significance of the decision. If it is a relatively minor decision, it can be made by a relatively low level official and, if it is a very significant decision, it goes up to the very highest level. I am not aware just yet that there is a formal procedure or, if there is one, that it is inadequate.

Senator METZENBAUM. Mr. Fasick, when you and your team make this study, one key issue I'd like you to keep in mind as something that concerns us is the following: We got into the IEA without a congressional enactment except in so far as it provided an antitrust exemption. It was not brought to Congress as a matter of a treaty. Its whole operations have been carried on at a very low profile.

I know that when I raised some questions about the IEA some months earlier before I went to the meeting in Paris I was amazed at how little anybody in our Government seemed to know about it except somebody over at the State Department. Even the Department of Energy knew very little about it, although it isn't fair to say that Mr. Bergold did not, he was quite familiar with it. The top of the Department was not that familiar with its operations. One of my concerns is that if we are to continue to provide this antitrust exemption, the question then is how is the public interest to be served? State Department doesn't necessarily reflect the views of what the people of this country want—they may or may not. The Department of Energy has obviously taken positions contrary to the Congress in a number of areas and has been rejected in their recommendations to the Congress.

One of my concerns is—if there is to be a continuation—how do we open the door wider so that the public interests may be served as well as the congressional interests in the activities of the IEA. I am not asking you to respond, but it is an area of my concern and I would hope that in your evaluation you will be giving consideration to the overall propriety of this kind of an operation. I am aware of the fact that you can't have international bodies operating with 535 Members of Congress participating on a daily basis, given some of the realities of the world in which we live.

But still, energy has become the highest issue in this country from the standpoint of controlling inflation and from the standpoint of making our economy run as well as our Defense Department run. So, I think it is important that you look at this area that concerns some of us.

I have one last question. Do you know how the United States would fare under the IEA allocation system as a result of a disruption similar to the Iranian shutdown?

Mr. FASICK. We don't know, again; different scenarios would create different situations, but, in most cases, I think we are going to find that the United States, because it is a larger importer, possibly would be involved with reallocation. In most cases, I think we will find, we are

still pursuing this, but in most cases we probably would find that the United States would be in a position of allocating its normal resources to others. To what degree we don't know at this point. A lot of it depends upon the other things that we come up with as we make our study.

Senator METZENBAUM. In other words, the United States, by allocating its resources to others, by reason of our participation in IEA, would suffer a greater amount of cutback than would other nations?

Mr. FASICK. I don't know whether we would suffer a greater amount of cutback, but there would be a cutback possibly greater than otherwise would happen if the traditional supply systems were at work in order to fulfill our obligations to IEA.

Again, a definitive or firm position on our part should await further study on our part of the different scenarios and different conditions that exist.

Senator METZENBAUM. One more question. Did Sweden ask for the IEA emergency system to be triggered after the Iranian shutdown and, understanding that it did, what happened?

Mr. FASICK. We understand it did and that the IEA did look into it and they did not apply the trigger because they determined that the Swedish shortage was more a product of price policy than a question of allocation discrimination. It wasn't really a condition of a shortage, it was a condition of a price factor working.

Senator METZENBAUM. To put it another way, is it fair to say that the IEA turned it down because the companies felt that the price as prevailing in Sweden was lower than other world prices and, therefore, didn't feel justified in triggering the mechanism?

Mr. FASICK. I think that is precisely it. When Sweden made adjustments in their prices, then their shortage problem, so-called shortage problem, went away. This is, again, a traditional and normal economic factors working in a supply system.

Senator METZENBAUM. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Fasick, we are glad to have you and the other gentlemen here today. Thank you for your presence.

Without objection, my statement on this bill will appear following the chairman's statement this morning.

Mr. Fasick, you commented that it must be recognized that the IEA emergency allocation system may not work unless the United States and other IEA nations undertake measures to significantly reduce their dependence on organization of petroleum exporting countries' oil supplies. I believe you made that statement.

Mr. FASICK. Yes, sir.

Senator THURMOND. What progress, if any, has been made in this direction by the IEA nations?

Mr. FASICK. I think one of the most important actions that need to be taken are conservation efforts on the part of the participants. As you know, in the United States, we only have had modest success in this area of conservation. Other steps, of course, that are encouraged by the philosophy of the IEA is the diversification of oil supplies. Again, a great deal of effort is going into this area, but there has only been modest success to date.

Senator THURMOND. Your reference to the need for a U.S. plan of action raised the question of the importance of such a plan as opposed to the current voluntary agreement. Please comment on the advantages and disadvantages of each of these type documents.

Mr. FASICK. They do have a voluntary agreement and they operate specifics about how the companies would act and what they would be absolutely essential in order for the players to understand precisely the ground rules, particularly as applies to the antitrust defense and there is a great deal of confusion existing at this point in time as to how they would function in a true emergency where mandatory allocations have to take place.

Mr. SPRINGER. Senator, if I might add to that, I believe that both the U.S. plan of action and a voluntary agreement would be in existence at the same time. The present voluntary agreement would remain in effect and the U.S. plan of action would, we believe, contemplate more specifics about how the companies would act and what they would be permitted to do during an actual emergency. But both of them would exist side by side. At present, there is just a voluntary agreement.

Senator THURMOND. Does anyone else have any comment.

[No response.]

Senator THURMOND. You gentlemen don't hesitate to speak up like Mr. Springer did if you have any suggestions or comments.

Mr. FASICK. I believe you stated that the U.S. oil companies that we have visited have stated that they will call a cease participation in all IEA activities if the antitrust defense for such activities is not extended. I believe that is correct.

Mr. FASICK. They are precisely the positions that were expressed to us by all of the oil companies that we interviewed that this is absolutely essential to their participation.

Senator THURMOND. What would you expect would happen to the IEA program if U.S. oil companies did withdraw. How would the U.S. oil situation be affected?

Mr. FASICK. First of all, the mass amount of expertise in this area is reposed in the oil companies as opposed to this type of expertise being in the body of Government employees or others that could be made available to IEA. I think that is one of the most important, and Mr. Thomas, maybe you have something to add to this.

Mr. THOMAS. I think presently that the allocation system could not be run effectively without the companies participation; however, the rest of the IEA, the subgroup on long-term cooperation, the subgroup on producer-consumer cooperation, and the subgroup on the oil market could conceivably be run without oil company participation through Government participation exclusively. But, if you look at the IEP and the IEA, the oil companies are an integral part of it. The IEP was designed to run on the normal marketing system which the oil companies represent.

I think you would need a new international energy program or radical revision of it to operate without the companies. You would also need considerable National Government authority to allocate supplies.

Senator THURMOND. Does anyone else have any comments?

[No response.]

Mr. FASICK, what would be the effect of the expiration on the international energy program?

Mr. FASICK. The expiration?

Senator THURMOND. Yes.

Mr. FASICK. I think that our own law provides for expiration in 1985. That is the Energy and Policy Act, right? What would be the impact of the expiration or termination of the international energy program, itself?

Senator THURMOND. That's right, if it is terminated at this point?

Mr. FASICK. Well, then it would leave in somewhat disarray, we use that term advisedly, the international community's ability to respond officially to an energy crisis and it would be left then in the hands of the conventional supply systems run by the oil companies.

Mr. SPRINGER. Senator, there is a provision in the IEP which says that the International Energy Agency shall exist for 10 years. There is also a provision that says that it will continue beyond 10 years and may be discontinued or terminated upon a vote of the governing board. The 10 years would not be up until 1985 and there is an additional provision in the IEP which says that a country can withdraw upon written notice of 1 year or 12 months.

Senator THURMOND. Suppose the United States withdrew before the 10 years was up. What would be the impact on the situation?

Mr. FASICK. That would be substantial because most of the major multinational or international oil companies are U.S.-based oil companies. Again, the United States is, indeed, the largest consumer of oil in the world and termination on the part of the U.S. participation in the program would, for all practical purposes, effectively destroy the international program.

Senator THURMOND. Does anyone else have any comment?

[No response.]

Senator THURMOND. Thank you very much, gentlemen. Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you, Senator Thurmond.

The issue before this committee is not whether or not the Government should continue to participate. I am positive that we have this jurisdiction. Issue before the committee is whether the antitrust exemption should continue. As I understand your testimony, if we withdrew the antitrust exemption or refused to renew it, the United States would still be in a position, if it saw fit to do so, to continue to participate in the IEA. The oil companies would not participate and, therefore, the only thing that would not be included would be the allocation system. Is that right?

Mr. FASICK. That is correct.

Mr. THOMAS. That is correct.

Senator METZENBAUM. Now, the allocation system, as we previously discussed, works out in such a manner that whenever there is a triggering, the United States will pay, in present shares, approximately twice as much as any other nation in the world except another producing nation, because the allocation is based upon consumption rather than on imports, is that correct?

Mr. THOMAS. We are unclear on that right now, Senator, but I would like to add this point, that if there were a politically inspired embargo against the United States—

Senator METZENBAUM. A what?

Mr. THOMAS. A politically inspired embargo against the United States tomorrow by OPEC countries or one country, the United States would certainly benefit by diversion of oil imports from other countries to the United States under the IEA program. It is our understanding that one of the major reasons that the United States pushed establishment of the IEA was to protect its own interests against such a political embargo.

Senator METZENBAUM. But the allocation formula itself was in the international agreements. We were, again, made party to an agreement where we, as this Senator sees it, were outnegotiated because we agreed to accept a formula which hurts our Nation more than any other nation in the world, any other consuming nation. Is that correct?

Mr. FASICK. Well, again, I am not sure. Your figures seem to make sense to us but I think we would have to check that out further. Again, the allocation system was based upon national defense and security interests, mobilization interests and I think it was a question of fairly allocating it so that national, as well as mobilization and international commitments would be fulfilled.

There is a serious consideration with respect to that element of the IEA. For example, our NATO allies are dependent to a great deal upon imported oil and it would be very important from the point of view of security for NATO forces to be assured of a supply.

So these factors have to come to bear in addition to the impact it would have on our economy, as such.

Senator METZENBAUM. I think that is all. We will look forward to your report, and I hope you will expedite the timing of it. April-May, we understand is what you are saying, and we look forward to hearing from you at that time in connection with that.

Thank you very much. You have been very helpful.

Mr. FASICK. Thank you, Senator.

Senator METZENBAUM. Our next witness is Mr. Alfred Dougherty, Director of the Bureau of Competition of the Federal Trade Commission. Mr. Dougherty, it is nice to welcome you back again.

STATEMENT OF ALFRED F. DOUGHERTY, JR., DIRECTOR, BUREAU OF COMPETITION, FEDERAL TRADE COMMISSION

Mr. DOUGHERTY. Mr. Chairman, I want to thank you for this opportunity to present the views of the Federal Trade Commission on the international energy program. The Bureau of Competition has been delegated the responsibility for implementing the Commission's statutory responsibility in the IEP, under section 252(i) of the Energy Policy and Conservation Act.

I have with me today, Ronald B. Rowe, the Bureau's Assistant Director for Petroleum Competition matters and Marc G. Schildkraut, the senior attorney in charge of the Commission's monitoring and reporting role under the IEP.

Following my testimony, we will be pleased to answer any questions you might have. I request permission to present the Commission's written statement for the record, Mr. Chairman. I will present orally a brief summary of this statement.

Senator METZENBAUM. Your written statement will be included in its entirety at the conclusion of your oral testimony.

Mr. DOUGHERTY. First, the statement describes the basic workings of the IEP and the Commission's role in the program. Second, the Commission's statement addresses the major themes of the—

Senator METZENBAUM. You are going so fast you are going right over us. No sense in reading it so fast that those of us who are trying to listen can't follow you. Just slow it down.

Mr. DOUGHERTY. The major themes of the Commission's seventh report to the President and the Congress are as follows, Mr. Chairman: First, a discussion of the oil company activities under the IEP from March through September 1979; second, a description of the IEP emergency allocation system and the participation of major oil companies should the system ever be activated; third, a discussion of why the curtailments of crude oil supplies from Iran during early 1979 did not lead to activation of the emergency allocation system; fourth a description of the IEP's data collection system; and fifth, a description of the special antitrust clearances that have been granted to various U.S. oil companies during the past 6 months, including the particular activities that were cleared and the antitrust safeguards that were required.

The third part of the report and of particular interest to this subcommittee, I am sorry, the third part of the statement, and of particular interest to the subcommittee today, is a discussion of the nature of the limited antitrust defense provided by the EPCA for oil industry participation in IEP. It is our conclusion from an analysis of the language and the legislative history of EPCA that this antitrust defense extends only to actions taken to plan and execute a voluntary agreement or plan of action under the IEA, and only if such actions are not taken with a view toward diminishing competition.

In order to facilitate oil company participation in the IEP, Congress provided a statutory antitrust defense for actions taken to plan and execute a voluntary allocation agreement under the IEP. Before the enactment of the EPCA in 1975, the antitrust defense provisions of section 708 of the Defense Production Act applied to the International Energy Program. That section simply permitted the implementation of voluntary agreements between industry members upon Presidential approval. Acts or omissions by industry members pursuant to approved agreements were given total immunity from antitrust prosecution.

Only the Attorney General, after reviewing the anticompetitive consequences of a voluntary agreement, could withdraw such approval once granted. However, such action by the Attorney General could operate only prospectively. Moreover, this mechanism did not provide for monitoring by the antitrust agencies of the voluntary agreements.

Because of the inadequacies of the flat antitrust immunity provisions of the Defense Production Act, section 252 of EPCA provided for numerous antitrust safeguards and limited the availability of the antitrust defense. The EPCA antitrust defense does not extend to acts taken with an objective of injuring competition.

Senator METZENBAUM. But on that score, doesn't the report language in connection with that particular subject require more than that? It says that the immunity is lost if the plaintiff shows the action was taken for the purpose, that is, with the specific intent of injuring

competition. That actually is not in the statute, it is in the report language. I, as a former practicing lawyer, really have great difficulty in understanding how anybody would be able to sustain that burden of proof. He would be able to specifically prove that there was an intent to injure competition if somebody who had been in on the meetings came forward to testify, but other than that, it would be almost impossible to prove. One of the questions, I think, that concerns us is whether or not the defense, as provided, doesn't go far beyond what it should, even if it is justified.

Mr. DOUGHERTY. Mr. Chairman, I think that the defense, as written, is reasonable. During the conference committee, there was discussion about where the burden of proof would rely; on the question of specific intent and, if you read on in the conference report, it says:

Unlike the Senate amendment, the conference substitute does not require the plaintiff to prove that the action was taken unnecessarily. It is the view of the conferees that the question of necessity, which can be relevant in showing the absence of specific intent to injure competition, is best addressed by the defendant.

So as a result of that report language, most of the burden remains with the defendant.

Now, it is true, that this defense does envision a rule of reason proceeding and in that kind of proceeding, one is going to have fairly good evidence that there was an intent to injure competition. That is not unlike most antitrust trials.

Senator METZENBAUM. Let me ask you this, Mr. Dougherty. I see a contradiction here. On the one hand, there is the statement that the immunity is lost if the plaintiff shows that the action was taken for the purpose, that is, with the specific intent of injuring competition, which places the burden on the plaintiff? On the other hand, the balance then says that, as you read it, the question of necessity, which can be relevant in showing the absence of specific intent to injure competition, is best addressed by the defendant. So, it seems to me that that is a contradiction in terms because in one place they are saying the plaintiff has the burden of proof and then go on to say that the question of necessity is best addressed by the defendant.

Mr. DOUGHERTY. Mr. Chairman, I think this has to be put in the context of meetings at IEA. Presumably, the antitrust defense will not be needed by the oil companies unless there is some triggering of the emergency provisions where current price and supply information would have to be exchanged among the companies. In those situations, there will always be a government monitor present and so we are not going to be without evidence of what is going on in those meetings. It is not a situation where we are going to have to draw inferences from actions taken by firms without anyone present to provide us with the evidence.

As is not often in the case in the traditional trade association information exchange type investigation or case, here we have monitors present and we should be able to have at hand every good evidence in our own testimony.

Senator METZENBAUM. Were you present at the conference committee?

Mr. DOUGHERTY. I was not present at the conference committee.

Senator METZENBAUM. I thought perhaps you were. I thought it was perhaps some staff responsibility, that is the reason I asked the question.

The Defense Production Act, which has some language having to do with an antitrust exemption, does not have the specific intent language as contained in this law. Would that have any influence upon your thinking as to the need for the language?

Mr. DOUGHERTY. I think the way we read the EPCA requirement is that it is probably more restrictive on the oil companies than if EPCA wasn't in existence. In this case, if you remove, as we read the statute, if EPCA goes out of existence, the Attorney General, in an emergency situation, would be able to give the oil companies a flat antitrust immunity under the Defense Production Act, without Justice Department or Federal Trade Commission monitors being present. I am not saying that the Attorney General would provide that total immunity, but the executive branch, in that situation, could provide it. So, the provisions of this statute really give you, the legislative branch, and us, the monitors, more leverage in this situation than if we were under defense production.

Senator METZENBAUM. You were talking before about the fact that at the meeting there would be an observer present; but, as a matter of fact, isn't it entirely possible to have an observer present and that without any specific written or oral undertaking you could still achieve the objective and have the specific intent and yet not be able to prove it?

Mr. DOUGHERTY. Mr. Chairman, I would like to ask Marc Schildkraut, who is on my right, to respond to that question. He has been involved in several of these meetings; and, perhaps, a description by him of what occurs would be helpful to your understanding of what goes on.

Mr. SCHILDKRAUT. I think I would like to clarify your question a little. In most cases if you are not in a situation where there is an actual allocation taking place, the companies do not receive a defense for actions taken outside of the meetings and that is the method the voluntary agreement and the plan of action are presently written. They also must receive a defense for transfers of documents between companies such as drafts of memos that will be discussed at meetings. They must present those documents within 15 days to the Department of Energy. So, for instance, they could discuss something at the meetings; but if they took any action based on what was discussed at the meeting, they would already be outside of the defense.

Senator METZENBAUM. Then the specific intent language would apply and that would provide the exemption, would it not?

Mr. SCHILDKRAUT. No; there would be no exemption. They would no longer be within the defense of the act, at that point, because the act, as it is written and as it has been implemented through the voluntary agreement and plan of action does not provide a defense for actions taken outside the meetings, outside of an allocation context.

Senator METZENBAUM. I understand. What if the companies use IEA information as a basis for allocating oil after the emergency has

ended. Would the defense, with its specific intent requirement then apply?

Mr. SCHILDKRAUT. Not under our interpretation of the act and the voluntary agreement.

Mr. DOUGHERTY. Immunity would not attach, Senator.

Senator METZENBAUM. But it could be interpreted that way, couldn't it.

Mr. DOUGHERTY. The defense would be—I am sure that if we brought a case against the companies that that would be an affirmative defense asserted by the firms in the proceeding. In our judgment, we would prevail.

Senator METZENBAUM. Please continue, Mr. Dougherty.

Mr. DOUGHERTY. We have the obligation of exercising continuing oversight over every aspect of industry involvement in the IEP. This duty comprises several functions. First, the antitrust agencies must monitor the program in order to encourage competition and to prevent anticompetitive practices and facilitating devices inconsistent with the purposes of IEP. The agency's review requests for clearances to discuss competitively sensitive topics at forthcoming IEP meetings, attend all IEP meetings and review all industry documents covered by the antitrust defense. Should any competitive activity on the part of IEP participants become apparent, Antitrust Division and the FTC may use all of their respective powers under the antitrust laws and the Federal Trade Commission Act to investigate and prosecute such activities.

Second, the antitrust agencies are authorized to propose alternative procedures to minimize possible anticompetitive effects of IEP procedures. A description of the Federal Trade Commission's suggestions is provided as an attachment to this statement. I might add, Mr. Chairman, that over time, we have made several recommendations for tightening up the IEP procedures.

Senator METZENBAUM. For what?

Mr. DOUGHERTY. For tightening up the procedures to minimize the possible anticompetitive consequences of actions taken in IEA, and the agency has been responsive.

The Commission believes that the IEP's procedural safeguards, both as originally devised and as adjusted to accommodate the antitrust agencies' suggestions, are sufficiently strict to provide an appropriate balance between the necessity for industry participation in IEP and significant antitrust concerns that may arise out of such participation.

Thank you, Mr. Chairman. Mr. Rowe, Mr. Schildkraut, and I will be happy to try to answer any of your questions.

[Material submitted by Mr. Dougherty follows:]

ORAL SUMMARY OF FEDERAL TRADE COMMISSION
STATEMENT ON INTERNATIONAL ENERGY PROGRAM
by Alfred F. Dougherty, Jr., Director, Bureau of Competition
October 3, 1979

Mr. Chairman and members of the Subcommittee, I am Alfred F. Dougherty, Jr., Director of the Federal Trade Commission's Bureau of Competition. I want to thank you for this opportunity to present the views of the Federal Trade Commission on the International Energy Program or "IEP." The Bureau of Competition has been delegated the responsibility for implementing the Commission's statutory responsibility in the IEP under Section 252(l) of the Energy Policy and Conservation Act or "EPCA." I have with me today Ronald B. Rowe, the Bureau's Assistant Director for petroleum competition matters, and Marc G. Schildkraut, the Senior Attorney in charge of the Commission's monitoring and reporting role under the IEP. Following my testimony, we will be pleased to answer any questions you might have.

I request permission to present the Commission's written statement for the record. I will present orally a summary of this statement.

First, the statement describes the basic workings of the IEP and the Commission's role in that program.

Second, the Commission's statement addresses the major themes of the Commission's Seventh Report to the President and to Congress under the EPCA. Those themes are: 1) a discussion of the oil company activities under the IEP from March through September, 1979; 2) a description of the IEP emergency allocation system and the participation of major oil companies should the system ever be activated; 3) a discussion of why the curtailments of crude oil supplies from Iran during early 1979 did not lead to activation of the emergency allocation system; 4) a description of the IEP's data collection system; and 5) a description of the special antitrust clearances granted

to various U.S. oil companies during the past six months, including the particular activities that were cleared and the antitrust safeguards that were required.

Third, and of particular interest to this Subcommittee, the statement discusses the nature of the limited antitrust defense provided by the EPCA for oil industry participation in the IEP. It is our conclusion from an analysis of the language and legislative history of EPCA that this antitrust defense extends only to actions taken to plan and execute a voluntary agreement or plan of action under the IEA, and only if such actions are not taken with a view toward diminishing competition.

In order to facilitate oil company participation in the IEP, Congress provided a statutory antitrust defense for actions taken to plan and execute a voluntary allocation agreement under the IEP. Before the enactment of the EPCA in 1975, the antitrust defense provisions of Section 708 of the Defense Production Act or "DPA"¹ applied to the International Energy Program. That section simply permitted the implementation of voluntary agreements between industry members upon Presidential approval. Acts (or omissions) by industry members pursuant to approved agreements were given total immunity from antitrust prosecution. Only the Attorney General, after reviewing the anticompetitive consequences of a voluntary agreement, could withdraw such approval once granted. However, such action by the Attorney General could operate only prospectively. Moreover, this mechanism did not provide for monitoring by the antitrust agencies of the voluntary agreements.

Because of the inadequacies of the flat antitrust immunity provisions of DPA, Section 252 of EPCA provided for numerous antitrust safeguards and limited the availability of the antitrust defense. The EPCA antitrust defense does not extend to acts taken with an objective of injuring competition.² In addition, the Attorney General and

¹ 50 U.S.C. Supp. § 2157.

² EPCA, § 252(f)(3).

the Federal Trade Commission are required to exercise a continuing oversight function over every aspect of industry involvement in the IEP.

This duty comprises several functions. First, the antitrust agencies must monitor the program in order to encourage competition and to prevent anticompetitive practices and facilitating devices inconsistent with the purposes of the IEP. The agencies review requests for clearance to discuss competitively sensitive topics at forthcoming IEP meetings, attend all IEP meetings, and review all industry documents covered by the antitrust defense. Should anticompetitive activities on the part of IEP participants become apparent, the Antitrust Division and the FTC may use all of their respective powers under the antitrust laws and the Federal Trade Commission Act to investigate and prosecute such activities.

Second, the antitrust agencies are authorized to propose alternative procedures to minimize possible anticompetitive effects of IEP procedures. A description of the Federal Trade Commission's suggestions is provided as an attachment to this Statement.

The Commission believes that the IEP's procedural safeguards, both as originally devised and as adjusted to accommodate the antitrust agencies' suggestions, are sufficiently strict to provide an appropriate balance between the necessity for industry participation in IEP and significant antitrust concerns that may arise out of such participation.

Thank you, Mr. Chairman. Mr. Rowe, Mr. Schildkraut and I will be pleased to answer any questions you might have.

STATEMENT OF FEDERAL TRADE COMMISSION CONCERNING
THE INTERNATIONAL ENERGY PROGRAM

Mr. Chairman and members of the Subcommittee, the Federal Trade Commission (FTC) is pleased to have the opportunity to present its views on the International Energy Program (IEP). The Commission is also pleased to submit its Seventh Report to Congress and to the President, as required by Section 252(i) of the Energy Policy and Conservation Act (EPCA), concerning oil company activities within the IEP for the last six months, from April through September, 1979.

Description of the Basic Purposes of the
International Energy Program

Two of the basic functions of the IEP are the collection of data on an ongoing basis concerning petroleum production and shipments, and the establishment of an emergency allocation system to minimize the adverse effects to any oil-consuming nation of a substantial disruption of petroleum supplies from producing nations.

Immediately after the International Energy Agency (IEA) invokes the provisions of the allocation system due to a substantial (7% or more) disruption of petroleum supplies, the IEP nations and participating oil companies report to IEA the amount of petroleum supplies that each member nation may expect to receive during the coming month.

The reported figures from the participating countries are then compared to each country's normal supplies in order to determine each's pro rata share of disrupted supplies under the allocation system. Where a nation would receive more than its pro rata share of supplies under the IEP formula it incurs an "allocation obligation" (AO) which is an obligation to permit a share of its expected supplies to be reallocated to other nations. Where a nation will receive less than its pro rata share of supplies, it is accorded an "allocation right" which is a right to receive oil originally destined for AO

nations.

Reallocations may take place in three types of transactions. In "type 1" transactions, oil companies may, through internal transfers, reallocate their intended shipments, e.g., a participating oil company on its own initiative, may reroute a tanker originally destined for its refinery in one nation to its refinery in another nation. In "type 2" transactions, oil companies may offer individual cargoes of oil for diversion to AR nations. The IEA, with advice from an industry advisory group, decides whether to accept the offer, and to which nation and company the supplies should be diverted. If the offer process fails to satisfy the objectives of the allocation, governments may order oil companies within their jurisdiction to divert supplies to other nations. These compulsory transfers are known as "type 3" actions.

In order to facilitate oil company participation in the IEP, Congress provided a limited antitrust defense for actions taken to plan and execute a voluntary allocation agreement under the IEP. Before the enactment of the EPCA in 1975, the antitrust defense provisions of Section 708 of the Defense Production Act or "DPA"³ applied to the International Energy Program. That section simply permitted the implementation of voluntary agreements between industry members upon Presidential approval. Acts (or omissions) by industry members pursuant to approved agreements were given total immunity from antitrust prosecution. Only the Attorney General, after reviewing the anticompetitive consequences of a voluntary agreement, could withdraw such approval once granted. However, such action by the Attorney General could operate only prospectively. Moreover, this mechanism did not provide for monitoring by the antitrust agencies of the voluntary agreements.

Because of the inadequacies of the flat antitrust immunity provisions of DPA, Section 252 of EPCA provided for numerous antitrust safeguards and limited the

³ 50 U.S.C. Supp. § 2157.

availability of the antitrust defense. The EPCA antitrust defense does not extend to acts taken with an objective of injuring competition.⁴ In addition, the Attorney General and the Federal Trade Commission are required to exercise a continuing oversight function over every aspect of industry involvement in the IEP.

This duty comprises several functions. First, the antitrust agencies must monitor the program in order to encourage competition and to prevent anticompetitive practices and facilitating devices inconsistent with the purposes of the IEP. The agencies review requests for clearance to discuss competitively sensitive topics at forthcoming IEP meetings, attend all IEP meetings, and review all industry documents covered by the antitrust defense. Should anticompetitive activities on the part of IEP participants become apparent, the Antitrust Division and the FTC may use all of their respective powers under the antitrust laws and the Federal Trade Commission Act to investigate and prosecute such activities.

Second, the antitrust agencies are authorized to propose alternative procedures to minimize possible anticompetitive effects of IEP procedures. A description of the Federal Trade Commission's suggestions is provided as an attachment to this Statement.

The Commission believes that the IEP's procedural safeguards, both as originally devised and as adjusted to accommodate the antitrust agencies' suggestions, are sufficiently strict to provide an appropriate balance between the necessity for industry participation in IEP and significant antitrust concerns that may arise out of such participation.

⁴ EPCA, § 252(f)(3).

Principal Points From the FTC's Seventh IEP
Report to the President and to Congress

1. Oil Company Activities under IEP from March - September 1979:

An Overview

The Seventh report was necessitated by the recent extension of Section 252 of the EPCA. The report delineates industry activities and other IEP-related developments during the last six months. Included are discussions of IEP issues that were the subjects of some interest within that period and suggestions made for alleviation of certain antitrust-related problems.

The report outlines the emergency allocation system and describes the method for sharing oil supplies should a crisis arise. The report compares IEP allocation principles to some allocation methods recently adopted by individual companies.

The report also explains why the curtailment of crude oil supplies from Iran during early 1979 did not require an IEA allocation.

The report details the IEP information system, describing the emergency data system and the general system on oil markets. The emergency data section explains problems with reporting errors. The report also recounts recent changes in the general section of the information system. This includes the role the Industry Working Party (IWP) played in those changes and the possible anticompetitive effects of the general section of the information system.

Recent antitrust clearances given to United States companies under the Voluntary Agreement are described.

The Report's conclusion assesses the competitive impact of the IEP as it operated over the last six months.

2. The Iranian Shortfall

The dislocation of international petroleum supplies caused by the loss of Iranian crude oil did not activate the emergency system. Activation is based on a calculation that does not simply compare supplies just before and after a disruption, nor does it simply compare IEA-wide demand and available supplies. Instead, the IEA measures available supplies against "base period" supplies. Since oil consumption unarguably had grown since the base period, a wider real gap is likely to exist between present supply and present demand than the gap as calculated under the IEP formula. Therefore, after the dislocation, supplies were sufficient to avoid an IEA-wide activation of the emergency mechanism.

3. Problems Caused by Reporting Errors

Questionnaires A and B (QA and QB) are an essential element of the IEP emergency information systems. Each reporting company compiles data concerning its own activities in each country, and then submits that data on a QA to the IEA Secretariat and the relevant national data to the appropriate national body. That national body (in the United States, DOE) compiles QAs together with information obtained from or derived for smaller, nonreporting companies and transmits the accumulated information to the Secretariat on a QB. Because QAs and QBs are so critical to the allocation process a substantial inaccuracy could mean that supplies initially would be allocated to the wrong country. These improper diversions would be corrected for in the long-run because AOs and ARs cumulate from month to month. In the interim some nations would have to rely upon buffer stocks.

Monthly QA and QB reporting began in November 1978, with the onset of the Iranian crisis. This provided an opportunity for fully testing the reporting system. Discrepancies in current month submissions can be determined by comparison with historical data submitted two months later as a recapitulation of the same information,

or "final" data. Comparisons made for the first half of 1979 indicate that total current month supplies for that period were overestimated within a range from 3.3% to 13.5% (June and February, respectively).

A number of reasons were given for the reporting inaccuracies, as follows: 1) undue optimism about the ability to make purchases of oil on the spot market; 2) double counting of available supplies when two or more concerns assume they can acquire the same shipment of internationally traded oil; 3) overestimation by companies of volumes of oil from inter-company trades; 4) underestimation of the frequency with which force majeure clauses in supply contracts would be exercised; 5) inaccurate company predictions about the travel time for tanker shipments; and 6) administrative mistakes, such as misplacing of decimals, aggregating figures inaccurately, or misinterpreting reporting instructions. In February, for example, when a 2.5 million barrel per day overestimate was recorded, a single reporting company was responsible for an overstatement of the current month's crude import data by over 432,000 barrels per day because of a misinterpretation of the reporting instructions.

Reporting errors may also be attributed to other significant factors. For example, it generally is believed that nonreporting companies (the smaller companies) provide less timely and less accurate supply information. Also, smaller independent importers had great difficulty in forecasting their forward supplies during the first half of 1979.

Department of Energy personnel are responsible for reviewing QAs and for transmitting aggregate actual and scheduled oil flow data for all oil companies operating in the United States to the IEA Secretariat. DOE has therefore endeavored to investigate specific reporting errors and rectify such mistakes. DOE continually compares IEA data with statistics generated by other petroleum data reporting systems. The IEA Secretariat with the support of industry advisory groups also is attempting to improve data collection.

The consensus seems to be that the historic QA and QB data can be used most effectively to monitor demand restraint and actual consumption, particularly since the historical data is relatively current. Current month inaccuracies in the data probably present a significant problem only in the allocation process, which can be corrected by continuous review of allocation rights and obligations.

4. Antitrust Ramifications of the General Information Section
of the IEP Information System.

The general information section of the IEP information system provides data on the oil market including prices of the oil imports of IEA nations. This system was designed by the IEA Standing Group on Oil Markets with the advice of the Industry Working Party.

Import prices are reported on 18 designated crude oil streams. Because cargoes from a given stream may vary in gravity level and, therefore, in value, adjustments are made for reporting purpose so that all cargoes for a stream can be reported at one nominal gravity level. These adjustments assure comparability of reported data among the reporting countries. The IWP recommends to the SOM the appropriate gravity price adjustments for each crude oil stream based on public information undoubtedly bolstered by their industry experience. The gravity differentials selected cannot equal the actual market differentials for all crudes at all times and are therefore somewhat subjective. The IEP must exercise its professional judgment in deciding the appropriate differentials.

The potential antitrust danger is that crude oil sellers may consider the differential to be more than a mere reporting device and may adjust market differentials to reflect reporting differentials. Some IWP representatives for instance, raised the possibility that producing country might increase its price to reflect a reporting differential, to the consumer's detriment.

While there are substantial reasons to be skeptical about this scenario it would be

impossible to dispel completely all doubts about the present system. Therefore the Commission believes the IEA should consider a more objective reporting system. The system is now in the process of being changed to provide more complete information on the oil markets. The Commission intends to continue to monitor closely these aspects of the system and will examine whether the new system imposes any appreciable hazard to competition.

5. Antitrust Clearances for International Oil Companies

While the Voluntary Agreement and Plan of Action provides an antitrust defense to participating companies attending IEP related meetings, no proprietary information may be exchanged at such meetings nor provided to the IEA Secretariat without prior approval of the United States. To receive clearance, a participating company must obtain approval from the Administrator of the Voluntary Agreement (the Secretary of Energy or his designee). The Administrator, before granting approval, must consult with the Secretary of State. The Attorney General must concur in that approval after consultation with the FTC. Voluntary Agreement, ¶ 5(b)(2).

During the last six months, three types of information exchange were cleared. One clearance related to an Industry Supply Advisory Group (ISAG) training seminar. A second clearance permitted the submission of short-term oil supply and demand data to the IEA Secretariat. The third approval extended a prior clearance for the provision and exchange of the special information system company data for the purposes of assessing the extent of dislocations in crude oil supplies.

With respect to the ISAG training seminar, the data were not competitively sensitive because they were not recent and, in most cases, were distorted by the hypothetical disruption constructed for the teaching exercise. The clearances contained standard safeguards. U.S. ISAG members were allowed to take notes, but not to keep notes relating to confidential information. The U.S. monitors spot-checked notes taken

by company personnel.

Concerning the short term oil supply and demand data for preparation of the Secretariat's Quarterly Oil Forecast, U.S. companies are permitted to supply data only to the Secretariat, not to each other.

With respect to the exchange of data for assessing the extent of the dislocation of supplies, however, there was discussion and exchange of confidential company data by IAB members at SEQ and joint SEQ/SOM meetings, and at IAB meetings preceding the government meetings. In each case, no confidential or proprietary information was divulged relating to subjects other than those specifically enumerated without advance approval of U.S. Government observers. Disclosure of price and company market share information also was explicitly prohibited without advance clearance by the government monitors. More latitude was permitted in meetings between the Secretariat and individual companies. After such consultations, however, the company was required to submit a complete written record of the meeting to the U.S. government.

The clearances use numerous safeguards to assure that no competitive harm results from the provision and exchange of confidential company information. In addition to the above procedural devices, government monitors are always present at group meetings. The discussions are stenographically reported at IAB meetings, and monitors may take notes on industry participation at SEQ and SEQ/SOM meetings. Company representatives are also prohibited from divulging confidential information learned at the meetings to anyone else. Moreover, contents of confidential data from QAs or QBs are not disclosed to any other country or company.

FTC Conclusions on the Competitive Significance
of the International Energy Program

Section 252 of the EPCA requires the FTC to evaluate the impact of IEP-related oil company activities on competition and small business. The FTC's six previous reports have proffered a number of suggestions for further reducing the competitive dangers of the IEP, following evaluation of potential aspects for antitrust and competitive abuses. Attached as Appendix A is a compendium of recommendations from those reports for improving procedural safeguards. The Commission's Seventh Report is attached as Appendix B.

It should be reiterated that, in order to minimize any adverse impact of the program, the FTC, the Attorney General, and the Department of Energy have incorporated into the program as many procedural safeguards as practicable. These safeguards are included in the Voluntary Agreement, in special clearances, and should also be part of any future Plan of Action.

Based upon the FTC's previous involvement in the development and implementation of the IEP, it is our conclusion that the program, with continued monitoring and with minor adjustments to preserve antitrust values, poses no meaningful opportunities for anticompetitive activities.

Appendix A

Commission Recommendations1. The Fifth Report

During April-May 1978, the International Energy Agency (IEA) conducted a test of its emergency oil allocation system. Since the type of international sharing tested in Paris was effectuated through the voluntary efforts of oil companies, twenty United States oil companies participated in the test. During the test proprietary and confidential information was exchanged. The Commission, in a letter to the Attorney General, noted:

Although the Commission is concerned about the anticompetitive potential of such [information] exchanges, it will not object to the Attorney General's approval [of the exchanges], but will use the [allocation] test as an opportunity to gain more information which will facilitate the assessment of the actual impact of such exchanges.

Based on the Commission's analysis of the April-May test, we conclude that the anticompetitive effect of such an information exchange does not create a risk warranting major overhaul of testing procedures. However, because there are potential anticompetitive risks in the present form of allocation testing, the Commission recommends two simple changes in the system which would prevent the exchange of sensitive information without jeopardizing the testing procedures:

1. The discussion among industry representatives of the anomalous supply patterns of competing companies is not warranted. The industry representative responsible for reviewing errors in the data submissions of a group of companies should communicate supply anomalies directly to the Secretariat.
2. Actual inventory data should be eliminated from the data display available to industry representatives.

2. The Sixth Report

The IEA allocation system requires oil companies to divert voluntarily oil supplies from their refineries to other companies in other nations. For the voluntary system to work companies must be compensated domestically for oil they give up in the

international allocation. The Department of Energy implemented such a "fair sharing" system in January 1979.⁵

DOE's fair sharing system had three features that were problematical. First, small refiners could purchase cargoes from large refiners at less than the large refiner's acquisition cost for that cargo. Second, most purchasing refiners would receive cargoes at acquisition costs plus a handling fee. Finally, inventories were not accounted for in the fairsharing formula.

The problem with compulsory transfers of oil cargoes at less than acquisition cost is that it would deter the oil company with the potential sales obligation from making purchases on the international market. Oil thereby could be diverted from the United States to non-IEA countries. The problem with transferring cargoes at actual acquisition price is that some companies designated by DOE to purchase additional supplies would be fortunate enough to receive a cargo at the long-term contract price while other companies would receive spot price cargoes. Since the selling company can choose which purchasing company would obtain which cargo, the seller can use the fairsharing mechanism to discipline companies that compete to aggressively. There would be no *prima facie* evidence of predatory behavior because there is no independent profit-maximizing basis for determining which buyer should receive which cargo.

A possible solution for all these problems would be to employ the average buy/sell price over a monthly period for all allocation transfers as the ultimate price for any buyer, while still employing the acquisition cost cargo price system for sellers. As a first step, buyers would acquire crude oil at the sellers' actual acquisition cost, plus handling and transportation fees. DOE could then, based on reported buy/sell transaction prices, calculate the average price, with adjustments for quality, and require those paying less than the average price to pay the difference into a DOE fund which would be distributed to firms that paid above average prices. This system would be more equitable because firms without international trading capabilities would pay no more than any other firms; it would be more efficient because companies would still have an incentive to obtain additional supplies; and it would prevent undetected anticompetitive behavior by equalizing prices.

The possible advantages of this system must be weighed against DOE's administrative burden and any other disadvantages of this proposal. Since only DOE can evaluate fully this proposal, it must judge whether the weaknesses in its present fair sharing system justify taking on the additional responsibilities proposed herein.

The U.S. fair sharing system is based on each refiners projected runs-to-still in a given month. By building its inventory and lowering its projected runs-to-still a refiner can reduce its sales requirement or increase its right to purchase additional crude oil. This system may result in an artificial inventory buildup, reducing the supplies of product in the market. One alternative approach might be to allocate on the basis of total available supply and permit each refiner to determine the proportion of oil which should be refined in any given allocation period.

3. The Seventh Report

This Report recommended that the IEA consider changing its general section of the IEA information system to minimize the possibility that the fixed reporting differentials would affect market prices. This system is explained in greater length in the body of the testimony.

⁵ 44 Fed. Reg. 3418 (January 16, 1979).

APPENDIX B

FEDERAL TRADE COMMISSION

SEVENTH REPORT TO THE CONGRESS
AND THE PRESIDENT

Pursuant to Section 252(i) of the
Energy Policy and Conservation Act of 1975
as extended by Pub. L. 96-30

September 1979

I.

INTRODUCTIONA. The International Energy Program

On November 18, 1974, the United States and 15 other oil-consuming nations signed an Agreement on an International Energy Program ("IEP").¹ The IEP Agreement sought a coordinated approach to reducing the dependence of these countries on foreign energy supplies and minimizing the adverse impact of any future oil supply interruptions.

A number of objectives are set out in the agreement. One of the important goals of the IEP is the creation of a comprehensive data collection system to inform the member nations ("Participating Countries") of international oil supply developments. Another IEP objective is the establishment of a standby emergency oil allocation system. Should a significant disruption in international oil supply occur, the system provides a mechanism for allocating available oil supplies on a fair basis among the Participating Countries.

In order to implement these policies the IEP Agreement established the International Energy Agency ("IEA") as an autonomous institution within the Organization for Economic Cooperation and Development ("OECD"). Overall direction of the IEA is provided by a Governing Board composed of high-level representatives from each Participating Country. Day-to-day operations are administered by the IEA Secretariat, a multinational staff located at the agency's headquarters in the OECD building in Paris.

The initial responsibility for development of IEA procedures has been delegated to a number of Standing Groups, each consisting of representatives from the Participating Countries. The IEA has formed committees consisting of representatives of major oil companies to advise the Standing Groups.

Two Standing Groups are germane to this report. The first is the Standing Group on the Oil Market ("SOM"). The SOM's main responsibility is the design and implementation of the general sections of the IEP's data collection system. The general sections collect data on crude oil and petroleum product prices and costs and volumes of imports to the IEA countries.² The Oil Market Information System, as it is called, was developed in conjunction with the Industry Working Party ("IWP"), the industry group that renders technical advice to the SOM on methods of data reporting.

¹ T.I.A.S. 8278. Currently, 20 countries have signed the IEP Agreement. They are Australia, Austria, Belgium, Canada, Denmark, the Federal Republic of Germany, Greece, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States.

² The general sections are described in detail in Part III.B, infra.

A second group, the Standing Group on Emergency Questions ("SEQ"), formulates the policies and procedures that would be taken to anticipate or respond to interruptions in oil supplies. Such procedures have included the maintenance of emergency reserves, the application of demand restraint procedures by Participating Countries, and the design of the emergency supply allocation system. The SEQ obtains technical advice from the Industry Advisory Board ("IAB"). The IAB is further divided into three subcommittees:

- (1) Subcommittee A participates in the development of the detailed procedures to be used during emergency oil allocations and in allocation system tests. The tests simulate in great detail hypothetical emergency supply interruptions and the appropriate work procedures developed to handle the emergency. Subcommittee A also considers antitrust clearance issues.
- (2) Subcommittee B has studied technical problems involving aviation and marine bunkers, stocks and emergency reserves, and the treatment of naphtha under the emergency allocation system. This Subcommittee is inactive presently.
- (3) Subcommittee C analyzes problems associated with extraordinary costs to companies participating in emergency allocations, settlement of disputes, and IEA monitoring of oil prices in an emergency. Subcommittee C also considers antitrust clearance issues.

In addition to describing the industry groups that advise the SEQ and SOM, this report describes the activities of two additional industry groups that would have important functions in case of an oil supply emergency. The Reporting Company Group, currently, 21 American and 11 foreign oil companies, provides information on oil production, imports, exports, and other supply data for the special information system used in an emergency.³ The Industry Supply Advisory Group ("ISAG") would assist the IEA Secretariat in implementing oil sharing during a supply emergency.

B. The Energy Policy and Conservation Act and the Voluntary Agreement and Plan of Action

IEP activities have required continued consultation and cooperation among oil companies, IEA Standing Groups, and the Secretariat. Without some form of exemption, some of these activities might subject United States oil companies to liability under the United States antitrust laws.⁴

³ The Reporting Companies would also be important participants in an emergency oil allocation.

⁴ For example, the emergency allocation system requires companies to offer to divert supplies from their original destination to other countries. The IEA would accept some of these offers to divert supply and would match each accepted supply offer with another company's offer to receive oil at the new destination. These agreements to divert supplies are somewhat analogous to market division agreements which the courts have held to be violative of the antitrust laws. See Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951).

(Continued)

Consequently, participating United States oil companies were granted a limited antitrust defense for their role in the IEP by Section 252 of the Energy Policy and Conservation Act ("EPCA"),⁵ enacted on December 22, 1975. Section 252 was due to expire on June 30, 1979, but on that date the President signed into law a four month extension.⁶

Section 252 provides an antitrust defense for American companies through the adoption of "voluntary agreements" and "plans of action." In March 1976, the Voluntary Agreement and Plan of Action to Implement the International Energy Program ("Voluntary Agreement") was adopted.⁷ The twenty-one U.S. oil companies that are members of the Reporting Company Group have agreed to participate in the Voluntary Agreement.⁸

The Voluntary Agreement prescribes the procedures participating oil companies must follow to qualify for the antitrust defense. In particular, it sets out the method of holding industry meetings and the requirements for industry participation during an emergency. The procedures include a number of antitrust safeguards: (1) approval by the United States government prior to the exchange of confidential or proprietary information among companies, or prior to the submission of such information to the IEA, (2) advance notice of meetings, (3) maintenance of a full and complete record of all meetings, (4) presence of United States government observers at meetings, and (5) prohibition against dissemination by industry representatives of confidential information learned at the meeting.⁹

The Federal Trade Commission has several responsibilities under the EPCA and Voluntary Agreement. The Commission participates and monitors the development and carrying out of voluntary agreements and plans of action.¹⁰ The Commission must be consulted by the Administrator of the Voluntary Agreement (the Secretary of Energy or his delegate) and the Attorney General before the Administrator adopts procedures to

Although the IEA has not yet declared a supply emergency, industry advisory bodies continue to meet to review various aspects of the emergency allocation procedures. Since the meetings might further an agreement to divide markets they also might violate the law, but for an antitrust defense.

⁵ Pub. L. 94-163, 89 Stat. 894 (1975), now codified at 42 U.S.C. § 6272.

⁶ Pub. L. 96-30.

⁷ 10 C.F.R. Part 209.

⁸ These 21 companies are Amerada-Hess Corp., Ashland Oil, Inc., Atlantic Richfield Co., Caltex Petroleum Corp., Cities Service Co., Continental Oil Co., Exxon Corp., Getty Oil Co., Gulf Oil Corp., Marathon Oil Co., Mobil Oil Corp., Murphy Oil Corp., Occidental Petroleum Corp., Phillips Petroleum Co., Shell Oil Co., Standard Oil Company of California, Standard Oil Company (Indiana), Standard Oil Company of Ohio, Sun Oil Co., Texaco, Inc., and Union Oil Company of California.

⁹ Voluntary Agreement, ¶ 5.

¹⁰ EPCA § 252(d)(1), (e)(1).

carry out voluntary agreements or plans of action.¹¹ The Attorney General must consult with the Commission before he approves either modifications to voluntary agreements or plans of action¹² or the exchange or provision of confidential information by oil companies.¹³ The Commission also may propose alternative provisions to voluntary agreements or plans of action on competitive grounds or request modifications or revocations of such agreements or plans.¹⁴ Every six months the Commission must submit a report to the President and Congress on the impact on competition and small business of IEP-related activities.¹⁵

C. The Seventh Report — Overview

This report was prompted by the recent extension of Section 252 of the EPCA. The report covers industry activities and other developments relating to the International Energy Program from March to September 1979. The report does not attempt to review every facet of industry involvement with the IEA. References are made to past Commission reports where additional explanations contained in those reports would be helpful.¹⁶ However, IEP issues which have been a source of some concern during the past six months are discussed in depth in this report.

Part II of the this report outlines the emergency allocation system. It describes the method of sharing oil supplies during a crisis and compares IEP allocation principles to some allocation methods recently adopted by individual companies. One section of Part II explains why the reduction in exports from Iran did not give rise to an IEA allocation. Part II also recounts a number of recent IEA activities, including industry meetings and the issuance of new Department of Energy regulations.

Part III describes the IEP information system. Two sections set forth the emergency data system and the general system on oil markets. The section on the emergency data system delineates problems with the accuracy of reporting. A subsequent section explains recent changes in the general reporting system, including the role the IWP played in those changes. Finally, the potential anticompetitive effects of IWP activities are considered.

Part IV of this report describes recent antitrust clearances given to United States companies under the Voluntary Agreement. One clearance permitted use of confidential data at an ISAG training session. A second clearance permitted one oil company to consult with the Secretariat on the company's forecasts of oil markets. A final set of clearances allowed the submission of data and advice to the Secretariat on the effects of the Iranian production cutbacks on world markets.

¹¹ EPCA § 252(b).

¹² EPCA § 252(d)(1).

¹³ Voluntary Agreement, ¶ 5(b)(2).

¹⁴ EPCA § 252(d)(1).

¹⁵ EPCA § 252(i).

¹⁶ The reports of the Attorney General are another useful source of information on the IEA.

A concluding section summarizes some of the observations made in this report.

II.

THE EMERGENCY ALLOCATION SYSTEM

The Federal Trade Commission's Sixth Report described in detail the IEP emergency allocation system and evaluated its likely competitive impact should the system be invoked.¹⁷ This report will only summarize those elements of the system which were explained at length in the preceding report. However, during the intervening six months, two elements of the system have become the subject of some interest: activation of the system, and the calculation of supply rights. These items will be explained in greater detail.

A. Activation

1. The Activation Procedure

Under the IEP Agreement, any Participating Country can request that the Secretariat make a finding that there has been a reduction in oil supplies sufficient to activate the emergency sharing system. There are three types of findings the Secretariat may make that may lead to activation of the system. First, the Secretariat may find that the group of Participating Countries as a whole has sustained a 7 percent or greater reduction in oil supplies. Second, the Secretariat might find that the group has suffered a supply reduction of 12 percent or more. There is a third type of finding when one or more Participating Countries have sustained a reduction in supplies in excess of 7 percent. This latter type of evaluation is known as a "selective trigger." The type of finding made by the Secretariat would dictate the method of allocation to follow. If the Executive Director of the IEA concludes that there is a trigger situation, the Secretariat's findings are reviewed by a Management Committee composed of senior representatives of each country. The Management Committee transmits the Secretariat's analysis along with its own report to the Governing Board of the IEA. Once the Governing Board receives the findings, emergency measures will be activated unless activation is rejected by a special majority of the Board.

2. The Basis for Determining the Reduction in Oil Supplies

In order to determine the degree of the reduction in oil supplies, normal supplies first must be established. Normal supplies for any individual Participating Country or the group as a whole are based on oil consumption in the most recent four quarters, with a delay of one quarter to collect information. Thus, the base period used to evaluate the depth of the supply shortage ends at least three months before the date of the evaluation. Oil consumption during this base period is derived from a questionnaire submitted quarterly to the OECD by the Participating Countries.

The next step in the calculation is to compare normal supplies to disrupted supplies. The magnitude of the disruption can be estimated by the Secretariat from a number of different sources. One source includes information from the Quarterly Oil

¹⁷ FTC Sixth Report at 6-13.

Forecast, which is an estimate of future world oil supplies derived from information submitted by governments and oil companies. If the special section of the IEA information system is in operation, Questionnaires A and B ("QA" and "QB") data may be another useful source of information on the disruption.¹⁸ Finally, the Secretariat may consult with oil companies and governments in order to obtain advice on the magnitude of the disruption.

3. 1978-79 Dislocations in Oil Supplies

The dislocation in worldwide petroleum supplies caused by the loss of Iranian crude oil did not lead to the activation of the emergency system. Activation is not based on simple comparison between supplies immediately before and after a disruption, nor is it a comparison between IEA-wide demand and available supplies. Instead, the IEA compared available supplies to base period supplies (base period consumption). Oil consumption since the base period had grown, creating a demand for oil at the time of the dislocation that was bound to exceed base period supplies. Thus, there may have been a wider real gap between present supply and present demand than the estimated gap measured by comparing present supply and base period supplies. Hence, even after the dislocation, supplies, as calculated by IEA, were sufficient to avoid an IEA-wide activation of the emergency mechanism.

Because the calculations incorporated a base period of a year in length, the possibility of activation was minimized due to the fact that the base period includes no special adjustments for seasonal variations in demand. During the winter months IEA-wide consumption of oil is greater than the yearly average, and the drawdown of stocks is most severe. The Iranian shutdown came during this winter period of peak demand. Hence, the gap between supplies and demand was bound to be greater than the gap between supplies and base period consumption.

Of course, the shortage was not spread equally among the IEA countries and implementation of selective allocation was always a possibility. The United States, however, despite the fact that it imported significant volumes of oil from Iran did not have a sufficient supply deficit to justify a selective allocation. In other cases, larger-than-average supply deficits were handled by discussions between the Secretariat and individual companies.

B. The Supply Right Determination

1. The Basis for Allocation

The allocation of petroleum to Participating Countries during an emergency is based on a calculation of each country's "supply right." The supply right determines the volume of oil to which a Participating Country is entitled. Whether a country will receive additional supplies or give up supplies will depend upon its supply right.

The supply right calculation is based upon both a participating country's consumption and net imports. Consumption includes all the supplies a country uses,

¹⁸ QA's and QB's, which would be used as the standard data format during an emergency supply allocation, are discussed at greater length in Part III.A, *infra*.

without regard to source.¹⁹ Imports include only supplies obtained from other countries. A country with substantial crude oil production obviously imports a smaller percentage of its total consumption than would countries without indigenous production.

When determining supply rights, a 7 percent general reduction in supplies must be distinguished from a 12 percent or greater general reduction in supplies. If the crisis is between 7 percent and 12 percent, the first 7 percent of the shortfall would be apportioned among the countries on the basis of its base period consumption. The remainder of the shortfall would then be apportioned on a net import rather than consumption basis.

Thus, for a crisis between 7 percent and 12 percent those countries with indigenous production are relatively favored by the allocation system in terms of sharing the loss above the 7 percent level. Because they are importing a smaller percentage of total consumption than other countries, their loss of a given percentage of imports would have a less severe impact than losing the same percentage of total consumption.²⁰

2. International Allocations by Oil Companies

Because of the dislocation in supplies caused by problems in Iran, some major international oil companies found they could not satisfy fully the demands of their subsidiaries and contract purchasers. Accordingly, these companies were forced to allocate supplies. Companies appear to have used a variety of methods to allocate oil among their subsidiaries in different countries. While some companies were purported to be using IEP principles for allocation, their unilateral actions were not the same as, and should not be confused with, the official emergency allocation procedures of the IEA, which were never invoked.

One group of companies appeared to be allocating to countries in proportion to the net imports by each of its subsidiaries. A second group may have based allocations on the sales of its subsidiaries in each country. Allocating supplies by imports would appear to be more advantageous to countries with a great deal of indigenous production, such as the United States, since indigenous supplies would not be subject to the allocation. The latter system, which is similar to an allocation based on consumption,

¹⁹ Consumption calculations utilize the concepts of imports, indigenous production and inventory changes.

²⁰ By way of example, suppose that the IEA was composed of two countries consuming one million barrels each during the base period. One country relies exclusively on indigenous production and the other imports all its supplies. If the reduction in supplies is 10 percent, 7 percent would be apportioned based on consumption and 3 percent based on imports. Both countries would have their supply right reduced 70,000 barrels based on consumption. The importing country would have to accept the entire IEA-wide reduction based on imports, which would be 3 percent of total IEA supplies or 60,000 barrels.

When the magnitude of the shortfall is greater than 12 percent of base period supplies, the calculation of the supply right changes in one respect. The amount of the shortfall that would be allocated on the basis of consumption increases from 7 percent to 10 percent of base period consumption. The remainder of the shortage would continue to be allocated on an import basis. This change in the formula favors those countries that rely more heavily on imports.

could result in reducing imports more sharply because indigenous production as well as imports would be shared among the parent companies' subsidiaries. But neither scheme closely approximates the IEA formula which contains elements of both imports and consumption.

For example, a system based on allocation by refined product sales of the subsidiary in a country or region over a given period of time, which may have been utilized by some companies, would depart from IEP principles in several respects. While in aggregate a country's sales may be roughly equivalent to a country's consumption, the sales of one company's subsidiaries in various countries would not necessarily be in proportion to the consumption of those countries. Thus, which countries would benefit and which countries would be disadvantaged by the system would be relatively unpredictable, based on the unique conditions of the allocating company. Such company allocations also could differ from IEA allocations if the allocating company used a more recent base period than the IEA employs. The more recent the period, the more such a company would favor those countries with greater than average growth.

Further, the allocation systems developed by individual companies may not have been designed to rely on a mixed system of sales and imports. Thus, if a major oil company's loss of supplies were greater than 7 percent, a company would not switch its allocation from a sales to import basis for part of the reduction. Compared to the IEP method of allocation, the individual company's pure sales basis of allocation would tend to disfavor countries with substantial indigenous production.

C. The Allocation Process²¹

During the IEA allocation process each country's supply right will be compared to the volume of oil that the country anticipates receiving. Supplies will be redirected from countries expected to receive more than their supply right (countries with "allocation obligations") to countries that anticipate receiving less (countries with "allocation rights"). The allocation rights and obligations of the countries are calculated from the QA's, which are transmitted by Reporting Companies to the IEA and to governments, and the QB's, which are a composite of QA data from that country plus additional non-reporting company data. QB's are transmitted from governments to the Secretariat.

Under the IEA system three types of allocations may take place. "Type 1" allocations encompass the Reporting Companies' efforts to meet their own emergency needs through internal reallocation and through supply rearrangements with other companies. The major distinction between a type 1 allocation and an oil company's allocation efforts prior to activation of the emergency mechanism is that companies may be cognizant of allocation rights and obligations during an IEP allocation.²²

In a "type 2" allocation, Reporting Companies offer to divert cargoes to countries with allocation rights. They may either offer to reschedule cargoes within their own systems or they may offer to sell cargoes to other companies in countries that are short of supplies. The Secretariat with the assistance of ISAG selects for implementation those voluntary offers that would best satisfy the allocation objectives of the IEA as a whole.

²¹ FTC Sixth Report at 9-11 contains a more complete description of the process.

²² FTC Sixth Report at 26-27.

If an insufficient number of voluntary offers are received, mandatory or "type 3" allocations may be required. Under a type 3 action, the government with jurisdiction over a company would order that company to transfer oil to its own subsidiary or to another company in another country.

D. The Department of Energy's "Type 3" Regulation

In accordance with Section 251 of the EPCA, the Department of Energy ("DOE") on May 14, 1979, issued regulations which would govern type 3 transfers of oil by United States oil companies.²³ The rule provides that DOE may issue "supply orders" to firms, requiring them to redirect supplies to a selected participating country.

The rule does not provide a specific price at which type 3 supplies would be transferred among companies. Instead a firm subject to a supply order would not be required to transfer the oil unless the receiving firm agrees in advance to submit to arbitration any dispute relating to the transfer, including price arbitration if the parties cannot agree to a price in advance of the transfer. Thus, a supply order would not result in the transfer of oil if the parties cannot come to terms over the conditions of arbitration and if the countries have no means of compelling a specific form of arbitration should negotiations on the issue break down.

E. Recent Industry Participation in the Development of the Allocation System

The IAB and Subcommittee C addressed the issue of price disputes in the allocation process with a proposal to create an IEA Dispute Settlement Center ("DSC"). The DSC would arbitrate contractual disputes between oil companies relating to supply rearrangements in the emergency allocation process. According to the IAB, the DSC would be preferable to other arbitration centers or ad hoc arbitration because the center would specialize in the emergency transactions during an allocation and because a single center would lead to rapid and uniform decisions.

The industry proposal contemplates that referring a dispute to the DSC would be voluntary. However, for a type 3 transaction, as opposed to a type 1 or type 2 transaction, a particular allocation could be conditioned by the government with jurisdiction on agreement by the receiving party to the use of the arbitration procedures of the DSC.

The industry proposal may not contemplate arbitration of incomplete negotiations. The DOE type 3 regulation does. Under DOE's rule if the parties do not come to an agreement on price, the supplying party need not transfer supplies unless the receiving party agrees to submit the unresolved pricing and other contractual issues to binding arbitration. The distinction is between arbitration of a disputed contractual term and arbitration between companies, which at the time of transfer, did not come to terms. If the DSC adopted by the Governing Board only had jurisdiction over the interpretation of contractual terms, companies subject to a DOE type 3 supply order could not utilize the DSC to assure execution of the order and might be forced to resort to two different forms of arbitration on a single transfer of oil. This process would seem exceptionally burdensome. The companies would find that, despite the implementation of a dispute center with expertise in emergency oil transactions, they would be forced to

²³ 44 Fed. Reg. 27969 (May 14, 1979).

resort to ad hoc arbitrators with less expertise to resolve the most difficult kinds of emergency disputes — those not governed by contractual terms. Despite such problems, the IAB appears somewhat reluctant to bestow jurisdiction over incomplete negotiations to the DSC.

In addition to its recent consideration of price disputes, Subcommittee C also has continued discussions on insuring companies against "extraordinary costs." Such insurance would cover risks pertaining to the emergency allocation process that are not presently insurable by commercial enterprises. For instance, a company would suffer an extraordinary cost if its holdings in a producing country were expropriated because, pursuant to the allocation procedures, it shipped oil to a Participating Country under boycott by the expropriating country. One proposal, recently considered by Subcommittee C, called for insurance coverage by a quasi-governmental corporation, to be composed of an underwriting group that would insure both oil and other multinational companies. The activities to be covered by this insurance might relate to any government-mandated action rather than only IEP activities.

While many risks related to involvement in IEP activities could probably be covered by insurance, no insurance could adequately cover the risk of expropriation. Some Subcommittee C representatives thought that the problems associated with this latter risk might better be handled through increasing the awareness of governments to the companies' exposure. Thus, in case of a selective boycott by some producing countries of some consuming nations, the IEA should assure that supplies diverted to the boycotted consuming nations do not come from boycotting producing countries.

Another topic of discussion was the development of standby antitrust clearances²⁴ for IEP-related oil company actions during an emergency. The IAB had submitted an outline for such clearances to the Secretariat. Thereafter, the Secretariat submitted an outline to the United States government. Under the EPCA any standby clearance adopted for U.S. companies would be termed a "Plan of Action." While the Voluntary Agreement provides an antitrust defense for oil company activities relating to an emergency allocation,²⁵ the IAB considers a separate, more definitive Plan of Action desirable because the Voluntary Agreement is general in nature and may provide insufficient guidance for the proper course of conduct during an emergency. In particular, the types of permissible communications during an emergency are not clearly spelled out by the Voluntary Agreement. The IAB also has considered the possibility that the Plan of Action could serve as a model clearance for other countries.

Subcommittee A recently discussed several situations in which the trigger calculations may not accurately reflect the severity of the shortfall. One such issue is the effect of seasonal variations in oil consumption. Another is the effect of a reduction in oil supplies on the base period. If oil supplies should be reduced for an extended period and if the magnitude of disruption is not enough to implement the emergency system, it is reasonable to assume that base period consumption would decline. For a time after supplies return to normal, the base period consumption figure would remain at an artificially low level. If thereafter the IEA should suffer a severe supply disruption, activation of the emergency system might be prevented because the magnitude of the

²⁴ As Part IV, *infra*, explains, antitrust clearances rendered to date have been individually written when requested by the IEA Secretariat.

²⁵ Voluntary Agreement, ¶6.

shortage would be measured against an abnormally low base period figure. One suggested remedy to this problem was to compensate for the reduction in consumption by adding a correction factor to the trigger calculation so that a smaller disruption would activate the emergency system. Some companies have expressed the view that there is sufficient flexibility in the activation mechanism to accommodate these problems.

Subcommittee A also reviewed how errors in QA/QB reporting might affect the emergency system.²⁶

III.

THE IEP INFORMATION SYSTEMS

The IEP Agreement contemplated two types of information collection. One is a special information system designed to facilitate operations during an emergency allocation. The special section is the responsibility of the SEQ with advice from the IAB. The other is a general system that regularly monitors the international oil market. The SOM developed the general section with advice from the IWP.

A. The Special Section

1. Questionnaires A and B

The special section of the IEP information system collects the data used to determine the direction and magnitude of allocations during an emergency. Each Reporting Company compiles data regarding its own activities in each country and then submits the data on a QA to the IEA Secretariat and the relevant national data to the appropriate national body. That national body compiles the QA's submitted by Reporting Companies together with information obtained from or estimated for smaller, non-reporting companies, and transmits it to the Secretariat on a QB. The relevant data includes petroleum imports to each Participating Country by country of origin, exports from one Participating Country to another, inventories and inventory changes in each Participating Country, production of crude oil and natural gas liquids in each Participating Country, and exports of marine fuel for ocean-going vessels. The QA submissions presently provide supply data for the current reporting month plus two preceding and two succeeding months. Companies are able to report a good deal of supply information about future months because a firm's supply decisions must be made sufficiently far in advance to ensure proper scheduling for refineries. Additionally, cargoes will be at sea with a destination chosen in advance of the date of importation.

Although the QA was designed for monthly submission during an emergency allocation, beginning in January 1979, it performed a second function. QA's have been submitted to the Secretariat each month in order to facilitate the Secretariat's evaluation of the international oil supply situation. For U.S. companies, special clearances were provided because QA submissions contain confidential information.²⁷

²⁶ This problem is discussed in Part III.A2, *infra*.

²⁷ See Part IV. C, *infra*.

Because the differences between QA and QB data and the data generated by other information systems has been a topic of some interest, Appendix A to this Report compares QA and QB data to information collected by other systems.

2. Problems with QA and QB Reporting

Because QA and QB data serves a number of important functions, inaccurate data would impair the effectiveness of the emergency system. In a trigger calculation, for example, a 7 percent loss of supplies compared to the base period would lead to activation of the system. Because of the relatively low percentage level required to trigger the sharing system, if supplies reported on QA's and QB's were to deviate by more than a few percentage points from actual supplies, the reporting system would not be a reliable method for determining the magnitude of the supply shortage.

QA and QB data also would be the basis for allocations once the emergency system has been activated. Data for the current month, as submitted by oil companies and governments to the Secretariat, would be used to calculate allocation rights and obligations of the Participating Countries. Based on these calculations supplies would be diverted from countries with allocation obligations to countries with allocation rights. If the QA and QB data were incorrect, oil could be moved in the wrong direction. Eventually these improper diversions should be compensated for, because the system is cumulative. If a country's allocation right in a given month is not satisfied or if after the correction of faulty data the IEA determines that its allocation right was not satisfied, the country's allocation right in the next month would grow by the amount of the preceding month's deficit. Until the data is corrected, however, some countries might unexpectedly need to rely very heavily on safety stocks.

a. Extent of the Reporting Discrepancies

Monthly QA and QB reporting, beginning with the onset of the Iranian crisis in November 1978, has for the first time provided an opportunity for fully testing the reporting system. Discrepancies and errors in current month submissions can be determined by comparison with historical data that is submitted two months later for the "month before last," which is often referred to as "final" data, although it is still subject to revisions. In any case, comparisons between current data for a given month—estimated for that month—and "final" data for that same month—reported two months later—show that the current month submissions overstate IEA-wide petroleum supplies by 4.6 percent to 9.5 percent.

For the United States, the same comparison indicates that total supplies for the first half of 1979 were overestimated by between 3.3 percent and 13.5 percent.²⁸ The margin of error averaged 6.1 percent per month, which is quite similar to the IEA-wide figure of 6.4 percent.²⁹ February statistics showed the most disturbing discrepancies, of 9.5 percent IEA-wide and 13.5 percent for the United States. Import statistics given on the questionnaires show margins of error of much greater magnitude

28 The decreases in the current month's reported supplies as reported two months later, for the United States over a six month period, are as follows: January (-3.8%), February (-13.5%), March (-4.5%), April (-7.8%), May (-3.9%), June (-3.3%).

29 The average margin of error for U.S. petroleum supplies is for a six-month period, while the international average is based on tabulations for four months.

than those for total supply data.³⁰ In the United States, the error rate for crude oil imports alone fluctuated between 6 percent and 21 percent for the first six months, with the average monthly rate somewhat above 10 percent. Furthermore, current month United States data has overestimated product imports by an average of 19 percent.³¹

There appears to be a discernible pattern of variation in the estimates of total worldwide petroleum supplies. A particular month's supplies appear somewhat underestimated when that month is reported as the month after next.³² Thereafter, reported supplies increase. In the "current month" supplies are substantially overestimated. Then reported supplies decrease slightly through the "last month" and appreciably when it becomes the final month or "month before last."

b. Reasons for Data Reporting Discrepancies

The Secretariat, SEQ and IAB have discussed the possible reasons for reporting errors. Presently, the overestimation of supplies for the current month is attributed to the following factors:

- (1) undue optimism about a company's ability to make purchases of oil on the spot market;
- (2) double counting of available supplies, when two or more companies assume they can acquire the same shipments of internationally traded oil;
- (3) overestimation by companies of volumes which can be acquired in inter-company trading;

³⁰ Since the import figures for the current month appear to be at least twice as inaccurate as the total petroleum supply data, it is clear that relatively consistent United States production figures, which account for roughly half of the overall supply amount, exerted a strong moderating influence on the error rate for total United States petroleum supplies.

³¹ Margins of error for petroleum product imports can be determined only for January (-3%), February (-26%), and May (-18%). Statistics for March and April of this year cannot be computed accurately since final figures for both months reflect the addition of five petroleum products not included in the current figures. Data for May incorporates these five additional products in both the current month's and final month's figures. For more information on petroleum product reporting, see Appendix A, Section 1.

³² Oil companies appear to be overly conservative in estimating forward supply data. For example, certain companies are conservative in their projections of the volume of oil they will purchase. Such companies may report only supplies actually acquired, while others also report anticipated purchases.

- (4) underestimation of the frequency with which force majeure clauses in supply contracts would be exercised;
- (5) inaccurate company predictions about when tanker shipments will arrive at the port of destination;
- (6) company changes in the destinations of tanker shipments in mid-route.
- (7) administrative mistakes, such as misplacing decimals, aggregating figures inaccurately, or misunderstanding reporting instructions.

During the first half of this year, a confluence of these factors probably was responsible for the inaccuracies in the current month's supply estimates. In February in particular, when a 2.5 million barrel/day overestimate was recorded, a single reporting company was responsible for an overstatement of the current month's crude import data by over 432,000 barrels/day because of a misinterpretation of the instructions.

Reporting errors may also be attributable to other significant factors. For example, it generally is believed that the non-reporting companies, whose data is recorded indirectly, provide less timely and less accurate supply information. Greater variation in their estimates can be explained to some extent by the greater difficulty encountered by the smaller independent importers in forecasting the availability of forward supplies during the first half of 1979. Another important reason for data reporting errors is that different oil companies have had conflicting views as to what factors should be acknowledged in the overall data base. For example, with reference to the United States, some companies included U.S. territories in their estimates while others did not. Also, certain reporting companies provided figures for the bunkering of ships and airplanes in international trade while others omitted this information.

c. Efforts to Correct Inaccuracies

The Department of Energy is responsible for reviewing QA's submitted by Reporting Companies and for transmitting aggregate actual and scheduled oil flow data for all oil companies operating in the United States to the IEA Secretariat. DOE is thus most concerned about reporting company inaccuracies and has endeavored to track down specific reporting errors once identified. If obvious statistical anomalies are recognized, such as transmission or mathematical errors, the Department attempts to rectify the situation by immediately notifying the particular company by telephone or telegram. If supply and demand figures on QA submissions do not balance, the reporting company is asked to explain the inconsistency and to revise and resubmit its figures.

In addition, DOE continually compares IEA data with statistics generated by other petroleum data reporting systems. If certain errors are deemed to be systematic, the inaccuracies are brought to the attention of the IEA. DOE may ask the IEA to issue general instructions to the companies for correcting recurring reporting problems.

Possible ways to improve the reporting system have been discussed in a preliminary way in recent IAB meetings. These have included:

- (1) the inclusion of a statistical bias to predict roughly the magnitude and kind of data inaccuracies anticipated;
- (2) the submission of data for a six month period instead of five, by adding another historic month to the reporting system, i.e., creating a three/one/two rather than the present two/one/two reporting system;
- (3) the preparation of a new report, investigating thoroughly the present data collection system.

The IAB, however, was skeptical of the value of these recommendations. The companies generally believed that the distortions in current and future supply statistics could not be eliminated since a bias was inherent in the figures. At the May meeting of the IAB in New York City, the companies generally expressed the view that a higher degree of statistical perfection in the future months' data in particular could not be achieved other than by trying to forecast future supplies as conscientiously and accurately as possible. The companies were more inclined, however, to consider specific ways of improving the accuracy of the historic data. The industry panel suggested that the accuracy of historic data could be improved either by compiling the data with greater care or by accelerating the process of comparing historic deliveries with consumption data.

The IEA Secretariat and the Reporting Companies both realize that present data inaccuracies in the questionnaires impair the value of the IEA data reporting system. Yet, the consensus seems to be that the historic data in particular can be employed to monitor demand restraint and actual consumption, particularly since this data is still fairly current. Furthermore, the more accurate historic QA data rather than current month QA data can be used by the Secretariat in analyzing oil markets and in determining whether to activate the emergency oil sharing program. Accordingly, current month inaccuracies in the data probably present a significant problem only in the allocation process. In this case, allocation rights and obligations must be corrected continually to assure that each country is treated equitably.

B. The General Information Section

The general information section of the IEP's information system was developed by the SOM in consultation with the IWP. Usually submitted on a quarterly basis, since January 1979, reporting has occurred monthly in order to provide more current data on the oil market situation.

Under the general section, Participating Countries provide the IEA Secretariat with information relating to oil company operations within their jurisdiction. To provide the precise data on the oil market called for in the Agreement, the IEA has created four reporting systems. The information collected includes the cost of crude oil as purchased from the producing country, import prices of crude oil and oil products, the financial structure of major international oil companies, and capital investments by the oil

industry. Presently, the IEA estimates that approximately 200 companies in the 20 Participating Countries are involved in the IEA information system, reporting prices on over 80 percent of the crude oil and more than 50 percent of petroleum products imported into the IEA area.³³

The Crude Oil Price System, containing data from the second half of 1973 to the present, monitors the prices that oil companies pay for the crude oil they import into individual IEA Participating Countries.³⁴ Prices and volumes of imports of 18 designated crude streams, each averaging over 500,000 barrels/day, are reported by companies to national governments. According to current procedures, governments then aggregate the data of individual companies into one national report (per crude stream) which they submit to the IEA. The Secretariat disseminates to Participating Countries aggregate data for individual countries and the IEA as a whole. Prior to distribution the IEA Secretariat will further aggregate national data if it pertains to less than three companies, in order to preserve its confidentiality. For the United States, DOE does the aggregation prior to transmitting the data to the Secretariat.

Prices for 18 crude streams are reported both free on board ("FOB") at the loading port (if such information is available) and on the basis of cost, insurance and freight ("CIF") paid to the port of discharge. For each crude stream, companies give the volume and weighted average price of their imports from affiliates, non-affiliates and in total. To make figures comparable, prices actually paid are adjusted to nominal gravity levels established for each crude oil stream using standard differential adjustments. Currently, price differentials vary from three cents per barrel per degree of API gravity for most Eastern Hemisphere crudes to twelve cents per barrel per degree for Western Hemisphere crudes.³⁵ Credit terms also are adjusted to make transactions comparable at a 30 day credit norm. This system also provides information on total national crude oil imports from all sources, including data on total supply costs, volumes, average API gravity and weighted average import prices on a CIF basis.

The Crude Oil Cost Information System collects data on 17 crude streams.³⁶ It monitors the original acquisition cost per barrel of oil that companies obtain from producing countries through their own production, concession-linked purchases or as other FOB purchases. Reports are submitted by oil companies acquiring at least 100,000 b/d of crude oil in the previous year from countries which are not members of the

33 IEA, Oil Market Information System at 6 (1979).

34 Much of the data submitted under this system is reported by companies on the Department of Energy's Form ERA-51, "The Transfer Pricing Report."

35 For example, if the nominal gravity designated for an Eastern Hemisphere crude stream was 33 degrees API, and the importer purchased crude of that type with a 34 degree average gravity, the importer would subtract three cents per barrel from the actual price before reporting to the government.

The crude streams and their nominal gravities were originally selected by the SOM with the advice of the IWP. See Part III. C, *infra*.

36 This information is reported by U.S. companies on the Department of Energy's Form EIA-67. DOE uses the statistical data generated by this system in its evaluation of the state and direction of the international oil market. Also, it should be pointed out that North Sea oil is included in the price system but not the cost system.

International Energy Agency. Under this system, cost data for actual acquisition also must be adjusted to the nominal gravity of each crude oil stream. The IEA Secretariat then aggregates the overall data for each producing country.

The Petroleum Product Price System monitors prices which companies pay for petroleum products imported to IEA countries. The method of reporting and principles of aggregation are similar to the crude price system. Reports identify seven products which comprise the vast majority of all internationally traded petroleum products. Any company which imports a minimum of 10,000 metric tons of an individual product from all sources per quarter is to report to the national government of the importing country the prices at the frontier of entry to the importing country.

The Financial Information Section of the IEA oil market information program became operational in 1979. The financial data submitted by the oil companies, including balance sheets, income statements and sources and uses of funds, is non-proprietary unlike other parts of the system, and is made available to the IEA on an individual company basis.

C. Recent Developments in the Industry Working Party

The IWP, composed of five domestic and eight foreign petroleum companies, has since 1975 advised and assisted the SOM and the Secretariat in the development of the general section of the IEP information system. In the past six months the IWP has analyzed a number of issues in response to requests by the SOM.

One topic addressed by the IWP was inclusion of additional crude streams in the crude oil price system. After the IWP analyzed the issue, the SOM adopted the IWP's recommendation and added North Sea crude as the eighteenth stream in the crude oil price reporting program. The North Sea stream (also known as North West Europe offshore) is composed of heterogeneous substreams, however, and while a correction factor of three cents per degree API gravity was adopted for North Sea crude, the SOM recognized that the correction factor did not adequately reflect the heterogeneity of the substreams. Since adjustments for gravity and quality posed similar problems applicable to other composite streams in the system, the SOM requested that the IWP restudy the adjustment issue.

The IWP in its subsequent discussions generated a number of proposals to overcome such problems. Discussions centered on the fact that a simple gravity adjustment could not fully reflect quality differences, such as sulfur content, among the heterogeneous crudes in the stream. In addition, the price obtained by each oil producer for a composite stream would be sensitive to the mix of crudes. One proposal suggested that a multiple-crude stream could be adjusted to a common gravity/quality base by adding or subtracting the differences in the official government selling price ("GSP") for each crude in the stream. Such price differentials could be obtained from a number of different industry journals. A second proposal would continue the price adjustment per degree of gravity (without quality adjustments), but would adopt new price differentials per degree to better reflect the relative values to refiners of crudes in a composite stream. The IWP plans to hold another meeting on this issue before making recommendations to the SOM.

Another topic which concerned the IWP was IEA publication of oil import price data. The IWP expressed great concern when the SOM originally proposed this step, fearing that the data would be published without adequate explanation and would be subject to misinterpretation. Therefore, the IWP proposed first to publish an explanation

of the data system. The SOM adopted this recommendation, and in March 1979, the IEA published a short brochure entitled "Oil Market Information System."³⁷ The SOM then again proposed publishing oil import price data. The IWP renewed its concerns. In a paper presented to the SOM, the IWP suggested that, for example, regional differences in prices for certain crude oils could be misunderstood. The SOM met this objection by resolving to recommend publication of IEA-wide figures. At the IWP's suggestion, the SOM also agreed it was appropriate to delete the 10th and 90th percentile price levels for the IEA as a whole because they were arrived at by averaging individual country percentiles, an incorrect statistical procedure.

During the period covered by this report, the IWP also began work on amending the crude and product price reporting systems to provide more information to the IEA and national governments. This program to provide additional data, known as greater "transparency" of the oil market, could be implemented (1) by establishing national import registries, to which each company would report cargo-by-cargo deliveries in lieu of aggregate reporting to governments as previously had been the practice in most countries;³⁸ (2) by accelerating the reporting dates to provide more up-to-date information; (3) by harmonizing IEA and European Economic Community (Common Market) reporting; and (4) by instituting a more detailed reporting regime.

At the initial meeting on the transparency issue the IWP discussed a wide range of issues suggested by the SOM. For instance, the SOM asked whether the number of crude streams reported should be expanded beyond the existing 18. Since companies would be reporting cargo-by-cargo data to national registries, the question was how governments should aggregate the cargo data to report to the IEA. The general impression of the IWP was that the present minimum volume for constituting a stream of 500,000 barrels per day should be continued, but that further work should be done on classifying the streams. New streams could be added as appropriate, such as a Mexican stream. Composite streams could be subdivided if useful information would be imparted, such as dividing Nigerian into light and medium streams. Multiple streams from one source could be redefined, such as the two Iraqi streams.

A second issue related to the degree of detail that governments should provide when reporting prices to the IEA. One proposal was to expand the decile system presently used. Under this system governments currently report to the IEA the average weighted price of imported crude oil, stream by stream, as well as the tenth and 90th percentile of prices of the aggregate national imports for each stream. Using the import registry, governments could increase the number of deciles reported and could calculate the deciles from cargo, rather than aggregate company, data. An alternate proposal called for reporting in steps of one dollar per barrel; that is, the volume of crude oil imported in each dollar-per-barrel price range would be reported. The IWP preferred percentile reporting and considered recommending that the 10th, 20th, 80th and 90th percentiles should be reported. The IWP considered percentiles superior to steps because

37 This pamphlet should be available through the OECD sales agencies in Washington, D.C. and abroad.

38 The United States already requires the reporting of crude oil imports on an individual cargo basis.

they give rise to uniform and consistent displays among countries and because changes in price levels and distributions are readily apparent.³⁹

Another topic discussed by the IWP was the extent to which individual product cargo data should be reported to the national registries. IWP endorsed reporting individual cargoes of 1,000 tons and above and refraining from reporting smaller cargoes. However, the IWP will present additional options to the SOM.

D. Possible Anticompetitive Effects of IWP Activities

As presently structured, the general section's crude oil price reporting is simplified by adjustment factors that permit the reporting of crude oils of differing gravity within a stream, as if the crude oil were a homogeneous stream of uniform gravity. Prices also are adjusted to standardize credit terms. It has been argued that these adjustments assure that comparable data could be reported without creating confidentiality problems. Because of this confidentiality problem, some data cannot be reported or disseminated unless at least three companies are included in a given category. If the reporting categories were differentiated by degree of specific gravity many fewer companies would fit into each category than if the reporting categories included an entire stream. Thus, a great deal of data would drop out of the system with the narrower, gravity-limited categories. However, if each country merely reported its weighted average import price per crude oil stream, inter-country price comparisons could not be made because it is unlikely that the specific gravity of each country's imports would be identical.

As discussed above, the IWP, under the supervision of the SOM, has been responsible since its inception for the initial development of an accurate price reporting system. This task has required the IWP to discuss the market price differentials per degree of gravity within a crude stream. The IWP also has recommended the appropriate price adjustment factors per degree of gravity and per days of credit for the reporting of imported crude oil to assure comparability. These activities present two anticompetitive issues: first, the ramifications of discussions of price differentials; and second, the effect of a standardized differential for reporting purposes.

IWP members' discussions of price differentials are based on public sources such as trade journals, perhaps bolstered by their own experiences on the oil trade. U.S. IWP representatives are aware that they have no antitrust defense for the exchange of price differential data that is proprietary to any company. However, if the discussions pertaining to non-proprietary price differentials, actual or artificial, were to lead to industry-wide standardization of price differentials, such standardization could facilitate parallel pricing practices by competitors. Thus, hypothetically, in the resale of crude oil in international trade, standardized gravity differentials could facilitate collusion because it would reduce coordination problems. Colluding firms would not have to pass signals on a multitude of prices for each crude stream. Instead, one price could be announced tacitly and all other prices for the crude stream would automatically fall into

³⁹ It also seemed to be the feeling of IWP members that confidentiality of data could be protected with less than three companies represented in each decile. However, great care must be taken to assure that individual company prices cannot be discovered by analyzing the decile distribution in countries such as the United States where source, volume and importing company are public information.

place. Such a simplifying device can maintain a combination that might otherwise collapse because of the complexity of its maintenance.

Mere discussions of price differentials for the purpose of standardizing reporting system are unlikely, without more, to have an anticompetitive effect. However, the system requires the IWP to go one step further. It must recommend a standard reporting differential for each crude stream. These differentials are subjective because they cannot reflect actual market differentials for all crude streams at all times. The IWP must employ its professional judgment in recommending the appropriate differential. If that differential were to be adopted as the appropriate differential in actual crude oil transactions, as well as in a reporting context, it thereby might promote collusion on crude oil prices.

In a related context, an FTC monitor has discussed the problem of subjective standardized price differentials with individual IWP representatives. During IWP discussions of the GSP standardization proposal, some industry personnel expressed concern over specifying a GSP for countries that either do not officially announce prices for each crude stream or that vary prices from the announced GSP. In follow-up discussions, some industry representatives suggested that IEA selection of an estimated GSP for reporting purposes might be viewed by some OPEC countries as more than a reporting device. Instead, they might view the adopted differential as an IEA expression of what the market differential should be. On the one hand, if the reporting differentials were narrower than the differentials the producing country thought were appropriate, that country might find it disturbing. On the other hand, if the reporting differentials selected were wider than the producing country's current selling prices, the country might widen its differential by raising some of its prices to the detriment of the consumer. Since the present gravity differential system has the same judgmental component, it might have an effect similar to the proposed GSP. One industry representative acknowledged this possibility.

There are, however, reasons to doubt that the present gravity differential system would have a pervasive price effect. First, the fact that there is a standardized differential for reporting purposes does not mandate a standardized price differential in transactions. For example, if the prices of the product yielded by a particular crude oil stream dictate a higher or lower differential value to a refiner, buyers can be expected to follow their economic self-interest rather than prescribed differentials. Indeed, the IWP is reconsidering the present reporting differentials, originally adopted in 1975, because they have become outdated in the marketplace.

Second, even if sellers wanted to adopt a standardized differential, the refining values of crude oils are extremely complex and are based on many characteristics besides specific gravity. For instance, low sulfur oils command a higher price because the refiner need not go to the expense of removing the sulfur from the petroleum products. Also, two crude streams at the same gravity may produce different volumes of light, valuable products, such as gasoline, in a distillation column. Because there are many such factors, fixed price differentials per degree of gravity could not alone lead to standardized pricing of a heterogeneous crude oil stream. Coordinating but one facet out of many could not coordinate prices, and, therefore, does not seem to provide the opportunity for coordinated pricing of all crude streams.

The circumstances described above would appear to attenuate the possibility of anticompetitive effects under present conditions. However, it would be impossible to dispel completely all doubts about the present system. The Commission consequently

both recommends that the IEA consider a reporting system that is more objective, and intends to continue to monitor closely these aspects of IWP's deliberations. When the IWP issues a recommendation to the SOM, we will examine whether that recommendation poses any appreciable hazard to competition, and whether any alternative reporting mechanism would serve the IEA's purposes with less risk to competition.

IV.

SPECIAL CLEARANCES

On a number of occasions in the past six months U.S. oil companies have received special antitrust clearances to exchange proprietary information at various meetings and to provide that information to the IEA Secretariat. While the Voluntary Agreement and Plan of Action provides an antitrust defense to participating companies attending meetings relating to IEP objectives, no proprietary information may be exchanged at such meetings nor provided to the IEA Secretariat without prior approval of the U.S. government.⁴⁰ To receive clearance a participating U.S. company must obtain approval from the Administrator of the Voluntary Agreement (the Secretary of Energy or his delegate). The Administrator, prior to granting approval, must consult with the Secretary of State. The Attorney General must concur in that approval after consultation with the Federal Trade Commission.⁴¹

During the period covered by this Report three types of information exchange were cleared. One clearance related to an ISAG training seminar. A second clearance permitted the submission of short-term oil supply and demand data to the IEA Secretariat. The third approval extended a prior clearance for the provision and exchange of the special information system company data for the purposes of assessing the extent of dislocations in crude oil supplies.

A. The ISAG Training Seminar

On June 5-8, 1979, ISAG conducted a seminar in Dusseldorf, Germany, to familiarize new members of the ISAG with the roles they would fill should a shortfall in world oil supply require the IEA to reallocate oil among Participating Countries. For teaching purposes, the IEA Secretariat requested that the U.S. government approve the use of data that had been generated for the Second Allocation Systems Test ("AST-2").⁴² This data had previously been cleared for provision to and exchange among ISAG members participating in AST-2. At the time, the data was not considered competitively sensitive because it was not recent data and in most cases it was distorted by the hypothetical disruption constructed for the test. Since the data was over one and one half years old at the time of the seminar, its limited use at the seminar did not appear to have any competitive significance. The clearance given contained standard safeguards. U.S. ISAG members were permitted to take notes, but they could not retain any copies of

⁴⁰ Voluntary Agreement, ¶ 5(b).

⁴¹ Voluntary Agreement, ¶ 5(b)(2).

⁴² AST-2 tested IEA's allocation procedure by applying a hypothetical disruption to historical data. See the FTC Fifth Report at 5-18.

the confidential data or notes relating to it. The United States observers present performed spot checks of the notes taken by United States company personnel.⁴³

At the seminar, the functions of ISAG members were reviewed in detail. Although it was primarily a training exercise, the ISAG also developed procedures for staffing a smaller version of ISAG in case the emergency system was activated for only one or two countries experiencing reduced supplies.

Some thought was also given to developing on a contingency basis an ISAG without the participation of American company personnel, to be activated only if Section 252 of the EPCA was not extended. Such a development, however, would not have satisfied the needs of the allocation system. The United States companies, which carry on the bulk of the international oil trade, would probably refuse to make voluntary offers because of the exposure to antitrust liability. Consequently, all supply redirection from United States companies would require type 3 supply orders from the Department of Energy. This process would be extremely inefficient because the Secretariat would be unable to select among a slate of offers in order to best satisfy IEA needs.

B. The Quarterly Oil Forecast

On January 15, 1979, the IEA Secretariat requested that Texaco, Inc. provide short-term oil supply and demand forecasts on a periodic basis for use in the Secretariat's preparation of the Quarterly Oil forecast. Other U.S. oil companies, with U.S. government approval, were already supplying similar information to the Secretariat. Since the Secretariat does not disclose any confidential data received from the companies and since no other companies are represented at forecasting sessions, allowing Texaco to submit the information posed little competitive risk. Clearance was granted in early May, 1979.

C. Clearances to Discuss Oil Supply Developments

The IEA Secretariat on a number of occasions requested clearances for the provision and exchange of oil company data to facilitate the Secretariat's analysis of the international supply situation. Beginning in October 1978, strikes by oilfield workers and political unrest in Iran led to temporary but severe decreases in exports. Later, in early 1979, production ceased altogether for over two months. Despite the fact that the loss of Iranian oil has been at least partially compensated for by the expanded production of other countries, particularly Saudi Arabia, the Secretariat has continued to monitor the situation closely. To this end, it sought information and advice from participating oil companies.

Five clearances have been extended to the companies granting antitrust defense for submission of data and consultation with the Secretariat. A clearance was issued on November 22, 1978. This clearance subsequently has been extended and modified four times: February 9, 1979; March 16, 1979; April 20, 1979 and July 6, 1979. The July 6 clearance expires on October 31, 1979.

The clearances permitted discussion and exchange of confidential company data by IAB members at SEQ and joint SEQ/SOM meetings and at IAB meetings shortly

⁴³ In fact, the seminar did not use the AST-2 data to work through specific allocation examples, and indeed hardly referred to the data at all.

preceding the governmental meetings. These industry consultations are authorized by Article 19.6 of the Agreement on the IEP. Article 19.6 permits the Secretariat to obtain the views of oil companies regarding developments in the oil market and the appropriateness of activating emergency measures. In a similar vein, oil companies received clearance for individual consultations with the Secretariat.

In each case, the clearances listed the types of confidential information that could be exchanged. No confidential or proprietary information could be divulged relating to subjects not specifically enumerated without advance approval of U.S. government observers. Disclosure of price and company market share information was explicitly disapproved without advance clearance by monitors attending the meeting.

In discussions between the Secretariat and individual companies, the clearances permitted slightly more latitude in the subjects which could be addressed than in discussions among the companies. If a U.S. government monitor was not present at these "bilateral" discussions, the requirement of prior approval for providing categories of confidential information not on the enumerated list was waived. However, after such consultations the company was required to submit a complete written record of the meeting to the U.S. government.

The clearances also permitted companies to submit QA data to the Secretariat on a monthly basis. The company reports included data for the month in question, two previous months, and two future months. This reporting obligation at the present time will continue to October 31, 1979.

The clearances employ numerous safeguards to assure that no competitive harm results from the provision and exchange of confidential company information. As previously stated, confidential discussions among companies were restricted to an enumerated list unless an explicit waiver is granted. Discussions must also be limited to matters that were to be the basis of advice to the Secretariat on the international oil market. In group meetings, U.S. government monitors are always present. At IAB meetings the discussions are stenographically recorded; government observers take notes on industry participation at SEQ and SEQ/SOM meetings. Company representatives are also prohibited from divulging to any person confidential information learned at the meetings. Moreover, the Secretariat does not disclose the contents of confidential data from QA's or QB's to any other company or country.

During these discussions, industry advice was requested on numerous issues including assessments of oil production in individual countries, evaluations of the Secretariat's Quarterly Oil Forecast, projections of petroleum supply and demand, reasons for tightness in oil markets, the accuracy of QA and QB data and methodological problems with the calculation of base period consumption.

With the exception of individual company consultations with the Secretariat, the discussions have been quite general and do not appear to have imposed any significant antitrust risks. Competitive harm also is unlikely to result from the submission of

company-specific QA data to the Secretariat or the provision of data to the Secretariat because the Secretariat does not divulge company-specific data.⁴⁴

Two individual consultations with the Secretariat deserve further consideration. In late May, 1979, the Secretariat requested individual consultations with two U.S. oil companies that had subsidiaries in another IEA country. That country's oil supplies had fallen below base-period levels and the Secretariat wanted information on the reasons for the problem and the possible solutions.

The Secretariat informed the U.S. government of the type of information it wished to discuss with the companies and asked whether such discussions had been cleared. The U.S. government replied that the contemplated discussions were within the clearance but, since specific prices or company market share information might be disclosed, advance approval would be required of the U.S. government monitor who would be present at the meeting. The discussions included explanations by each company of its international allocation scheme and its internal operations in the country in question. While the discussions were quite specific, the disclosures were made only to Secretariat personnel and the U.S. monitor present.

V.

CONCLUSIONS

Section 252 of the EPCA requires the Commission to evaluate the impact of IEP-related oil company activities on competition and small business. The FTC's Sixth Report contained a lengthy competitive evaluation of the program, which will not be repeated here. However, it should be reiterated that in order to minimize any adverse impact of the program, the Commission, the Department of Justice and Department of Energy have incorporated into the program as many procedural safeguards as practicable. These safeguards are included in the Voluntary Agreement, in special clearances, and should also be part of any future Plan of Action.

Antitrust risks are strictly limited by the limitations placed on both the contents and the method of discussions. The role of the government observer is of particular importance in this regard. All industry meetings are monitored; most meetings are attended by monitors from four agencies: the Federal Trade Commission, the Department of Justice, the Department of Energy and the Department of State.⁴⁵ This careful scrutiny assures that discussions will not stray from relevant topics into areas

⁴⁴ The appearances at SEQ meetings by IAB representatives do provide the IAB companies with one type of information which previously may have been unavailable, viz. information on future imports into IEA countries, which appears in summaries of QB submissions for future months. Such data is not provided by other reporting systems. See Appendix A. Thus, IAB companies are privy to one form of data not available to other companies. DOE should consider whether there is an element of unfairness in releasing this data to less than all companies.

⁴⁵ Occasionally, because of emergencies or overlapping industry meetings it is impracticable for each agency to be represented. Under those circumstances the two antitrust agencies make sure that at least one of their observers is covering the meeting. That monitor has an obligation to report to the agency not represented at the meeting.

prohibited by existing clearances.

During the past six months IEA activities have been the focus of significant public attention due to the possible activation of the emergency system as well as the implementation of various demand restraint measures taken to cope with the oil shortage. Some of these activities may have caused some confusion. For example, inaccuracies in supply figures were widely reported; there were expectations that the emergency sharing system might be activated; and there were pronouncements by at least one major oil company that its international allocation system was modelled on the IEA system.

The emergency system was not activated, nor were the allocations of the major international oil companies synonymous with IEA allocations. Different types of allocations were implemented, presumably with varying effects. As discussed above, although there are significant problems in the IEA's data reporting system, both DOE and the IEA are attempting to correct these problems.

During the past six months, oil industry activities related to the IEP as set forth in this report appear to have had no significant effects on competition in the oil industry or on small business. One possible exception is the use of standardized, subjective gravity/price differentials in the general section of the IEA information system. If these reporting differentials were to affect actual market transactions, anticompetitive results might follow. To minimize the possibility of such results the IEA may wish to consider adjusting the reporting system to the extent practicable.

In the Sixth Report, the Commission noted some continuing technical problems with the IEP but added that during an acute supply emergency the present IEA allocation system, functioning under government controls and in the presence of government monitors, is preferable to a situation where oil supplies depend entirely on private decisions of international oil companies. The activities in oil markets during the recent disruptions have reinforced that conclusion. During the current period of supply disruptions, international allocations by major oil companies affected the relative levels of supplies in consuming nations. Since government authorities were not privy to these decisions, they were not in a position to prove or rebut suspicions of unwarranted market manipulations. Thus, from an antitrust perspective and assuming the United States and other participating countries desire some form of international allocation, the standby system, accompanied by strict monitoring of oil company activities, still appears preferable to unilateral oil company allocation decisions.

Appendix A

A Comparison of IEA and Other Petroleum Data Reporting Systems

To evaluate the impact of the Iranian crisis on the world and domestic crude oil markets, reliable information showing the actual level of the crude oil supplies was needed. However, since the petroleum reporting systems were developed by various government agencies and private organizations to serve their own unique purposes, the information generated by these systems often appeared to be inconsistent.

An examination of four of the more authoritative sources of U.S. import data, the IEA, American Petroleum Institute ("API"), Department of Energy and the U.S. Customs Service, reveals that differences in definitions, methodologies and applications account, in part, for significant variations in import information. Specifically, differences in import data can be attributed to a number of the inherent characteristics of each data reporting system, including differences in the categories utilized, conversion from one system of measurement to another, timeliness of the data, geographical coverage, reporting frequency and treatment of Strategic Petroleum Reserves. All these factors affect the accuracy and consistency of the import data produced by the reporting source.

1. Categories

One serious discrepancy stems from the reporting system's use of different categories for reporting import volumes. For example, the IEA reporting system (the QA's and QB's) aggregates data on imports of crude oil, natural gas liquids and feedstocks. API, DOE, and the U.S. Customs Service present crude oil imports as a category distinct from natural gas liquids and feedstocks.

Petroleum product classifications create even greater problems in uniformity. Oil product import data as reported by the IEA aggregated figures for nine types of petroleum products.⁴⁶ As of May of this year, IEA added five additional petroleum products.⁴⁷ This change made IEA's total product import figures somewhat more consistent with those of API and DOE, which are fairly uniform since they employ similar categories. Both API and DOE publish separate statistics for residual fuel oil, motor gasoline, distillate fuel oil, jet fuel and other petroleum products which are combined to give total product imports.

The U.S. Customs Service, on the other hand, although classifying major petroleum products in a manner similar to the other reporting systems, has additional anomalous reporting practices. For example, the Customs Service alone reports as a distinct category data on mineral oil, lubricating oils and lubricating greases. Furthermore, while some other systems distinguish between types of naphthas, Customs reports figures under a "general naphtha" heading. The Customs Service also provides a category for "mixtures of hydrocarbons not specially provided for" under its other headings, some of which are identified individually by the other reporting systems.

⁴⁶ IEA's Questionnaires A and B cover the following principal oil products: LPG, naphtha, motor gasolines, aviation fuels, kerosenes, gas/diesel oils, residual fuel oils, lubricants and bitumen.

⁴⁷ As of May, 1979, IEA expanded its slate of products to include wax, coke, petrochemical feedstocks, special naphthas and miscellaneous products.

2. Conversion Methodology

To reconcile U.S. oil import volumes reported by each information system, one must equate standards of measurement by selecting an appropriate common denominator. Presently, information is submitted to IEA in thousands of metric tons per month; Customs assigns rates of duty on a per gallon basis; and DOE and API publish import volumes in thousands of barrels per day. Choosing barrels as the best common denominator, the Customs Service's figures can be converted easily to barrels per day. However, it is more difficult to convert metric tons to barrels since the weight of a given volume of crude will depend on its gravity. DOE employs general conversion factors of 7.46 barrels per metric ton for all types of crude oil and 7.03 barrels of refined product per metric ton. Such conversion factors can give only an estimate of actual amounts imported into the IEA system, since in addition to the gravity problem, the IEA's QB submissions combine crude oil import statistics with those for natural gas liquids and feedstocks. An accurate total also would have to take into consideration other conversion factors for natural gas liquids and feedstocks.

3. Reporting Frequency

The IEA's QA's and QB's presently are providing monthly data on actual and scheduled supplies of petroleum to each IEA Participating Country. DOE publishes various reports on the petroleum supply situation on a weekly, monthly, quarterly, and annual basis.⁴⁸ The most useful DOE source of United States crude and product import data is the "Report on Oil Imports to the U.S. and Puerto Rico" (Form ERA-60),⁴⁹ which is based on information reported each month by U.S. oil company importers. The Department's ERA-60 is republished monthly by the API under the title, "Imported Crude Oil and Petroleum Products Report." API's "Weekly Statistical Bulletin," on the other hand, is an important source employed by DOE in its "Weekly Petroleum Status Report." DOE also receives information from the U.S. Customs Service on a daily basis. In addition, a copy of the Custom Service's consumption entry report, Form 7501, is submitted regularly to DOE as well as to the Bureau of the Census. The information contained in this report is tabulated and published by the Bureau of the Census on a monthly and quarterly basis.

4. Time Coverage of Data

The IEA's reporting system covers a five month period from "month before last" through "month after next." The "current month" is the calendar month in which the

⁴⁸ U.S. petroleum import statistics are published in a number of DOE publications, including the following: "Weekly Petroleum Status Report," "Petroleum Statement Monthly," "Monthly Petroleum Statistics Report," "Petroleum Statement Annual," and the quarterly report to Congress.

⁴⁹ Another DOE source of U.S. crude and product import data is the "Transfer Pricing Report" (Form ERA-51). The usefulness of this report is limited by its coverage, which is only 70 to 80 percent of the volume of U.S. imports, and by its reporting of loaded as opposed to landed volumes.

submission is due.⁵⁰ Because of unusually unstable market conditions prevalent during the first half of this year, IEA's data projections for the current month have varied over 10% for crude oil imports and even more for petroleum product imports when compared to statistics for the "month before last" or the final figures.⁵¹

Neither API nor DOE reports estimate future supplies of petroleum. Also, DOE's weekly petroleum report relies primarily on API's weekly statistical bulletin for its import data.⁵² More recently, DOE has attempted to keep better apprised of the current import situation by requesting on a spot basis unverified daily vessel reports from the U.S. Customs Service. These reports reveal the specific types and volumes of petroleum imported.

5. Geographical Coverage

Disparities in import figures among the information systems to some extent are attributable to a lack of uniform reporting practices concerning the treatment of imports into the U.S. from the U.S. territories and Puerto Rico. The IEA includes in its aggregated U.S. import figures shipments of crude oil and product into the Commonwealth of Puerto Rico and the territories of Guam and the Virgin Islands. On its Form ERA-60, DOE incorporates petroleum imports into the U.S. and Puerto Rico only. On the other hand, API does not acknowledge imports into Puerto Rico or the U.S. territories, but rather includes imports from those areas into the U.S. in its overall import figure. Similar to API, the U.S. Customs Service does not report imports into the U.S. territories, but does include import data for the Commonwealth of Puerto Rico, a U.S. Customs area.

6. Treatment of Strategic Petroleum Reserves

API statistics do not include crude oil imported for the Strategic Petroleum Reserve ("SPR") in its overall import total.⁵³ API's omission of SPR imports is one reason why its import figures generally appear to be lower than the crude import totals provided by the other reporting systems. Furthermore, since SPR imports were

⁵⁰ IEA data is reported for a five-month period with data provided under the following categories: the month before last/final, last month/provisional, current month/estimated, next month/scheduled, and month after next/scheduled.

⁵¹ For further information on the reliability of import figures derived from QB questionnaires, see Section III A2, supra.

⁵² In 1977, DOE discontinued its weekly petroleum reporting system and began relying on API for the most up-to-date, accurate petroleum data. In the spring of this year, however, DOE again began collecting its own weekly statistics. Such data, presently for internal use only, is employed to assess the consistency of DOE and API figures and as a source for revisions.

⁵³ In addition, API does not report crude oil stocks held in the SPR.

relatively higher for the January-March period of this year, especially when compared to the first quarter of 1978, a slightly greater discrepancy may exist when comparing API data with that of the other reporting systems for this time period.⁵⁴

⁵⁴ SPR stocks in particular were built up substantially during the January-March period of this year. These inventory levels stand in marked contrast to those recorded in the same quarter of 1978 when stocks were nominal.

Appendix B

Table of Abbreviations and Initial Reference Page

API	American Petroleum Institute	26
AST-2	Second Allocation System Test	21
CIF	Cost, Insurance and Freight	16
DOE	Department of Energy	9
DSC	Dispute Settlement Center	9
EPCA	The Energy Policy and Conservation Act of 1975	3
FOB	Free on Board	16
GSP	Government Selling Price	17
IAB	Industry Advisory Board	2
IEA	International Energy Agency	1
IEP	International Energy Program	1
ISAG	Industry Supply Advisory Group	2
IWP	Industry Working Party	1
OECD	Organization for Economic Cooperation and Development	1
QA	Questionnaire A	6
QB	Questionnaire B	6
SEQ	Standing Group on Emergency Questions	2
SOM	Standing Group on the Oil Market	1
SPR	Strategic Petroleum Reserve	28

Senator METZENBAUM. Mr. Dougherty, you have made how many reports at the FTC on the IEA?

Mr. DOUGHERTY. The report that is attached to my statement is the seventh report, Mr. Chairman.

Senator METZENBAUM. Have all of them been submitted to this committee?

Mr. DOUGHERTY. I don't know the answer to that, Mr. Chairman.

Senator METZENBAUM. Are all of them available to this committee?

Mr. DOUGHERTY. I believe all of them have been submitted. They certainly are all available.

Senator METZENBAUM. Is one of them classified?

Mr. DOUGHERTY. There have been, in the past, some classification problems. I will ask Mr. Schildkraut to address those questions specifically.

Mr. SCHILDKRAUT. The fifth report was classified. We also came out with a nonclassified version of the fifth report which is publicly available.

Senator METZENBAUM. Which is what?

Mr. SCHILDKRAUT. Publicly available.

Senator METZENBAUM. Was there an effort on the part of State to classify the most recent report?

Mr. DOUGHERTY. When we were preparing our draft last week, prior to submitting it to your staff, we did confer with State. They had some classification problems. Over the weekend, we were able to work out the classification problems and come out with a report that is not classified, Mr. Chairman.

Senator METZENBAUM. Had you put any proprietary information in either of these reports?

Mr. SCHILDKRAUT. Proprietary information to the companies; no.

Senator METZENBAUM. Without violating the classification aspect, can you give us a general idea of the reason and the need for the classification?

Mr. SCHILDKRAUT. Well, you would really have to ask the State Department about that, but as far as the fifth report was concerned, we went into a good deal of detail about the second allocation test. Now, the document on which an allocation is actually based is a classified document and it was thought by the State Department at that time that some of the things we were discussing in the report would reveal some types of classified information within that backup document, which discusses how an allocation would be run. That was the reason of the classification of that report. We did not have that problem this time.

Senator METZENBAUM. On a restricted basis, recognizing that it is classified, the Chair would like to see a copy of the fifth report, with a copy made available also to the ranking minority member with the appropriate restrictions.

Mr. DOUGHERTY. Yes, of course.

Senator METZENBAUM. Does the participation in IEA give oil companies access to information otherwise unavailable to them?

Mr. SCHILDKRAUT. Yes, it does. There are certain types of data which are not publicly available which can be learned by representatives of the Industry Advisory Board at meetings in Paris. There is one type

of information in particular, forecasts of imports into the various IEA countries, which is not publicly available but which is available at those meetings, but only in aggregate form, of course, to representatives of the Industry Advisory Board.

Senator METZENBAUM. Could this information be used by the companies to injure competitors?

Mr. SCHILDKRAUT. We haven't thought of a way which it could be used to injure competitors. No; it is aggregate information, it is not disaggregated. Our only concern is the fact that some large companies are receiving this information and smaller companies which might want information on the oil markets are not receiving this information.

Senator METZENBAUM. Assume company X, which is the dominant one; knows that country Y is going to be under extreme supply pressure, could they not, under those circumstances, use it to advance their own economic position as far as entering that market?

Mr. SCHILDKRAUT. If you could pierce the veil of the aggregate information—

Senator METZENBAUM. Of the what?

Mr. SCHILDKRAUT. If you could pierce the veil of the aggregate information for a particular country, which I don't think you can, you might be able to make some kind of determination of a given company position in the market; and I can understand being possibly used in, for instance, contract negotiations with other companies and for that reason, we think that this information—it should be considered whether this information should be disseminated more widely or restricted totally.

Senator METZENBAUM. Isn't it an acknowledged fact that certain companies dominate some countries' markets. You travel through a certain smaller country, particularly, and you see a plethora of one kind of signs only and maybe a few of somebody else's; so isn't it a fact that you would be able to get a pretty good idea of the shortage if you knew the country?

Mr. SCHILDKRAUT. I think that you could probably, for some countries, make some kind of educated guess as to the involvement of certain companies.

Senator METZENBAUM. Does the FTC or the Department of Justice clearance prevent the companies from using the information obtained through their IEA participation to injure competitors?

Mr. SCHILDKRAUT. If it is proprietary information, based on the clearances they have now received, the representatives of the companies are not permitted to discuss that information with their companies, their own companies. In other words, if a IAB representative in Paris should happen to learn some proprietary or confidential information, based on the present letter clearance they have received, they cannot disseminate that information within their company.

Senator METZENBAUM. That is a very interesting approach. Just how do you go about policing that? Do you just know that when the man from Exxon learns something that he is going to be the kind of man that he isn't going to tell his company about it, or the man from Mobil?

Mr. SCHILDKRAUT. Well, based on what we have seen at the meetings so far, very, very little, if any, proprietary and confidential information has been discussed at the meetings. That is point 1.

An additional point is that they would receive obviously no defense under this act if they did disseminate such information within their company.

Senator METZENBAUM. Are there any criminal penalties for this?

Mr. SCHILDKRAUT. The penalties would be all the antitrust penalties.

Senator METZENBAUM. Why do you say that there would be no defense under this act if they told their employers the information that they had received at the meeting? Give me an example.

Mr. SCHILDKRAUT. Because they would be outside the clearance.

Senator METZENBAUM. Pardon.

Mr. SCHILDKRAUT. They would be outside the clearance that they had been given.

Senator METZENBAUM. Just explain that a bit for me.

Mr. SCHILDKRAUT. The act has been implemented as far as the carrying out of voluntary agreements through regulations of the Department of Energy. Those regulations permit further clearances if necessary for the distribution or exchange of proprietary information. Those clearances which have been issued so far with consultation of the Federal Trade Commission do not permit the distribution of that information within the company.

Senator METZENBAUM. You are saying then that there is some regulation. First of all, do the companies have to get a clearance to gain the defense of this act?

Mr. SCHILDKRAUT. The clearance, yes, the clearance is necessary for them to distribute or exchange or disseminate in any way, means or form, proprietary or classified information at these meetings.

Senator METZENBAUM. But I don't follow you to the next step—that they lose the clearance if they do distribute.

Mr. SCHILDKRAUT. The clearances are so conditioned. That is one of the conditions of the clearance.

Senator METZENBAUM. Will you make available to this committee, the language in a typical clearance that has been authorized?

Mr. SCHILDKRAUT. Certainly.

Senator METZENBAUM. If the IEA relied less on the oil companies to assist them in developing plans for allocating oil, would the danger of anticompetitive problems and consequently the need for an antitrust defense be reduced?

Mr. DOUGHERTY. Certainly, Senator. But as the gentleman from GAO testified earlier, at least at this point, it appears that oil companies' expertise is probably helpful in making the program work. As governmental expertise develops over time, hopefully, there will be less oil company participation.

Senator METZENBAUM. Why do companies need a defense for bilateral exchanges of information?

Mr. DOUGHERTY. I would like to back up, Senator. With the exception of a point in time when there is some trigger effect, we have an emergency, I don't think a defense is actually needed.

Senator METZENBAUM. You don't think the defenses are actually needed?

Mr. DOUGHERTY. That's right. As I understand, the defense was included and this is anecdotal information only, the defense was included to gain the participation of the oil companies in the program.

And the oil companies wanted the sanction of governmental immunity before they would participate.

Now where you have an emergency and where there is current price and supply information being exchanged, then a defense, were I a defense lawyer representing the oil companies, I would insist on an antitrust defense. But otherwise, I don't think it is really necessary. The question for you is how badly do you want the oil companies to participate in this program.

Senator METZENBAUM. Well, what you are saying is that the only time that the defense is actually needed, if at all, is after the allocation mechanism is triggered.

Mr. DOUGHERTY. That is my opinion. I am reasonably sure that counsel for the oil companies take a different position.

Senator METZENBAUM. Do they need a defense for submitting data to IEA on a regular basis?

Mr. DOUGHERTY. No, I don't believe they need a defense for the submission of data to IEA. The defense is needed when they sit down and together there is some possibility of joint action that might have an anticompetitive effect. And, if you are talking about just the submission of data to a governmental body, an international body, the defense is not needed.

Senator METZENBAUM. Has the FTC had a person present every time subcommittees A, B, or C have met?

Mr. SCHILDKRAUT. Either we have been present or the Justice Department has been present. At the vast majority of meetings, we have both been present. There have been occasions, for instance when there have been overlapping meetings in a foreign city, and in those cases, we have split the duty.

Senator METZENBAUM. But in every instance at least one of you has been present?

Mr. SCHILDKRAUT. Since I have been on the program in spring of 1977, that has been the case.

Mr. DOUGHERTY. I believe that is the case, Senator. We will check and make sure that our statements are accurate.

Senator METZENBAUM. Has the FTC examined how much assistance the IEA really needs from the oil companies apart from bilateral exchanges of information between individual companies and the IEA?

Mr. DOUGHERTY. No, we haven't, Senator.

Senator METZENBAUM. Would you be good enough to do that and advise us in writing?

Mr. DOUGHERTY. Sure.

Senator METZENBAUM. Are you aware of the data deficiencies that have occurred through the IEA?

Mr. DOUGHERTY. Yes, Senator, we are.

Senator METZENBAUM. Would you be good enough to advise the committee what your findings are with respect to the data deficiencies of the information that has been forthcoming from the IEA?

Mr. DOUGHERTY. Certainly. Would you like us to?

Mr. SCHILDKRAUT. There have been some problems with reportings on questionnaire A. Now that is a data report which goes from the oil companies to the Department of Energy and also to the IEA. It basically consists of import and production information. It is used in order

to determine exactly how much consumption of oil and imports of oil a given company is receiving. The data has been less than perfect.

During the current month, it has varied from 5 to 9 percent from what appears to be the appropriate level 2 months later when measuring that current month.

Senator METZENBAUM. Five to nine percent?

Mr. SCHILDKRAUT. Five to nine percent.

Senator METZENBAUM. Of what?

Mr. SCHILDKRAUT. Of total consumption.

Senator METZENBAUM. Of total consumption.

Mr. SCHILDKRAUT. Within the country.

Senator METZENBAUM. Since it takes only a 7-percent figure to trigger the IEA mechanism, that 5- to 9-percent variation in an extremely significant amount, isn't it?

Mr. SCHILDKRAUT. It would be if that data were being used to evaluate a trigger situation; however, that data would not be used. More historical data, 2 months older would be used, in order to make that evaluation. That data seems to be much better. So we don't think it is a problem in the trigger situation.

Senator METZENBAUM. Well, actually, if there is a shortage, it will come very rapidly, very suddenly, and the accuracy of the figures, whether it is 5 percent or 9 percent—which is actually the difference between being below the trigger or substantially above it—is very important. So, how can you say that they would be using historical data when it is the 7-percent shortfall at a particular point, with the probability of continuation thereof, that give them the right to trigger the mechanism?

Mr. SCHILDKRAUT. Well, I think there are two reasons. First, the shortage should be of some duration before the trigger mechanism will be implemented.

Senator METZENBAUM. How long?

Mr. SCHILDKRAUT. That is a matter of interpretation of the IEA Secretariat and the governing board of the IEA. I don't think there is any specific figure which is in the agreement.

Second, because the Secretariat realizes the problem with this data, I think they would be hesitant to use the current month data to make that decision.

Senator METZENBAUM. Do you plan to clear the IWP—which I understand is the Industry Working Party—to discuss the standard for reporting specific gravity differentials of each crude stream?

Mr. SCHILDKRAUT. Are you asking me whether we cleared that?

Senator METZENBAUM. Yes.

Mr. SCHILDKRAUT. That is not confidential and proprietary information. They do their work based on public information and, therefore, do not need a special letter clearance. They are cleared under the voluntary agreement to have those discussions.

Senator METZENBAUM. Didn't you find some possible anticompetitive effects with respect to IWP activities. Can you explain what you have found?

Mr. SCHILDKRAUT. Yes; we have found some possible anticompetitive effects. We have discussed these with various members of the industry who acknowledge these possibilities.

Basically, the IWP is responsible for advising an IEA group in the setting up of a reporting system of imports and prices of crude oil and products. Now, in order to put this system together, it was necessary to make adjustments in the prices of various crudes which are above or below the medium gravity of a crude stream. The reason that it was necessary to make those adjustments was so that we would receive comparable figures from the various countries concerned.

Additionally, by making that adjustment, the IEA was able to avoid problems of confidentiality, whether it be very few companies reporting data on a specific crude stream with a specific gravity. Therefore, that type of adjustment was made.

The possible effect of the adjustment is that sellers in the marketplace may consider it more than merely a reporting adjustment and may consider it to be the differential which ought to affect prices in the market so that they may take this differential and change their prices, based on the reporting differential.

Senator METZENBAUM. Thank you. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Dougherty, we are glad to have you gentlemen with us. I just have a few questions here.

What present activities of the companies would possibly constitute an antitrust violation in the absence of the immunity granted by statute?

Mr. DOUGHERTY. As I indicated earlier to the chairman, Senator Thurmond, in my judgment, only where you have a triggering of the emergency system.

Senator THURMOND. Please speak louder, I can't hear you.

Mr. DOUGHERTY. Only where you have a triggering of the emergency system and a need to exchange among the companies current price or supply information would you have the possibility of anti-competitive activity. In the current situation, as a result of what I guess is referred to as the minicrisis, the Iranian shortfall situation, information is being collected and exchanged; and, therefore, right now, there probably is a need to have an antitrust exemption for the companies' participation in the program.

Senator THURMOND. What activities could continue even if immunity is not extended?

Mr. DOUGHERTY. Well, the companies would certainly continue to report.

Senator THURMOND. They could do what?

Mr. DOUGHERTY. They could continue to report both to the Government, to DOE here under the reporting system and to the IEA so the information could be collected. The question here is whether you want the companies to get together under the auspices of IEP and work out an allocation scheme in the event of an emergency.

Certainly the Government could continue to collect the information, Government officials could make those allocations decisions if the companies were not present; based on what we have seen so far, we believe that there is probably some need, some utility to have the companies work with the Government in figuring out how an allocation scheme should be put together and implemented.

Senator THURMOND. Have all recommendations by your agency continued and your semiannual reports to Congress been adopted?

Mr. DOUGHERTY. No, they haven't, Senator.

Senator THURMOND. If not, would you explain which recommendations have not been adopted and the reasons therefor.

Mr. SCHILDKRAUT. We have made a number of recommendations in various reports. In the fifth report we pointed out that DOE's regulations on how to share oil within the country, which is a part of the international allocation, might cause some problems. For instance, there is an inventory mechanism in DOE's fair sharing regulations which permits the companies not to report the amount of crude oil they have in inventory for the basis of sharing within the country. Because this is the case, companies may be very willing to build inventories and to project lower crude oil runs in a given month to their refinery. Doing that may mean that there will be more crude oil bills and less oil in the system within the country of itself. So we suggested as a possible alternative that the inventory be counted within the fair sharing allocation within the United States. That was one of our recommendations in the fifth report.

A similar recommendation in the fifth report had to do with the price at which oil would be shared within the country under DOE's regulation. What would happen in international crisis is there would be voluntary allocations of oil on the high seas between countries. That would mean that some companies would be short of oil in the United States. Those companies would then have to share oil within the United States; otherwise they would obviously be unwilling to voluntarily share oil internationally.

The Department of Energy has set up a system to share oil within the United States and has determined the price at which oil will be shared. They have created a bifurcated system so that some companies receive oil at the cargo price, but a group of small refiners will receive oil at the selling companies' average price. Now, when a company receives oil at an average price, obviously the company that is selling it is very likely to be selling it at a loss because he has gone out and purchased oils on the high seas, on the spot market, during an international crisis.

Because of that, the companies may decide that it is not worth their while to purchase crude oil internationally; and there may be some disincentives in that regard; and less oil may be coming into the IEA system as a whole because of that. We recommended, therefore, that the system be changed to remove that disincentive.

In the seventh report we have made a recommendation based on our recent discussions on the possible anticompetitive effects of the IWP that a more objective reporting system be attempted or considered, at least, by the IEA to remove the possibility of the problems caused by the subjective differentials and sellers in the market changing their prices based on these subjective differentials.

Senator THURMOND. Are there any other recommendations you made, and if so, would you place those in the record following your remarks.

Mr. DOUGHERTY. Yes.

Mr. SCHILDKRAUT. Yes, we will.

Senator THURMOND. How many employees are devoted to carrying out your responsibilities for this program and what is your budget in the fiscal year 1979 for such work?

Mr. DOUGHERTY. I will have to provide you with a more detailed information on the budgetary requirements, Senator Thurmond. Right now, we have approximately two or three full-time professionals working on the program.

Senator THURMOND. The current act, the current law, requires a provision to require timely access to transcripts by Congress. Do you suggest any additional procedural requirements for meetings of the companies?

Mr. DOUGHERTY. No, Senator, we have not. We have available to us transcripts of the meeting. We think that the meetings procedures as they have been established so far are adequate for our purposes to monitor possible anticompetitive activity.

Senator THURMOND. Doesn't that act provide for Congress to have access to these reports?

Mr. SCHILDKRAUT. I believe Congress, I don't think I am incorrect, I believe Congress can have access to the records of the meetings through the Department of Energy, which collects those records.

Mr. ROWE. I might add, Senator Thurmond, that it has been an issue which has been aired before and it is quite, perhaps, a serious issue for you in making your determination on the program as to whether Congress has sufficient access to these records. I am afraid that we can't answer that question.

Senator THURMOND. Mr. Chairman, I would suggest, if there is no objection, that present law be inserted in the record for information and this bill extended, but section 252.

Senator METZENBAUM. I am sorry, you wanted to insert the language of the present law?

Senator THURMOND. I think it would be helpful.

Senator METZENBAUM. No objection.

Senator THURMOND. And then in their proposed bill, S. 1413.

Senator METZENBAUM. No objection.

Senator THURMOND. Thank you very much. Thank you, Mr. Chairman.

Senator METZENBAUM. One last question. The law provides that Congress shall have access to the transcripts of the meetings. Is that correct?

Mr. SCHILDKRAUT. Yes, I believe that is correct under the regulations, but it is not the law though.

Senator METZENBAUM. It is not the law?

Mr. DOUGHERTY. I don't remember whether it is in the law or the regulations.

Senator THURMOND. Would you check that and let us know definitely, sir.

Mr. ROWE. Senator Metzenbaum, we would assume from the regulations that Congress might have access; however, during hearings that were held before Chairman Dingel in the House Energy and Power Subcommittee last June, there was some dissatisfaction expressed on the record with the access of specific Congressmen and Members of Congress to the activities of the IEA and I don't know whether the execution of that intent to provide access has been carried out in a satisfactory manner.

Senator METZENBAUM. Can you tell me who made the determination that whenever the transcript is made available to the Congress it shall be on a classified basis?

Mr. ROWE. It is our belief that the IEA Secretariat is primarily responsible for access problems and classification generally. With respect to—

Senator THURMOND. Who is responsible?

Mr. ROWE. The IEA Secretariat with respect to classification generally of the IEA activities. I am not exactly certain with respect to access in the United States; however, the State Department has been instrumental in the classification procedures regarding FTC participation.

Mr. DOUGHERTY. Senator, I am not sure whether we can provide you with the best evidence on this. It is somewhere between the Secretariat, the State and DOE. We are not active players in that game.

Senator METZENBAUM. You are the ones who have the transcripts. It is FTC, DOE, the Antitrust Division of Justice, and the State that participate in the industry meetings, right?

Mr. SCHILDKRAUT. That's correct.

Mr. DOUGHERTY. That's correct, Senator.

Senator METZENBAUM. Who then provides Congress with the information?

Mr. SCHILDKRAUT. That is up to the Department of Energy, which has records of the transcripts and all of the documents involved.

Mr. DOUGHERTY. DOE is the depository for the documents, Senator.

Senator METZENBAUM. And it is State who determines that they shall be classified?

Mr. SCHILDKRAUT. We believe.

Mr. DOUGHERTY. We believe so, but we are not certain.

Senator METZENBAUM. Do you know of any reason why there should be a blanket classification by IEA and in turn by State of all industry transcripts?

Mr. DOUGHERTY. No.

Senator METZENBAUM. Would you think it would serve the public interest better if there were not such a blanket classification—

Mr. DOUGHERTY. You mean as to Members of Congress or as to the public? Are you distinguishing?

Senator METZENBAUM. Either, both, however you care to answer.

Mr. DOUGHERTY. I can't understand why we need a blanket classification, period. Certainly, Congressmen and Senators who are passing on this program should have access, immediate access, to all of the records.

Senator METZENBAUM. This Senator is of the opinion that this continual classification of documents by the State Department is inappropriate and doesn't serve any useful public service. It actually causes people to lose confidence in their government.

Thank you very much, Mr. Dougherty.

Senator THURMOND. I think it would be helpful if question No. 4 and the answers in a statement of Mr. Harry E. Bergold, Jr., Assistant Secretary of International Affairs, U.S. Department of Energy, before this Subcommittee on Energy and Power, Committee on In-

terstate and Foreign Commerce, U.S. House of Representatives be placed in the record.

Senator METZENBAUM. Senator Thurmond, as you probably know, at our next hearing, State Department representatives will be present. I wonder if their testimony is not the best evidence for this hearing. I think in all probability Mr. Bergold will be testifying. Is that correct? Can somebody tell me that who is here from State?

Senator THURMOND. Mr. Chairman, I can put it this way. If he appears, he can be propounded, the question can be propounded to him. If he is not here, then there is no objection.

Senator METZENBAUM. That is fine.

Thank you very much, gentlemen.

Our next witness is Mr. Thomas L. Boeder.

Mr. Boeder, we are happy to welcome you to this hearing and we appreciate your coming long distance in order to be with us. We will be very happy to hear from you. Do you have a written statement.

Mr. BOEDER. Yes; I do, Mr. Chairman, and with your permission, I would like to present that written statement and then just present a summary.

Senator METZENBAUM. Without objection, the entire written statement will be included in the record and we will be happy to hear your summary.

STATEMENT OF THOMAS L. BOEDER, SENIOR ASSISTANT ATTORNEY GENERAL FOR ANTITRUST, STATE OF WASHINGTON

Mr. BOEDER. Thank you, Mr. Chairman, Senator Thurmond. I am senior assistant attorney general for the State of Washington and am chief of the consumer protection and antitrust division of the State of Washington.

I am here today to speak in opposition to the extension of the immunity which is envisioned by S. 1413. A number of years ago it would, perhaps, have been unthinkable for a representative of a State attorney general's office to speak on matters such as this concerning foreign policy and antitrust. But this is an instance, I would submit, where the States have a great deal of expertise; a great deal of practical expertise and that practical expertise is with litigating in the petroleum industry and litigating against the oil companies.

In my written statement, I outlined the cases, particularly where the Western States have been litigating against the oil companies. These cases involve the asphalt industry where the oil companies were the defendants; the fertilizer industry, presently in litigation, where the oil companies, again, are the key defendants; and our petroleum litigation which is now pending in the Central District of California. I hope you will excuse me, I have a cold today.

Mr. Dougherty from the FTC likes to refer to the bill as granting a limited defense, rather than an immunity, and I would like to testify here today that from the point of view of a practitioner who is attempting to enforce the antitrust laws in court that that is a distinction that would be very hard, as I submit to you, would be very hard to present to a court. The immunity is a very broad one when

it is viewed from the point of view of an antitrust prosecutor or an antitrust plaintiff.

Moreover, the antitrust immunity to the oil companies to participate in allocations, to address international crises and supply shortages, is one which is directly contrary to the theory of the *Petroleum Litigation* that six States are now involved in, pending in the Central District Court in California. One of the allegations in that lawsuit is that the major oil companies contrived the petroleum shortage of 1973-74 by their concerted activities.

Senator METZENBAUM. Which States are involved?

Mr. BOEDER. The States that are involved, Senator, are Connecticut, Florida, California, Washington, Oregon, and Arizona.

Senator METZENBAUM. I am sorry South Carolina isn't in that case.

Mr. BOEDER. Perhaps that may be remedied someday.

In any event, it causes me a great deal of concern when I examine the oil company participation in the IEA and the delegation of authority to the oil companies which I think is inherent in the antitrust immunity and the statutory pattern. It causes me a great deal of concern because one of the allegations, one of the key allegations, in our suit was this contrivance of the shortage of 1973-74.

Moreover, it seems to me that there is a great deal of loss of credibility with regard to the solution of national energy problems when there is such delegation of control over petroleum supply through the oil companies—where this function, the dominant role in this function, is taken by the oil companies, not by an international agency or a representative of the U.S. Government working in the public interests.

It also seems to me that one should take a look in examining the validity of extending this immunity—one should take a look at what this kind of immunity has accomplished in the past. It seems to me that the record is not very good in that respect. The DPA Act, the original act on immunity which arose during the Korean war, was followed—or so the Western States allege—by a price-fixing conspiracy which was facilitated, or originated at least in part, in that immunity from the DPA.

The 1973 shortage preceded the Arab oil embargo, and we say it was contrived by the oil companies. Yet the solution to that crisis has involved giving a limited defense or immunity to the oil companies alleged to have caused that shortage and the problems which have arisen from it.

Lastly, after the new authority in antitrust immunity has been given or had been given to the IEA, the oil companies working under the IEA, then we have the 1979 oil shortage. The overall result has been gasoline which was priced at 35 cents per gallon, approximately, in 1972 and is now up to \$1 a gallon. I would submit to the committee that if this is the result or these are the benefits to be obtained by oil company participation in the IEA, then perhaps the public can very well do without that participation in IEA.

To summarize then, it seems to me that the IEA concept, the antitrust immunity to the oil companies for participation in the IEA is flawed at its core. The assumption is that coordinated activity by the oil companies is the best way of dealing with the international short-

age. Yet, to those of us who are litigating against the oil companies on the west coast in the *Petroleum Litigation*, this cooperation between the oil companies is at the root of the shortages themselves.

I would also submit to the committee that oil company participation is not essential to such an allocation program. I have been involved for a relatively short period of time in litigation against the oil companies yet the State of Washington and the west coast States have been able to gather experts and a staff which, I think, can deal fairly effectively with the oil companies and with the petroleum industry.

I find it inconceivable to imagine that the International Energy Administration, the American Government or American Government officials participating in that program, could not do the same thing. And it seems to me that, if that policy or if that program is to have credibility to the public—70 percent of whom, by recent polls, think that the recent shortages were created or resulted from activities of the oil companies—if that program is to have credibility, then it cannot proceed on the basis of an immunity being granted or extended to the oil companies.

I have presented, in my written statement, some potential solutions which would be short of rejecting outright an extension of the immunity. The thrust of those proposals in essence is to get the attorneys general of the various States, perhaps through the National Association of Attorneys General or through some other vehicle, involved in this oversight mechanism.

As the statute stands right now, it would be difficult if not impossible for us to have access to that information to participate in the monitoring process. One might ask why is that State attorneys general should be involved in monitoring this kind of a program. Well, if one takes a look at the recent development in petroleum litigation, it is the States that are taking the lead, I would submit to the committee it is the States who are taking the lead in petroleum litigation. In many instances, our views are quite different than those of the Department of Justice Antitrust Division and the Federal Trade Commission. So, if there is to be monitoring, if there is to be this immunity, then I would recommend that the States attorney general be included in that.

Inclusion in that, of course, would also involve hopefully elimination of the *Illinois Brick* barrier which stands between the attorneys general of the States and their ability to bring cases of this sort against the oil companies. Without repeal of the *Illinois Brick* decision by the Supreme Court, it might be extremely difficult if not impossible for a State attorney general to effectively litigate against the oil companies even if they were able to prove that there were antitrust violations arising from IEA participation.

The final thing that I have to say though is that my strong recommendation would be that the antitrust immunity not be extended, because the kinds of safeguards which I recommend are second best.

Senator METZENBAUM. John Sherman, author of the Sherman Antitrust Act, was a Republican Senator many years ago from my State. He just sent me a message from his grave that he is very proud of the Republican attorney general who sent you here to make that statement. As one of the cosponsors of this piece of legislation—not this one—has indicated this is an issue which the Republicans really should be

claiming as theirs; they ought to be involved and take a supporting position. Your comments certainly indicate that and I commend your attorney general for his leadership in that litigation.

Mr. BOEDER. Thank you, Senator. He will be very pleased to hear that.

Senator METZENBAUM. I commend your own statement as well.

Mr. Boeder, do you believe that meetings of oil companies that are sanctioned by the Federal Government facilitate collusive anticompetitive behavior?

Mr. BOEDER. I would think in the context of the litigation that we have been involved in—the *Petroleum Litigation*, I would think that we have very strong suspicions to that effect. At the very least, they provide additional forums for such meetings and there is the circumstantial evidence of the occurrence of meetings of this sort before each of the crises which are part of our lawsuit.

Senator METZENBAUM. Would you repeat that?

Mr. BOEDER. There is circumstantial evidence, Senator Metzenbaum, that international meetings of this sort occurred before each of the crises which is the subject of the *Petroleum Litigation*. Let me expand on that just briefly.

In 1972, in 1971 and 1972 there were meetings of the London Policy Group. This was a high-level group of the oil companies. These meetings were given in effect a sort of antitrust immunity by Department of Justice Antitrust Division Business Review Letter procedure. Mr. Kauper—then head of the Antitrust Division—testified after the fact to a Senate committee on multinational corporations hearings, and I have quoted that in my written testimony testified that he or the Justice Department Antitrust Division had some concern about the lengths to which the discussions between these oil companies under the umbrella of the London Policy Group, the extent to which those conversations had gone and the potential impact on competition.

In 1972, the proof in MDL 150, the *Petroleum Litigation* shows that shortly after those meetings, competition in gasoline pricing ceased in virtually every market of the United States which we have surveyed. Prior to that time, as you may remember, as I am sure you remember, there were gasoline wars, price wars. In the second week of August 1972, shortly after one of those London Policy Group meetings, that competition ceased. It was as though the patient had cardiac arrest. The price line goes absolutely level.

In addition to that, of course, we have the IEA meetings and then shortly after that cooperative effort, we have the 1979 shortage occurring. That is not absolute proof; it is, however, to my mind, even at this stage of the game, before we go to trial on MDL 150, that it is strong circumstantial evidence.

Senator METZENBAUM. How does the antitrust defense that is in this legislation affect your ability to prosecute antitrust violations under State law.

Mr. BOEDER. Well, the defense extends to prosecutions under State law and it obviously extends to those suits which we bring in Federal court to recover treble damages. I would repeat that the real problem with that defense is the practical one when you go into court. One can talk about it being a limited defense and one can talk about oversight

and one can talk about documents and records, but I have been in court many times trying to argue against a defendant who is raising a defense of immunity and it is a very tough thing to overcome.

Senator METZENBAUM. How does the defense provided in this litigation affect your ability to sue on behalf of your citizens under *parens patriae* for violation of Federal laws?

Mr. BOEDER. It would eliminate that ability also, Senator, in those instances where there was a defense.

Senator METZENBAUM. Am I correct in understanding your position that you oppose the antitrust defense but if it were to be applicable, you still believe that it is far too broad? Is that a fair summary?

Mr. BOEDER. Yes; I oppose the defense because I think that it is not warranted and it is not wise. Then my second position is that if there is to be a defense, it is too broad, and my third position is that if there is to be oversight, the attorneys general ought to be involved in that oversight.

Senator METZENBAUM. Do you believe that joint activities by the oil companies are necessary for the effective operation of IEA?

Mr. BOEDER. I simply can't accept that, Senator. Our experience admittedly has been brief—the State's experience has been brief in historical terms—but we have found that we can gather together the expertise to understand the petroleum industry, to litigate, we believe, effectively against it. We have examined very carefully the problems with Department of Energy allocations and the shortages of 1973-74 and 1979. There is expertise available and I find it impossible to believe that the Government of the United States can't get that expertise without having coordinated activities by the oil companies.

It also seems to me that it is possible that the oil companies could participate on a bilateral basis—when their advice is needed, advice could be sought individually from each company by the IEA. I fail to see why it is necessary for the oil companies to sit down and in the same room and in a coordinated manner come up with the allocation.

Senator METZENBAUM. Mr. Boeder, have you ever been consulted by the Federal antitrust enforcement agencies about IEA?

Mr. BOEDER. No, Senator Metzenbaum, I haven't.

Senator METZENBAUM. What about the National Association of Attorneys General, have they ever been consulted to the best of your knowledge?

Mr. BOEDER. I don't believe so. I believe that the first that I even knew about IEA was just recently in the last several weeks.

Senator METZENBAUM. Have these agencies ever indicated any willingness to be helpful to you in the litigation that you are involved in with the six States?

Mr. BOEDER. Not really, Senator. We have given the evidence available in that suit to the Department of Justice. The FTC, of course, is involved in its *Exxon* lawsuit. Our suit, of course, raises the contrived shortage issue which is different and beyond that in the *Exxon* suit. No; we have not received any help.

Senator METZENBAUM. Have you or any other of the attorneys general ever been asked for input on the anticompetitive effect of our domestic allocation programs?

Mr. BOEDER. No; absolutely not.

Senator METZENBAUM. Yet, such an allocation program could have a significant effect on your State's consumers, couldn't it?

Mr. BOEDER. It not only could, but it does. As a matter of fact, we have investigated the 1979 shortage and along with it the Department of Energy allocations and we concluded that they have had a very severe negative impact on the consumers of the State of Washington.

Senator METZENBAUM. Is my understanding correct that your office has a particular expertise in the area of competition in the petroleum industry?

Mr. BOEDER. Yes, Senator. We feel that we do. We feel that we have been involved in it since the early 1960's and that the combined expertise, particularly of the west coast States, is very substantial in the petroleum industry.

Senator METZENBAUM. So that there are many States' attorneys general who have similar capability and interest?

Mr. BOEDER. That is correct, Senator. There are at least a half dozen attorneys general who have been involved deeply with the matters relating to the petroleum industry.

Senator METZENBAUM. Do you see any reason to provide a defense for bilateral exchanges of information between companies and the IEA?

Mr. BOEDER. Absolutely not. As I understand the antitrust laws, if there were communications between the IEA and a particular oil company, there would be no antitrust problem created.

Senator METZENBAUM. Would access to unclassified transcripts be useful to you?

Mr. BOEDER. It certainly would. It would allow us to determine (1) whether there is potential anticompetitive harm, and (2) it might very well lead to evidence in support of our *Petroleum Litigation* in Los Angeles.

Senator METZENBAUM. Do you currently have such access?

Mr. BOEDER. We have only limited access. We have obviously the same or worse problems with classified materials than the committee itself does.

Senator METZENBAUM. Would it be important to you to be able to attend IEA industry meetings or to have a representative of the attorneys general attend?

Mr. BOEDER. I think that it would be a valuable deterrent if that opportunity were made available to the State attorneys general.

Senator METZENBAUM. Do you know whether or not you would be able to attend those meetings at present?

Mr. BOEDER. Well, you will find in my written statement, I have just suggested that obviously Federal funding would be useful if the attorneys general were to do that. If the Federal funding were not forthcoming, it would be more difficult, but I still think it would be possible because it would have a sufficiently high priority that I think some attorneys general would expend the public funds for that purpose.

Senator METZENBAUM. There seems to be a question as to your right to attend?

Mr. BOEDER. As it stands right now, I think that would be extremely murky whether or not we have the ability to attend.

Moreover, I think that there are so many limitations on notification and ability to attend that I think it would be almost impossible, I suspect it would be almost possible if you, the chairman of this committee, had some difficulty in attending meetings, I can imagine that my difficulties would be much, much greater.

Senator METZENBAUM. Senator Thurmond.

Senator THURMOND. Mr. Boeder, I want to commend you for coming here and testifying. We appreciate your presence. I noticed in the conclusions of your statement on page 9:

No. 1, State attorneys general should be allowed access to all records of meetings attended by oil companies' representatives pursuant to the statute and prior notice of such meetings and the right to send the representatives to attend.

Would you care to elaborate on that?

Mr. BOEDER. Yes, Senator Thurmond. As I understand the law as I read it, as it stands right now, first of all, State attorneys general are not among those who would routinely receive notice of such meetings. So we would not have sufficient notification to be aware of the meetings before they occurred.

No. 2, there are many of these meetings which, as I understand it. We would not be allowed to attend and that I think it is very important; and

Third, much of the material, although in theory it should be public information and available to us, is classified and there is no exception to the classification for the benefit of State attorneys general.

Senator THURMOND. Do you see any reason why the material should be classified at all?

Mr. BOEDER. I certainly don't, Senator Thurmond. I certainly can't understand any reason why any of the material should be kept from the Congress or kept from attorneys general who have law enforcement responsibilities. There may be some proprietary material there but that can be protected by adequate safeguards by still allowing release of the materials to the people who should have access to it.

Senator THURMOND. The proposed bill here by the administration, I believe, merely extends the proposed law, to June 3, 1979, to January 19, 1986. To carry out your recommendation, it would have to be a broader modification of the present law, wouldn't there?

Mr. BOEDER. That is correct. The bill itself, the underlying law would have to be amended.

Senator THURMOND. Have you prepared any suggested amendments to the present law?

Mr. BOEDER. Senator Thurmond, I have not but I would do so if the committee would like me to do so. Obviously, my preference, Senator Thurmond, is that—

Senator THURMOND. I am sure the committee would be glad for any witness to present any recommendations that we have so if you have any suggestions, I am sure it would meet the chairman's approval if you wish to submit them to the committee.

Mr. BOEDER. Thank you, I will do that, Senator Thurmond. The only reason I didn't do that in the paper is because of my strong preference for not having the amendment passed at all, but I would be happy to propose the alternate amendment.

Senator THURMOND. Thank you very much.

Senator METZENBAUM. Thank you, Mr. Boeder, for a very, very helpful statement—a very illuminating one. It is my understanding that you will be around for a bit, is that correct? I would like to talk with you about some of your thoughts on the amendments.

Our next witness will be Donald Flexner, Deputy Assistant Attorney General, Department of Justice.

How are you today, Mr. Flexner, nice to have you with us.

Your written statement will be included in the record at the conclusion of your oral testimony.

[The prepared statement of Mr. Boeder follows:]

PREPARED STATEMENT OF THOMAS L. BOEDER

I want to thank you for inviting me to testify before the subcommittee today on the issue of extension of the antitrust immunity provided to the oil companies for activities relating to participation in the International Energy Agency.

In my view, passage of such legislation would seriously undermine the effective enforcement of the antitrust laws against the oil companies, would not result in any offsetting advantage to the country's efforts to deal with energy problems and would not be in the public interest. Before discussing the reasons for this opinion, it may be helpful to the subcommittee if I describe briefly the background and experience which have led me to this conclusion.

BACKGROUND

I am a Senior Assistant Attorney General and Chief of the Washington State Attorney General's Consumer Protection and Antitrust Division. With the exception of two years in the United States Army, including a tour with the 1st Infantry Division Judge Advocate General's Office in Vietnam, I have been an attorney with that office since graduation from Yale Law School in 1968.

You may ask why a representative of a state antitrust division feels qualified to testify on issues of international energy policy and antitrust immunity. Ten years ago, there were few state attorneys general who had antitrust enforcement programs at all—let alone, effective ones. Today, however, the state attorneys general take a very prominent, aggressive and creative role in antitrust enforcement in state and federal courts, thanks in no small part to legislation by Congress in the areas of *parens patriae* and antitrust funding.

Even more remarkable than the general expansion of antitrust enforcement by the Attorneys General, is the dominant role taken by a few states in antitrust litigation against the major oil companies. In this industry, the largest and most significant cases in recent times have been brought not by the federal government, but by state attorneys general. This began in the mid 1960's with the *Western Liquid Asphalt Cases* filed by the States of Washington, California, Oregon, Arizona and Alaska which involved charges of price fixing against Standard Oil of California, Shell, Union, Mobil, Gulf, and Douglas. These cases were ultimately settled with recoveries to the states of approximately \$25 million.

In 1975, the Northwest States of Washington, Oregon, Idaho, Montana, and Alaska filed an antitrust action alleging price fixing and contrivance of product shortage in the fertilizer industry. Again, most of the defendants in this case are divisions of major oil companies, including Chevron (Standard Oil of California), Phillips, Shell and Union.

By far the most significant antitrust case against the oil companies since the *Standard Oil Case* in the early 20th Century, however, is the *Petroleum Litigation*, (MDL 150), now pending in the United States District Court in Los Angeles. This litigation, too, is being pursued by states—Arizona, California, Connecticut, Florida, Oregon and Washington—and alleges systematic price fixing of petroleum products on the West Coast for decades, contrivance of the 1973-1974 petroleum products shortages and elimination of competition in the industry.

As a result of these suits, the three West Coast States of California, Oregon and Washington, in particular, have developed substantial knowledge and experience in the antitrust problems of the oil industry. In fact I think it would

not be an exaggeration to say that states have for some time taken the dominant role in antitrust enforcement in the petroleum industry.

It is this background which I bring to bear upon the important issue before this subcommittee. Based on the experience of the states with anticompetitive problems in the petroleum industry, I see great dangers in the extension of antitrust immunity envisioned by S. 1413 and no compensating advantage to the public.

ANTITRUST PROBLEMS ARISING FROM PREVIOUS GRANTS OF IMMUNITY TO THE OIL COMPANIES

I understand that it was in response to the shortages and crises in 1973-1974 that the oil companies were given the antitrust immunity presently under consideration. Presumably it was felt that the need for coordinated efforts by the oil companies to deal with the shortage outweighed the dangers to competition inherent in such an approach. Yet one of the key allegations in the *Petroleum Litigation* is that this crisis was contrived by the oil companies to drive up prices and to eliminate competition. In this respect it is significant to note that shortages on the West Coast preceded the Arab Oil Embargo, and that gasoline price wars ceased simultaneously throughout the country simultaneously in August of 1972—well before the Arab Oil Embargo.

Significantly, these events were preceded by another series of meetings by the oil companies facilitated by another "suspension" in the application of the antitrust laws. I refer to the meetings from 1971-1973 of the so-called London Policy Group composed of major oil company executives, held after antitrust clearance had been obtained from the Department of Justice pursuant to the Business Review Letter procedure. Thomas Kauper, former head of the Antitrust Division of the Department of Justice, testified during the Senate Multinational Corporation hearings with regard to these earlier meetings that:

"* * * our continuing study of the records of the London Policy Group indicates that what was to be an ad hoc organization has become a quasi-permanent institution for oil company cooperation, and that the discussions and studies within it tend to approach sensitive competitive areas of supply, cost, demand, control of downstream distribution and possible exclusion of independents by means of exclusive buyback arrangements." Multinational Corporations and United States Foreign Policy Hearings, before Subcommittee on Multinational Corporations of the Committee on Foreign Relations, United States Senate, Part 9, p. 48, (5 June 1974).

The sensitivity from an antitrust point of view of high level meetings between the executives of supposedly competing oil companies can hardly be overemphasized. Approval of meetings such as those by the London Policy Group and those held under the auspices of the IEA constitute virtually an open invitation to further cartelization of the oil industry. The meetings themselves provide golden opportunities for exchange of competitive information and formulation of agreements which would be illegal but for the exceptional grant of antitrust immunity.

LACK OF PUBLIC BENEFIT ARISING FROM JOINT ACTIVITIES OF OIL COMPANIES UNDER THE IEA UMBRELLA

Some will say, however, that the danger to competition involved in extending a broad antitrust immunity to meetings of supposed competitors is outweighed by the critical need to solve the nation's energy problems. But we are not forced to examine this question in a vacuum. What is the record of accomplishment under the present system with its antitrust immunity for the oil companies? The facts are rather stark. Gasoline which sold before the 1973-1974 crises for 35 cents per gallon, sold for 65 cents by 1977. In 1979, the country experienced a new shortage which is being questioned by many and is being investigated by our office; and gasoline is now selling for over \$1.00 per gallon.

Where are the public benefits which are so valuable that the risk of immunizing potential antitrust violations was justified?

FORMULATION OF GOVERNMENT POLICY SHOULD NOT BE DELEGATED TO PRIVATE OIL COMPANIES

To my mind there is a rather striking illogic to the underlying theory of the oil company immunity within the framework of IEA. As I understand it, the

function of this agency is to provide cooperation among nations in lessening the impact of increasing prices and potential cutoffs resulting from joint activities by producer nations and to encourage development of alternate energy sources. Why is it that such a dominant role in accomplishing this task is given not to public officials but to the major oil companies, who profit from increased prices and who are so deeply involved in crude oil production arrangements?

Most importantly, I think that the credibility of national energy policies is greatly jeopardized by such an approach. To a great extent this credibility is dependent, in the public's mind, to the perceived autonomy of government action and policy and freedom from control by coordinated action of the major oil companies designed to suit their own private interests. The recent experience of the IEA and of the Department of Energy reflect a dangerous schizophrenia in government policy toward the oil companies. If government controls are required, then they must be exercised independently by public officials, not delegated to the oil companies themselves. If we are to rely on competition to yield results, then the government not only must refrain from encouraging and immunizing coordinated efforts among supposedly competing oil companies but also must vigorously enforce the antitrust laws against anticompetitive activities by the major oil companies whenever they occur.

The antitrust immunity provided to oil companies in the context of IEA activities, is not made more acceptable or less of a threat to competition by the elaborate monitoring system set up under the International Energy Program. It is naive to say the least to assume that such safeguards are adequate, particularly in light of the past experience with such an approach as described by Mr. Kauper in his testimony in 1974. Even with the attempted safeguards, the immunity granted to the oil companies establishes a hopeless maze of statutory and factual complexity to an antitrust plaintiff who would seek to prove an antitrust violation based in whole or in part on concerted or conspiratorial activities which take place behind the shield of IEA.

CONCLUSION

In conclusion, I would urge you not to extend the antitrust immunity by passage of S. 1413. The burden of proof should rest heavily upon any party who seeks immunity from the antitrust laws which have served so long as this Nation's charter of economic freedom. There is nothing in the history of the oil companies' performance while enjoying the benefits of such immunity which would justify its extension.

If such an immunity is given in spite of the compelling arguments against such an approach and the absence of any countervailing benefits to the public, the Bill extending antitrust immunity should be amended to provide safeguards such as the following:

1. State Attorneys General should be allowed access to all records of meetings attended by oil company representatives pursuant to the statute, prior notice of such meetings, and the right to send a representative to attend.
2. Strong penalties should be established for failure to give adequate prior notice, and to maintain records, of such meetings.
3. Federal funding should be provided to appropriate State Attorneys General to allow them to represent the interests of consumers in monitoring activities as to which immunity is claimed.
4. Authority also should be given to State Attorneys General to maintain treble damage and civil penalty actions against oil companies who engage in antitrust violations involving activity under color of the IEA immunity but outside the scope and purposes of the IEC. Suits by Attorneys General pursuant to this authority should not be barred in any way by the rule stated in the Supreme Court's *Illinois Brick* decision, i.e., by the fact that the state or its citizens are indirect purchasers of the goods which are subject to the antitrust violation in question.

While these proposals would be a poor substitute for the outright rejection of S. 1413 which I feel is required by logic and sound public policy, they would at least provide some additional deterrent against the antitrust violations which are likely to result from the immunity which would be granted by the bill.

Again, I thank you for the opportunity to testify before the subcommittee today.

**STATEMENT OF DONALD L. FLEXNER, DEPUTY ASSISTANT
ATTORNEY GENERAL, DEPARTMENT OF JUSTICE**

Mr. FLEXNER. Good morning Mr. Chairman, Senator Thurmond. It is a pleasure to be here this morning to discuss the International Energy Agency and the defense that is provided in respect to oil company participation in the voluntary agreement and plan of action relevant to the International Energy Agency. Mr. Chairman, I have a rather lengthy statement, as you know, and I would ask that it be made part of the record and I will orally summarize the contents of that statement this morning.

Senator METZENBAUM. Please proceed, your entire statement will be included in the record.

Mr. FLEXNER. I begin, Mr. Chairman, by going back to what I think is a first principle that ought to govern our discussion of the utility of the antitrust defense. I think it should be clear from past experience that the United States, both from a national security as well as an economic security aspect, needs some mechanism for managing a shortage where that shortage is imposed by external events beyond the control of the United States.

Senator METZENBAUM. In the Iranian crisis, did it work?

Mr. FLEXNER. No, sir, it did not, but I should add that the shortage never reached the level that required the trigger that sets off the emergency sharing mechanisms of the International Energy Agency. The 7- to 12-percent shortfall which would set into motion the various allocations mechanisms that have been established under IEA was never set off. However, as we both know, a very serious impact on the United States did occur and, as the chairman knows, the Department of Justice is mandated by the President of the United States to investigate the causes of the gasoline shortage and we have been doing that now for a couple of months. We expect, by November, to have concluded that investigation, at least one aspect of it, Mr. Chairman, which includes consideration of the effects of the DOE regulations. In regard to your question of Mr. Boeder, I should point out that we have consulted the State attorneys general as well as other State officials on the effects of DOE regulations. Indeed, my staff has met with Mr. Boeder's staff for about 7 hours on the subject of the gasoline shortage; we have consulted on that issue and it is an important one and we expect to make some findings.

Senator METZENBAUM. This had nothing to do with IEA.

Mr. FLEXNER. No, sir.

Senator METZENBAUM. This had to do with the shortage?

Mr. FLEXNER. Well, it goes back to your question of the causes of the shortage and I just wanted to reassure the Chair that that is under the investigation.

Senator METZENBAUM. Mr. Flexner, so that the record is straight, the White House saw fit to put out a whitewash statement about the oil industry some weeks ago on this whole issue. You, in the Justice Department, disassociate yourself from that position?

Mr. FLEXNER. Well, I am not sure, Mr. Chairman, with all due respect, that I would subscribe to that characterization. I think what was issued was a preliminary or tentative report by the Department of

Energy and it only purported to be a preliminary or a tentative report. Sentaor METZENBAUM. It was based only upon API figures, wasn't that it?

Mr. FLEXNER. Well, I am not an expert, sir, in all of the sources of information relied upon; I don't think it purported to be a final statement of views of the Department of Energy and it certainly did not represent our views. We are conducting an independent investigation and we will make our findings known based on our own information and analysis.

Senator METZENBAUM. But actually, when they put the statement out they mentioned the Department of Justice, didn't they? In the study being made?

Mr. FLEXNER. They mentioned the Department of Justice but I don't think they represented that we joined in their report.

Senator METZENBAUM. All right, but I think inferentially they did.

Mr. FLEXNER. Well, I would certainly want to disabuse the chairman of any notion that we did join in that report. We are preparing our own report and have been from the start. Obviously, I think it would be helpful to the Department of Energy if they had our views and we would make our views known to them and we would certainly want to have their views, as well.

Senator METZENBAUM. This is probably not pertinent to this hearing, but the fact is that the President made a major statement on this, saying that he was going to have the matter investigated. He hired a private accounting firm, and never waited for the private accounting firm's report. They asked the Department of Justice to check into it; they never waited for the Department of Justice's report and they did then put out a statement and it was, indeed, a whitewash and was, indeed, based upon API figures. If there is anything that causes people to lose confidence in their government, it is that kind of activity. The Chair is very incensed about it; it has no relevance to this hearing but I mention it since you had seen fit to talk about that.

Mr. FLEXNER. I obviously made a serious mistake.

Senator METZENBAUM. You rubbed the wrong—

Mr. FLEXNER. I should point out, so that the record is clear from my perspective, that it is not my impression that the White House endorsed that statement as the final views on the investigation, and second, I know that the President expects a final report from the Department of Justice and he will get that.

Senator METZENBAUM. There are 215 million Americans; 214,990,000 didn't get the emphasis that it wasn't the final report, that it was some kind of interim report. The other 10,000 understand it. They are in the oil industry and they are special kinds of consumers; the others missed it.

Mr. FLEXNER. If that is true, it is unfortunate and there is no doubt that how the thing was played in the press certainly contributed to that impression. Fortunately, the Government has no control over that.

Senator METZENBAUM. Please proceed now that I have given vent to my own emotional reaction to that matter.

Mr. FLEXNER. Maybe that subject is over and done with.

Mr. Chairman, I would go back to the point that you raised about the antitrust defense, whether it is terribly broad or narrow. I think

one of the advantages of this statute is that the antitrust defense, in my judgment, and I have litigated issues of primary and exclusive jurisdiction in various antitrust cases, is narrower than a blanket antitrust immunity. Under a blanket antitrust immunity, the situation would be as follows: For example, if the ICC approves the section 5(a) agreement under which rate bureaus can agree on rates, the antitrust laws would be totally and completely displaced with respect to any conduct taken under that agreement.

Here, the defense only covers those acts which are in conformity with the law, the regulations, the recordkeeping requirements and which have been carried out pursuant to and under government scrutiny, so that there is room for challenge and inquiry if that becomes appropriate should an enforcement agency reach the conclusion that the apparently lawful activity was merely a subterfuge for illegal activity or, if indeed, the activity had occurred outside the scope of the voluntary agreement or plan of action.

Senator METZENBAUM. Do you feel that the language setting forth the burden of proof required to show that it is anticompetitive, and is too much of a burden to expect the plaintiff to make?

Mr. FLEXNER. Are you referring to that part of the antitrust defense which imposes, rather requires, that a demonstration be made that the purpose of the conduct was to achieve some anticompetitive end to overcome the defense?

Senator METZENBAUM. Yes, the specific intent language.

Mr. FLEXNER. I think that the purpose of that language is to impose a burden where, I think, a burden would be appropriate if the conduct, on its face, is in conformity with regulations. If the conduct, on its face, is pursuant to a voluntary agreement or plan of action, if the conduct occurred under the auspices of the International Energy Agency and under the scrutiny of the enforcement agencies, it should be entitled, I believe, to some presumption of legality.

The burden that such conduct be demonstrated to have had the purpose of being anticompetitive, in those circumstances, I think, is appropriate. Now that doesn't mean, Mr. Chairman, that you are foreclosed from all inquiry. As you know, having been a former trial lawyer, you can demonstrate, if you believe the facts to warrant it, that a course of conduct reveals an anticompetitive purpose without having a document which says that the purpose of that conduct was anticompetitive.

However, I think that the burden which you asked me about is appropriate where the conduct is specifically that which occurs under the regulations or the statute. I, Mr. Chairman, believe that the safeguards that have been imposed to govern the conduct of oil companies and the oil industry with respect to the International Energy Agency have proven themselves to date to be adequate. All meetings of industry groups in conjunction with IEA committees are monitored by government employees. Information that is submitted to the IEA Secretariat is cleared, scrutinized, and studied by the enforcement agencies, and the processes by which that information is obtained is cleared as well.

In the end, should there be an emergency and should there be an occasion for redistribution of petroleum supplies in a shortage situation, it is important to understand what would occur: First would be the ordinary commercial conduct of the oil companies with respect to

international oil movements and in respect of that unilateral conduct or joint conduct the antitrust defense would not apply at all.

Second, where it becomes necessary for the allocation rights of the various members of the International Energy Agency to be dealt with by the mechanisms under IEA, the system would essentially involve close government participation. After voluntary offers were made by the participating oil companies, if that was inadequate to deal with the shortage, the rest of the allocation would be accomplished through the dictates or sovereign mandate of respective states. I think in those circumstances, it is fair to say that the oil companies would not be making the decisions, but rather governments would be making the decisions.

Our reports to date, and I think there have been six of them, and we have another that is due very shortly to the Congress and to the President, have concluded that there is no evidence of any adverse affect on competition and small business that we have been able to detect. In conclusion, from our perspective, Mr. Chairman, the continuation of the antitrust defense is both appropriate and necessary to the continued viability of the International Energy Agency, which we view as important to the national interests of the United States.

I thank you.

Senator METZENBAUM. There have been some feelings that this administration and the Antitrust Division have been less than effective in dealing with the oil companies of this country. Before this administration came into office they addressed themselves to the horizontal divestiture issue in very strong terms and then totally reversed that position after coming into office. Mr. Shennelfield testified to that effect.

At one point the Attorney General of the United States testified before Congress with respect to divestiture as pertaining to the pipeline issue, and that was the end of that effort. I never saw any legislation come up from the Antitrust Division.

Today you indicate that the exemption from antitrust laws for the oil companies is just "hunky dorry." My question to you is—you have been with the Department since when?

Mr. FLEXNER. Since 1967.

Senator METZENBAUM. Can you tell us, since January 1977, what if any action has been taken by this Department of Justice to indicate a concern about oil company activities, whether by way of initiating special investigations other than the one the President asked you to do, or by way of bringing any actions or taking any conduct that would indicate that, indeed, the Antitrust Division is just that? The FTC has moved far more effectively, as I see it, than you.

Mr. FLEXNER. Well, Mr. Chairman, I must say that as someone who has grown up in the Antitrust Division, I have a good deal of pride at the way the Antitrust Division has approached his responsibilities with respect to the oil industry and the other industries of the United States which it is responsible for overseeing. The most important investigation that we have, and I think the one that is most critical to this inquiry, to many, many concerns which you, of the Antitrust Subcommittee, have had over the years and which you will continue to have as our international oil investigation. That was commenced in July 1977, and it is a massive investigation involving full and com-

plete discovery of the nature of competition in international oil markets and critically the market affected by dealings in the Persian Gulf. I don't believe that there is any investigation by any antitrust authority that rises to the level of the importance of that investigation or that more critically affects judgments that are to be made about the competitiveness of the oil industry.

The Division, John Shenefield in particular, has been unsparing in the resources that have been devoted to that investigation. We have as fine a group of attorneys as I have ever been associated with running the investigation, economists, paralegals, information support systems and I think we are making good headway and I think we are learning what we need to know in order to make judgments and make decisions about whether or not to institute lawsuits.

Senator METZENBAUM. When do you think that would be concluded?

Mr. FLEXNER. My expectation, Mr. Chairman, is to have a recommendation from the staff in the spring of 1980.

Senator METZENBAUM. Mr. Flexner, I commend the Department for that. But I ask you, with energy prices up 46 percent since the first of the year, with everybody recognizing that the major factor in increased inflation is energy prices, how can the American people get any comfort from knowing that their Antitrust Division would take approximately 33 months to conclude an investigation which is merely the first step. Isn't this the kind of concern that the people have that Government is so ponderous and bureaucracy works so slowly that they can't turn to their Government anymore and hope for any protection.

Mr. FLEXNER. Well, Mr. Chairman, there are some things that can, and other things that cannot, be handled in 1 day or 1 week's work. First of all, it is important to separate two questions.

First has to do with the ability of the United States in the conduct of its foreign relations and obviously there are certain activities affecting the price of oil that are not directly attributable to oil companies, but rather are attributable to the decisions of sovereign nations and that distinction has recently been reflected in the opinion of Judge Hauke in dismissing the IAMB OPEC case on the west coast.

On the matter of the pace of the investigation, certainly you have a perfect right and role in questioning whether that has moved as quickly as it should, whether the Antitrust Division has done its job as well as the jobs that should be done. I can only say to you, sir, that it is a highly complex industry; we are dealing with a large number of companies; we are dealing with many, many thousands of documents. Understanding the relationship, understanding the history of that market is a difficult and complex inquiry. We have a responsibility as law enforcement officers only to bring action if we feel that we can win. That was Judge Bell's policy and I believe it will be the Attorney General's policy. Meeting that standard is not something that can be done in an industry as quickly as this and in a market as complex as the international oil market as fast as we might like.

Senator METZENBAUM. That is the only action that the Department has undertaken since this administration began, vis-a-vis the oil companies.

Mr. FLEXNER. We had three investigations pending, Mr. Chairman, one was in the natural gas industry, that is still pending; one is in the

international oil market, that is pending; and the gasoline shortage investigation which was requested by the President, and that is pending. Now that doesn't—

Senator METZENBAUM. What we really have is a pending Antitrust Division.

Mr. FLEXNER. We have investigations that are pending but I don't believe that it is fair to conclude that that reflects inattention on the part of the Antitrust Division. I think it ought to be noted that a good deal of the oil industry is now subject to Federal regulation and the Antitrust Division has been quite active in that area. We have been active participants in the matters of reforming rate regulation of pipelines which are directly affecting the pricing of oil.

Senator METZENBAUM. Are you suggesting by that that in your monitoring you have been successful in keeping the price down?

Mr. FLEXNER. That is not our role, Mr. Chairman.

Senator METZENBAUM. No, but it is your role to further competitive forces and competitive forces would keep the price down.

Mr. FLEXNER. Competitive forces would keep the price down at a competitive level and we have no evidence to date that even though prices have gone up, that that reflects the fact that the industry is non-competitive or that there has been a conspiracy. It may reflect the fact that Government action has been ineffective or counterproductive and that is a matter that we will address in our report on the gasoline shortage. It is a matter that we have addressed in numerous filings before the Department of Energy and it is certainly a matter that we have addressed in filings before the Federal Energy Regulatory Commission.

Senator METZENBAUM. Mr. Boeder just testified that they have had no assistance, or no indication of assistance in connection with the case that six States have against the oil companies. Does that indicate a lack of enthusiasm?

Mr. FLEXNER. Mr. Chairman, I don't know what assistance Mr. Boeder has in mind. We have been in consultation and in touch with the chief of that trial; the chief of the San Francisco office, at any request has personally reviewed documents and transcripts in that matter and I think it would be inappropriate of me to comment on that litigation as a Federal law enforcement officer and I would ask that the chairman not ask me to do that, but to the extent—

Senator METZENBAUM. I haven't.

Mr. FLEXNER. To the extent, we haven't been asked for any assistance as far as I can tell. I don't know what kind of assistance would be appropriate. We have not, on the basis of our review of that record, determined that any action on our part independent of that case would be appropriate.

Senator METZENBAUM. Would you tell us whether or not the Antitrust Division is going to involve itself in Shell's recently announced acquisition of Belridge Oil Co. in California, a \$3.7 billion deal, and the largest acquisition of one oil company by another in the Nation's history.

Mr. FLEXNER. I know that the energy section has requested authority to begin a preliminary investigation. I know that they will receive that authorization. I am quite sure that we will have discussions with the Federal Trade Commission on whether we or they should

conduct that investigation; but we haven't had those discussions yet, so I won't predict the outcome.

Senator METZENBAUM. Mr. Flexner, do you have concerns about unnecessary exchanges of inventory data during the last test, the setting of standard gravity differentials by the IWP, access of IAB participants to data about level of imports into IEA countries? The FTC has indicated that they had such concerns. Do you also have those concerns?

Mr. FLEXNER. Well, we are looking—I will of course study with great care the FTC's analysis and findings in respect of that issue. I should say that my understanding is that the information regarding imports and import prices would have been submitted would be nonproprietary information, that is, public information. The Chairman should be aware that the amount of information on imports and import prices that is public, published by Government agencies such as our own and which I think it appropriately published, is very great indeed and, therefore, I would while I am extremely interested in the FTC's conclusions and will study them with great care, I think that we ought to approach the issue with some caution given the amount of public information to which relates to imports.

Senator METZENBAUM. Why haven't you issued the requisite regulations on recordkeeping?

Mr. FLEXNER. Sir, I think we have requisite regulations on record-keeping. We consulted every step of the way with DOE in the promulgation of those regulations. I think they are effectively the regulations of the Attorney General inasmuch as they clearly reflect our judgments on the appropriate procedures for selecting and maintaining information.

Senator METZENBAUM. Have you promulgated rules concerning maintenance of necessary and appropriate records?

Mr. FLEXNER. Sir, there are such rules. They have been promulgated by the Department of Energy after close consultation with the Attorney General's staff and I regard them as within the spirit of the statute's dictate that there be such regulations.

Senator METZENBAUM. Well, the statute says that you have the responsibility—not the DOE and it says that you should, in consultation with the Federal Trade Commission and the Administrator, promulgate rules concerning the maintenance of necessary and appropriate records.

Mr. FLEXNER. Those are, for purposes of that statutory section, Mr. Chairman, the rules that have been issued are effectively our rules. Those regulations governing the maintenance and procedures for selection of data reflect our judgment.

Senator METZENBAUM. You are a good enough lawyer to know that if the law says that you are to do it, it is insufficient to say that somebody else is going to do it now.

Mr. FLEXNER. Well, Mr. Chairman, I will review that carefully and if it appears that, notwithstanding the fact that the regulations that now exist are in the spirit of the statute that we have to make them formally the Attorney General's, we will do that.

Senator METZENBAUM. Will you advise me?

Mr. FLEXNER. I certainly will.

Senator METZENBAUM. Do you know whether or not the oil companies have used IEA data or the opportunity afforded by IEA meetings to engage in anticompetitive activity?

Mr. FLEXNER. Mr. Chairman, our six reports so far have evaluated that question and have concluded that we have no evidence that that is the case.

Senator METZENBAUM. Have you looked at any company files on IEA?

Mr. FLEXNER. I am advised that members of my staff are about to undertake such inspection.

Senator METZENBAUM. This is prospective.

Mr. FLEXNER. Prospective. I don't know whether we have done it so far.

Senator METZENBAUM. And this is only after 4 years of its being in existence?

Mr. FLEXNER. If it is prospective, the answer would be "yes."

Senator METZENBAUM. I think that is a reasonable conclusion, Mr. Flexner.

In the Justice Department's report on the Interstate Compact to Conserve Oil and Gas on October 14, 1978, your Department stated "similarly the collection by the Texas Railroad Commission of detailed industry operational data and supply-demand forecasts not only for Texas but for areas far beyond its borders and the dissemination of that information to industry participants at TRC hearings and elsewhere may inadvertently facilitate the signaling among competitors of current and near-term future business conduct." If such data exchanges are a problem with respect to IOCC, the Interstate Oil Compact Commission, why aren't they a problem with respect to IEA data exchanges during an emergency?

Mr. FLEXNER. Because they wouldn't occur.

The problem that we noted with respect to the Texas Railroad Commission was that none of the safeguards that apply to the IEA do apply to the Texas Railroad Commission situation. There is extremely current live proprietary data that is being both collected and disseminated on a company specific basis, and that is a serious problem which is the reason we brought it to the Congress attention.

In respect of the IEA—

Senator METZENBAUM. During an emergency, they actually occur, don't they? It is just the fact that they are cleared.

Mr. FLEXNER. No; they don't. I believe that there is no dissemination of disaggregated company specific data even during an emergency.

Senator METZENBAUM. During an emergency, the companies have a right to, under clearance, to talk with each other, don't they?

Mr. FLEXNER. There would be no occasion, Mr. Chairman, that I am aware of that would involve intercompany exchanges of confidential information. Decisions as to allocations of products would be made by voluntary offers from the oil companies to IEA and then mandated redirection of supply by individual companies.

Senator METZENBAUM. Mr. Flexner, I think it would be desirable if you would recheck the situation on that. We have a contrary conclusion and certainly you are answering to the best of your knowledge

and ability, but we do believe that that answer is not correct. Therefore, we would appreciate your checking and advising us further by letter.

Mr. FLEXNER. I would be happy to do that, Mr. Chairman. I can assure you that our written advice will give you with precision the full extent of any information exchange that would occur in an emergency if such exchange would be possible.

Senator METZENBAUM. Under the Code you are required to report to Congress regularly with respect to your review of the voluntary agreements and plan of action to implement the IEP. How soon are you supposed to get us those reports?

Mr. FLEXNER. Well, I think our reporting requirement is every 6 months and you should have the next one very soon. I understand the drafts are on the way through the review process and I should get it shortly. As soon as I do, it will be transmitted to you.

Senator METZENBAUM. Aren't we supposed to get them every 6 months?

Mr. FLEXNER. Yes, sir.

Senator METZENBAUM. And, isn't the last one we received dated September 1978?

Mr. FLEXNER. That's correct.

Senator METZENBAUM. And hasn't it been a fact ever since the reporting requirement was involved that you constantly have been behind? When I checked it last time, many months ago, I couldn't find anything that was current.

Mr. FLEXNER. Well, Mr. Chairman, I must correct the record. We submitted a report in March 1979.

Senator METZENBAUM. Apparently we don't have that and the record will stand corrected.

Mr. FLEXNER. I wish to leave no doubt on this. We owe you and are obliged to provide you a report every 6 months. The only delay that there would be is that we would wait the 6 months, we would draft a report, obviously the drafting process and the review process would involve some time lapse.

Senator METZENBAUM. Thank you very much, Mr. Flexner.

Senator THURMOND.

Senator THURMOND. Mr. Flexner, we are glad to have you with us. I just have a few questions here.

In your statement, you commented that your Department of Justice reviews have consistently found that the antitrust provisions in section 252 of the EPCA, the regulations promulgated thereunder and the voluntary agreement itself have adequate safeguards against any possible adverse impact on competition and small business that might result from oil company participation in the IEA activities. Now, what in your judgment would be the effect of the expiration on the international energy program? Expiration of this law?

Mr. FLEXNER. I think, Senator Thurmond, that it would be unlikely that major oil companies would endure the risk of participating in the program. I think that they would be deterred from doing so by the possibility of prosecution for any exchange of information or discussion that might be construed as anticompetitive so that I think the defense coupled with safeguards is an important factor in insuring the continuation of the IEA.

Senator THURMOND. What would be the effect if they did not have the antitrust immunity?

Mr. FLEXNER. If they did not have the antitrust defense, they would be subject to liability for those actions which they now undertake pursuant to rule and regulation. That is to say that it could be alleged that the submission of proprietary data which is now reviewed and cleared by the Attorney General to the International Energy Agency to engaging in meetings as advisory groups constituted situations that would lead to the inference that agreements were being reached and thus would be subject to the antitrust laws. So, the defense is an important vehicle for insuring that those limited kinds of conduct are not subject to unnecessary antitrust.

Senator THURMOND. Other than the antitrust immunity, what other immunities or understandings exist with respect to the non-U.S. companies and the European Economic Community in the international energy program?

Mr. FLEXNER. I know of none, specifically, Senator Thurmond. There may be some under the European Economic Community. I can endeavor to supply that information in writing, if that is your wish.

Senator THURMOND. I wish you would do that.

Now, in your concluding paragraph, you state that the Department supports the extension of the provisions of section 252 of the EPCA, particularly in light of current conditions in the international oil market, we believe that the continued availability of the statutory antitrust defense, coupled, of course, with continued antitrust safeguards and active antitrust monitoring is in the national interest. Since the October 31, 1979, date is so close upon us, if 1413 is enacted, are appropriate mechanisms and contacts ready to move forward with minimal disruption of IEP activities?

Mr. FLEXNER. Could you repeat the last part of your question, Senator, I am sorry.

Senator THURMOND. Since the October 31, 1979, date is so close upon us, if 1413, the bill that is being proposed here, is enacted, are appropriate mechanisms and contacts ready to move forward with minimal disruption of IEP activities?

Mr. FLEXNER. I think they are, Senator. I think we have the safeguards in effect; I think we have the personnel; I think we are ready to move forward.

Senator THURMOND. The chairman asked you a question that I just want to ask a point on. The chairman said that the White House has whitewashed the matter referred to. Does the Justice Department work closely with the White House and is the Antitrust Division of the Justice Department part of this whitewash or not?

Mr. FLEXNER. Senator Thurmond, I don't—I would hope that I would personally never be associated with a whitewash. I don't believe we are associated with a whitewash and I can assure you that the report that the Department of Justice will produce at the conclusion of its investigation will be a full and fair analysis of the causes of the shortage which worked such a substantial hardship on the American people. I can only say that we will do the best job we can as professionals and as an independent enforcement agency. We will stand by the results of that analysis before this committee and before the President.

Senator THURMOND. So, if there is a whitewash, you don't feel the Justice Department had a part in it and so it must be on the part of the White House alone.

Mr. FLEXNER. We are no part of any whitewash, Senator, and I have no knowledge of any whitewash.

[The prepared statement of Mr. Flexner follows:]

PREPARED STATEMENT OF DONALD L. FLEXNER

I appreciate the opportunity to appear before you today to express the support of the Department of Justice and the Administration for S. 1413. The proposed legislation would extend, through January 19, 1986, the antitrust defense accorded by section 252(f) of the Energy Policy and Conservation Act (EPCA), 42 U.S.C. § 6272(f), to U.S. oil company participation in voluntary agreements to assist in carrying out the allocation and information provisions of the Agreement on an International Energy Program (IEP).

This Agreement grew out of talks among a number of oil-consuming nations initiated by the Secretary of State in February, 1974. These talks were initially aimed at devising a mechanism for sharing oil supplies in the event of future curtailments, though the objectives gradually expanded to cover a number of other energy areas. After lengthy negotiations, the United States and 15 other countries entered into the IEP Agreement in Paris on November 18, 1974. Since that time, the total number of participating nations has increased to 20. I do not intend to describe the IEP in detail, but some familiarity with its terms is necessary to understand the role played by U.S. oil companies.

One element of the Agreement was the establishment of an International Energy Agency (IEA), which was made an autonomous arm of the Organization for Economic Cooperation and Development (OECD) and was located in the OECD's Paris headquarters. The IEP Agreement provides for a Governing Board and four Standing Groups within the IEA organization. The most important of these Groups in terms of our oil company monitoring responsibilities is the Standing Group on Emergency Questions (SEQ), which carries out functions related to the emergency preparedness of member nations. These functions include: establishment of emergency reserves; development of demand restraint measures; development of an organization and procedures for allocating supplies; activation of an emergency allocation system; and institution of a special section of the IEP information system required for the efficient operation of an emergency allocation plan. A second intergovernmental body, the Standing Group on the Oil Market (SOM), also interacts with the oil companies. It carries out functions related to the General Section of the Information System, which is intended to enhance the IEA member governments' understanding of the international oil market. Under Chapter VI of the IEP Agreement, the SOM also consults individually with oil companies on various aspects of the international oil market.

The Agreement also provides for a Standing Group on Long-Term Cooperation and a Standing Group on Relations with Producers and Other Consumer Countries, which carry out the functions indicated by their titles. However, the work of these two groups, while extensive and important, is limited to intergovernmental activities, and thus bears no relation to the monitoring responsibilities of the Department of Justice under the EPCA. Along with the four standing groups, the IEA also has a substantial Secretariat housed in the OECD headquarters. The Secretariat, the SEQ, and the SOM have been the focal point for oil industry advice and consultation with the IEA.

I would now like to describe in somewhat greater detail the background to activities of the Department of Justice in relation to the IEP. The IEP Agreement clearly envisioned the use of international oil industry advice and assistance in implementing its emergency allocation and information-gathering provisions. It explicitly provided for the formation of an international advisory board from the oil industry to assist the IEA in ensuring the effective operation of emergency allocation measures.¹ In activation of emergency information systems, it also called for consultation with oil companies,² which it defined as "international companies, national companies, non-integrated companies and other en-

¹ IEP Agreement, Articles 19(7) and 23(4).

² IEP Agreement, Articles 19(6), 30 and 35.

titles which play a significant role in the international oil industry."³ Even while final details of the IEP Agreement were being negotiated by the participating governments in October 1974, representatives of those governments sought a meeting with a number of international oil companies to seek to enlist the cooperation and consultation of petroleum companies in intergovernmental implementation of the IEP. Because participation by U.S. companies in such a meeting raised antitrust issues, the Deputy Legal Advisor of the State Department wrote to the Assistant Attorney General in charge of the antitrust Division to seek our views on the legality of such participation. After reviewing the facts and the agenda for the proposed meeting, Assistant Attorney General Kauper replied on October 18, 1974, that under the particular circumstances of the proposed meeting as described to the Department, participation by the invited U.S. oil companies would not violate the antitrust laws.

Thereafter, a meeting was held in London on October 23-24, 1974, between U.S. and other governmental representatives and representatives of a number of oil companies, including five U.S. companies. Since use of industry advisory groups in dealing with highly technical areas was a routine practice with most governments, the discussion envisioned creation of two industry working parties: one to begin providing advice related to the emergency information and allocation provisions of the IEP; and the other to develop initial advice on implementing the General Section of the IEP's Information System.

These plans were submitted by the State Department for Antitrust Division review. We took the position that continuing approval of U.S. company participation in IEA activities under such a quasi-business review clearance was not appropriate. Rather, we indicated that if oil company assistance to the IEA were deemed necessary, the U.S. companies should enter a voluntary agreement under section 708 of the Defense Production Act, with appropriate antitrust safeguards included by the Government. Because the State Department believed that a need for the emergency machinery might arise very soon, however, it urged that these industry groups be permitted to commence their work immediately, before a voluntary agreement could be established, and before the IEA Secretariat could be organized. Accordingly, based on the information furnished to us, Assistant Attorney General Kauper gave a limited concurrence to initial meetings of the industry groups in late 1974.

While these meetings went forward, with representatives of the State Department in attendance, the State Department and the Federal Energy Administration, now the Department of Energy (DOE), were developing a preliminary draft voluntary agreement. This draft agreement was first discussed extensively with other U.S. Government agencies and then with potential industry participants and the public. Representatives of the Department of Justice and the Federal Trade Commission participated very actively in these meetings in which the draft agreement was further developed and refined, in order to ensure the incorporation of adequate antitrust safeguards. On March 28, 1975, the Voluntary Agreement pursuant to section 708 of the Defense Production Act was officially approved, and formal requests for participation of oil companies were issued.⁴

When the Voluntary Agreement was activated, the IEA created three main industry groups to provide it with advice and assistance. The two working parties were reorganized as the Industry Advisory Board (IAB) and the Industry Working Party (IWP). The IAB—with three subcommittees—was to provide advice concerning emergency allocations, while the IWP was to assist in establishing the general information system. A Reporting Company Group was also formed, and now includes all 34 companies participating in the IEP. Its members, accounting for 80 to 90 percent of the international trade in free world oil, are called upon to provide international oil supply data to the IEA and to assist the IEA in any actual allocation of oil during an emergency. Much later, in 1977, an Industry Supply Advisory Group (ISAG) was formed to serve as part of the IEA's Emergency Management Organization in Paris, along with the IEA Secretariat and an Emergency Group from the intergovernmental Standing Group on Emergency Questions.

On March 21, 1976, section 252 of the EPCA became effective and the Voluntary Agreement under the Defense Production Act was terminated. By that time, DOE

³ IEP Agreement, Article 26.

⁴ Details of the Voluntary Agreement and the particular antitrust safeguards incorporated in it have been included in prior reports of the Attorney General to Congress.

regulations to govern voluntary agreements under the EPCA had been drafted and promulgated. A replacement voluntary agreement—the one presently in effect—had been developed, approved by the Attorney General, and submitted to proposed oil company participants for their acceptance. Operations under its authority commenced in April 1976.

Since the establishment of the IEA, the Department of Justice has submitted six reports to Congress on the activities of U.S. oil companies undertaken in relation to the IEP: the first pursuant to section 708(e) of the Defense Production Act of 1950, as amended, and the next five pursuant to section 252(i) of the EPCA. Each of these reports was based upon our surveillance of all permissible industry activities under the Voluntary Agreement. We have consistently found that the antitrust provisions in section 252 of the EPCA, the regulations promulgated thereunder, and the Voluntary Agreement itself have been adequate safeguards against any possible adverse impact on competition and small business that might result from oil company participation in IEA activities. We have discerned no such impact to date.

The reasons for the absence of any adverse impact are not hard to find. They are: (1) the limited applicability of the antitrust defense; (2) the antitrust safeguards imposed on permissible oil company activities; and (3) the degree of detailed monitoring of these activities carried out by the Antitrust Division and the Federal Trade Commission.

First of all, the antitrust defense provided by U.S. law has very limited scope. Since 1975 it has applied to only three situations: first, to activities conducted in connection with the two tests of the IEA emergency system, each of which used simulated emergencies and distorted data; second, to unilateral submission of needed information to the IEA Secretariat by individual companies, under appropriate restrictions against further disclosure in disaggregated form; and third, to a regular series of industry advisory group meetings. Under the Voluntary Agreement the participating companies are permitted contacts outside these meetings only to the extent of circulating draft papers prepared for consideration at the next meeting and other recommendations with each other on purely procedural matters. Copies of such documents and records of such communications are required to be filed in timely fashion with the U.S. Government.

I would like to reemphasize that the antitrust defense under the Act has so far extended only to these three activities. Contrary to some published reports following the onset of the Iranian crisis, we have no reason to believe that the oil companies have engaged in any joint emergency allocation action under the aegis of the IEA, nor in any other type of action under that aegis beyond what I have already described. Furthermore, any joint activities to allocate supplies or restrain trade in which they might have engaged in response to the current situation in the international oil market would be fully subject to scrutiny and prosecution under the antitrust laws if they occurred.

The activities to which the antitrust defense applies are not only limited in scope, they are also carefully circumscribed by a variety of antitrust safeguards. Notice of and the agenda for each meeting must be published in advance. Discussion must be limited to that agenda, which, of course, may cover only subjects legitimately related to the allocation or information functions of the IEA. A U.S. Government representative must be present at each meeting, and a full and complete record must be made by the U.S. Government, usually by means of a verbatim transcript.

Most importantly, no company-specific information or data can be disclosed at these meetings without specific advance approval by the Department of Energy and the Attorney General. Let me emphasize that since 1975, with only two exceptions, there has been absolutely no discussion of specific company information at any of the industry advisory meetings held under IEA auspices. Industry discussion to assist in developing the IEA emergency allocation scheme and its information-gathering system have uniformly been conducted in abstract terms and on a general level.

The two exceptions have involved, first, the conduct of two IEA allocation systems tests in Paris and, second, a limited series of consultations by the Industry Advisory Board with the IEA on the Secretariat's periodic evaluations of the international oil market situation following the onset of the Iranian crisis. In each case, several U.S. Government clearances to exchange such information were required and these were narrowly drawn with respect to subject-matter, occasions and circumstances for disclosure. In each case, too, the actual disclosures of cur-

rent raw company data which have occurred have been very few and of virtually no competitive significance.

During an emergency, oil company activities receiving the antitrust defense would likewise be limited and subject to similar antitrust safeguards. For example, activities of the Industry Supply Advisory Group assisting the IEA in Paris will be specifically limited in scope, will be in conformity with specific timetables and procedures, and will be subject to appropriate restrictions on the subjects for discussion. These activities will also be subject to surveillance and recordation requirements similar to those applicable to pre-emergency industry meetings. Companies undertaking the specified types of actions to which this defense applies will have to furnish to the Government an adequate record of such actions and associated communications.

Moreover, the range of activities receiving the antitrust defense—assuming full compliance with applicable requirements and safeguards—will also be quite limited. Individual company action to adjust to emergency conditions in whatever way it saw fit would be considered normal commercial activity not under the IEP and thus not covered by the antitrust defense. The defense would cover only the monthly submissions of data to the IEA on these projected and concluded commercial activities, plus the additional international movements of oil diverted from individual company planned schedules in order to correct member countries' imbalances in their shares of available supplies. For the antitrust defense to attach, these movements covered under the IEP would have to have been specifically volunteered to and accepted by the IEA or mandated by the member country with jurisdiction over the particular company.

These diversions from normal commercial oil company movements would be wholly in international trade, not within individual countries. They would aid in allocating supplies among IEA member countries, not among oil companies. Once these supplies enter a member country, it is the responsibility of the government organization contemplated in the IEP—the country's National Emergency Sharing Organization—to reallocate supplies to ensure that each company operating within its borders, international or domestic, receives a fair share of available supplies. We estimate that these IEA-directed oil movements among countries would involve only 10 to 15 percent by volume of total international trading in crude oil and petroleum products. All other oil industry activities, both domestic and international, beyond what I have described, would be outside the IEA plan and would remain fully subject to all applicable laws, including the antitrust laws.

The third factor I have mentioned is the detailed monitoring of permissible industry activities by the antitrust agencies. As indicated above, these activities have essentially been confined to attendance at industry advisory group meetings. In the three-and-one-half years since the effective date of section 252 of the EPCA, there have been a total of 136 industry advisory group meetings or IEA intergovernmental meetings at which representatives of an industry group were present. One hundred and seven of these were concerned with aspects of the IEA's emergency allocation system and 29 with the general information system.

In our monitoring we have not relied merely on study of the transcripts of these meetings or the reports of other Government agencies with representatives in attendance. The successive reports of the Attorney General have included a running list of all these meetings, showing the date, venue and particular industry group, and have identified the antitrust agency staff that was present. These reports show that all but a handful of meetings were personally monitored by staff of the Antitrust Division. Meanwhile, most of the meetings we did not attend were attended instead by staff of the Federal Trade Commission under our informal arrangement for sharing these responsibilities.

Since the beginning of 1977, the Antitrust Division has had an average of three attorneys regularly assigned to IEA affairs. This staff has recently been increased to four. The FTC's Bureau of Competition also maintains a similarly sized staff for this assignment.

The Second Allocation Systems Test (AST-2) held by the IEA in the Spring of 1978 provides an illustration of the extent of our monitoring activity, as well as an indication of what our role would be should the IEA's allocation system be triggered. During the seven weeks of AST-2, we had at least one attorney, and frequently two attorneys, on the test site at all times. Three attorneys from our Energy Section rotated in three-week shifts, with nearly a week of overlap between each shift in order to assure that each monitor was fully familiar with test activities before his predecessor departed. Moreover, in carrying out our

specific on-site monitoring functions, we coordinated closely with the Federal Trade Commission staff which also monitored the test. I should mention that DOE and the State Department also provided personnel for the surveillance staff, so that at all times there were at least five U.S. Government representatives monitoring the test. The Government's effort would be at least this extensive in the event of an actual emergency.

What I have indicated about our IEA staffing in the event of an actual emergency presupposes, of course, that the present provisions of section 252 of the EPCA are extended. In the absence of such an extension, with its attendant antitrust defense, it appears highly unlikely that U.S. companies would continue to assist the IEA, presumably because the companies would be unwilling to risk antitrust attack.

It must be understood that in assessing the possible consequences of participating in IEA activities without the protections of section 252 of the EPCA, a company must be concerned not only with possible prosecution by the Department of Justice or the Federal Trade Commission, but also with possible suits brought by private parties. A private treble damage action can, of course, be very costly to a defendant, even if it should eventually prove to be without foundation. True, the present statutory antitrust defense is no bar to institution of such a private suit.⁵ Still, the antitrust safeguards presently required, the antitrust agency monitoring of company activities, and the periodic Government reports on these activities—all of which would continue if an extension of section 252 and the antitrust defense were adopted—provide a powerful deterrent against private suit.

If the statutory defense provided under the EPCA were to lapse, a number of activities which the companies have undertaken or could undertake in assisting the IEA could raise the clear possibility of antitrust liability. For example, agreements with respect to supply or price in general constitute per se violations of the antitrust laws, and possible liability to private parties for such actions would not necessarily be mitigated by the fact that governmental officials participated in such agreements. As a result, in the absence of the statutory defense, it is difficult to imagine oil company participation in an agreement to allocate available supplies among IEA member countries—the sort of agreement which lies at the heart of the IEA's emergency system—which would not raise serious antitrust issues. Thus, those companies would be most unlikely to make voluntary offers under the IEA allocation plan to correct imbalances in available supplies between IEA member countries, and would be most unlikely to supply representatives to staff the Industry Supply Advisory Board formed to advise the IEA in supervising these emergency reallocations.

Similarly, companies may be reluctant to provide competitively sensitive information to the IEA since, in the absence of appropriate safeguards, such activity could lead to an inference of collusion unlawful under the antitrust laws. Although we have no reason to believe that the current IEA safeguards for such information are inadequate, it is possible that a company seeking to avoid even the appearance of an illegal information exchange would be reluctant to provide sensitive information to the IEA without an antitrust defense. Such information is an essential part of the IEA's emergency allocation process if it is to function properly. In short, the company activities central to much of the effective functioning of the IEA would be impaired if the EPCA defense is not extended. Even though companies might conclude that such activities do not violate the antitrust laws, they are unlikely to risk learning "the hard way" that they were mistaken.

This is not to say, of course, that no oil company activity in connection with the IEP could occur if the statutory defense were not extended. For example, the submission to the IEA of distorted or "masked" data, such as that used in AST-2, would presumably not violate the antitrust laws. However, if companies knew that because of legal concerns they would not participate in IEA allocation during an actual emergency with "live" data, they would have no incentive to devote the time and resources necessary to prepare for a test.

In conclusion, while the Department of Justice continues to oppose piecemeal exemptions from the antitrust laws, the existing limited grant of an antitrust defense to oil company assistance to the IEA has so far given no cause for report.

⁵ Similarly, a business review clearance by the Department of Justice pursuant to 28 C.F.R. § 50.6, in the absence of a statutory defense, would offer no insurance against private suits.

While joint industry activities to assist the IEA obviously present at least a potential for anticompetitive abuse, we believe that the range of antitrust safeguards imposed, together with the vigorous monitoring of them by the Antitrust Division and the Federal Trade Commission, have so far ensured that this potential has not been translated into actuality. Accordingly, for all the reasons stated above, the Department supports the extension of the provisions of Section 252 of the EPCA. Particularly in light of current conditions in the international oil market, we believe that the continued availability of the statutory antitrust defense, coupled, of course, with continued antitrust safeguards and active antitrust monitoring, is in the national interest.

This concludes my prepared statement of the Department's views on S. 1413. I would be happy to answer any questions the Subcommittee may have, or to elaborate on any specific point I have discussed today.

Senator THURMOND. Thank you very much.

Senator METZENBAUM. Thank you very much, Mr. Flexner. We appreciate your cooperation.

Mr. Lamont, we are very happy to have you with us and I have just been notified that there is a 12 o'clock rollcall. Do you have a written statement?

Mr. LAMONT. Yes, Mr. Chairman, I have a written statement and I would like to submit it for the record.

Senator METZENBAUM. Your entire statement will be submitted for the record, but we would like to hear from you. I think if you can do it in about 7 or 8 minutes, even if there is a rollcall, I think we can still make it.

STATEMENT OF WILLIAM J. LAMONT

Mr. LAMONT. Basically, my problem with this entire operation is that I feel, up to this morning, rather lonesome in my opposition to the extension of the immunity to the oil companies who operate IEA.

There are two questions that you really have before you. One is, do you really think the IEA is an appropriate agency for U.S. policy on international oil? You mentioned awhile ago that you didn't think this committee had direct jurisdiction over it. Under the circumstances, since this is under an executive agreement, which Congress has expressly refused to ratify, its only validity depends upon the existence of other authority to carry it out.

You are in the process of considering a piece of legislation which, if enacted, would enable the IEA to carry out its functions. Therefore, I think you must review the entire operation at least in part, at least superficially, to be satisfied that this is the kind of an agency to which we want to confide such sweeping powers on behalf of the United States.

Senator METZENBAUM. I agree with your interpretation.

Mr. LAMONT. Second, I object most strongly to conferring immunity on the oil companies for this kind of a planning operation. I have noticed a very interesting paradox: The Federal Trade Commission and most particularly, the Antitrust Division, have said really, that what has been done here by the companies needs no antitrust immunity. The oil companies say that they won't continue to do it unless they have an antitrust immunity.

One of two things is possible. Either the oil companies are wrong, or quite possibly, they know a good deal more about what has actually been done than the Department of Justice. This is the Achilles heel of the whole operation as we view it. There has been inadequate supervision. The statute, originally drafted with considerable effort by the Congress in 1975 made provision for an awful lot of public intervention in proceedings in aid of insuring that it was not anticompetitive. A four-page statute, dealing with Sunshine Act provisions, in effect, was completely overturned by a two-line exception that said that all of these need not apply to meetings of bodies established by the International Energy Agency. "Need not" has been translated into "shall not."

There has been no opportunity for anyone else except the Justice and FTC monitors to sit in there. Their inspection has been by the barest of corporal's guards, two, three, four persons, possibly. The Justice Department's current report, the one "as of March 21, 1979," says they have assigned three attorneys. That is approximately the staff that they would assign to a medium-sized merger case. That does not, however, seem quite adequate to police the world's movements of petroleum and the actions of the companies that deal with it. This is a rather vast and confusing commerce.

Mr. Flexner ended up his statement by pointing out that it was a long and difficult and arduous job to investigate the international movements of petroleum, which is why 33 months have passed already without report on their international investigation.

Well, if that is true, how can they turn around and say at the same time that the actions of those same companies, in discussing those matters and exchanging this information, however masked, within the framework of an agency of whose makeup and conduct we really do not know very much about, are unimportant and must be viewed wholly and completely harmless?

Incidentally, on a couple of minor fact questions, I would like to correct Mr. Flexner.

He said that the information would never be unmasked for the individual companies, even in a shortage situation. The fifth report of the Attorney General—which would have been the sixth report had they filed every 6 months as required, they skipped one—the fifth report on page 37 noted that the clearance letter that they had issued on February 9, gave approval to group consultations with respect to questionnaire A submissions and similar material. Questionnaire A materials are the "company specific" information which we have been speaking about. They said, however, that this is only limited to group discussions in the IAB meeting in February 15, 16, 1979, and so forth.

Senator METZENBAUM. I was just going to ask you to wind up in 1 minute or so.

Mr. LAMONT. OK. Good.

Senator METZENBAUM. You have been around here long enough to know the pressure of rollcall.

Mr. LAMONT. Yes, I do, and as I say, most of what I wanted to say has already been said by way of questioning or by way of answer. I do not think that the Justice Department's track record here is one which gives us any degree of comfort with respect to it. I have a mixed

feeling in this regard which makes me the virtual opposite of Mr. Flexner.

He said that he viewed the role of the Justice Department with pride. I view it with a sincere humiliation. I worked for them for 30 years and I was very proud of it. During those years, we at least tried to enforce the antitrust laws as laws. We did not try to use them as regulatory devices by which prosecutorial discretion would be used to select those cases which would be tried or those cases which would not be tried, not on the basis of whether or not they were active, important violations, but rather whether or not their enforcement would fit the overall policy of the administration or not.

Senator METZENBAUM. Thank you very much, Mr. Lamont.

Senator THURMOND. Mr. Lamont, I believe you oppose an extension of this present law.

Mr. LAMONT. I oppose an extension of the present law most wholeheartedly.

Senator THURMOND. Would you care to submit to the committee any recommendations for suggestions of modifications or amendments?

Mr. LAMONT. Nonenactment. In other words, I simply say "don't report or enact the bill".

Senator THURMOND. In the event the committee should see fit to extend it, I was wondering if you would care to make any suggestions or recommendations on amendments.

Mr. LAMONT. Yes, I would.

Senator THURMOND. So we would have the whole picture before us.

Mr. LAMONT. I will be happy to, Senator Thurmond.

[The prepared statement of Mr. Lamont follows:]

PREPARED STATEMENT OF WILLIAM J. LAMONT

I appear at the invitation of the Chairman to testify on the bill (S. 1413) to extend until 1986 an immunity from antitrust challenge which has been given to the multinational oil companies since 1974 for actions they perform under the auspices of the International Energy Agency.

I oppose its enactment on two principal grounds. First, this would endorse IEA's actions. Yet the IEA is not given omniscience and objectivity merely because it is an international entity. Consequently, we must not confer on it a broad and unspecified authority to act, in areas of so great importance to this Nation's future, without the normal safeguards and reviews we require of domestic governmental agencies. Second, the track record of the multinational companies in the last two serious crises is not so clearly in the national interest that we can afford to place those companies above the law, without wholly losing credibility with the American people.

Let me begin with a review of the background of the IEA. It was established by executive agreement, the International Energy Agreement of 1974. That Agreement was created in response to the oil shortages of 1973-1974, and the steep price rises which followed. Those shortages were produced by the Arab boycott which followed the 1973 Yom Kippur War. By the Agreement, the Executive Branch of the United States Government committed this government to common endeavors on energy policy with other oil-consuming nations. Signatories included all of the major industrial nations of the free world, excluding France.

From its outset, the IEA has kept a remarkably low profile. Its meetings and actions are largely confidential. Indeed, as the Chairman will recollect, meetings of the agency itself are not normally open even to a Member of the United States Congress. However, from the circumstances surrounding its formation, the Agreement itself, and from Executive Branch statements before and during its negotiation, we can glean something of its basic policy objectives.

The Agreement, as noted, was ostensibly in response to the Arab boycott and the OPEC price increase. It followed several formal, public and private conferences among the oil-consuming nations. These were accompanied by a substantial number of informal—and decidedly non-public—conferences among representatives of those nations and the multinational companies.

Out of this process came an Agreement which created an Agency whose stated objectives were establishment of a common emergency self-sufficiency in oil supplies among member countries, the conservation of scarce supplies by "demand restraint", and if needed, the emergency allocation of international oil supplies. Various committees of member country representatives were established to govern Agency operations. The Agency was charged by the Agreement with several specific duties. It was to review member country policies; to recommend plans of action to meet current or potential oil supply problems; to devise information-gathering programs to cover source, destination and costs of oil in the international markets; and to examine the basic industrial structure of those markets. Finally, the Agency was to provide a permanent framework for consultation with individual oil companies, although the precise meaning or form of "framework for consultation" was left unexpressed.

As a result of these provisions, the Agency encountered controversy even before it was launched. First, contemporaneous speeches by Secretary of State Kissinger and Assistant Secretary Enders made it clear that the Agency was committed to the concept that there should be a "floor price," below which the international oil price would not be permitted to fall. This guaranty of high prices seemed odd policy for an oil-consumer group. A second controversy revolved around the series of meetings with the international oil companies which were conducted in 1974 without any compliance with any statutory procedure for antitrust immunity. Some thought this involved antitrust violation.

These provoked controversy over the basic statutory procedures for antitrust immunity of such international planning activities. These were thoroughly revised in the 1975 Energy Policy and Conservation Act ("EPCA"). In addition, that Act went to unusual lengths to state that, although Congress did authorize company participation in IEA operations, it did not intend to confer

... advice and consent, ratification, endorsement, or other form of congressional approval of the specific terms of such program. [EPCA, § 255.]

From then until now, there has been no direct review of the operations of the IEA. Unlike domestic energy agencies, the IEA has been free from any legislative review of its budget, or oversight of its personnel practices or operating policies. Indeed, there has been no legislative study of what those policy decisions have been. It was, for example, unofficially reported in 1975 that the Agency had decided upon a floor price for crude oil that was at or near \$8.00; but there has been no indication since then whether there has been any further decision to increase the price floor, whether that floor applied to U.S. domestic as well as OPEC oil, or any of the official detail concerning it.

Again, although the Iran shutdown in 1978 seemed to the outsider to create a sufficient "shortfall" to trigger the Agreement's allocation provisions, nothing happened. There was no allocation action; nor indeed, was there any published plan under which allocation would have been performed had the trigger been pulled. No committee has yet fully reviewed that decision, even though the apparent consequences of that shortfall on this country have been serious.

As a first step in enacting legislation for the implementation of this Agreement, it would seem appropriate to insist upon some public information as to what this Agency is, what its policies are, and what the United States obligations are under the Agreement. No one could reasonably object to international cooperation in matters of international concern; but should we not insist that there be at least a minimum degree of public disclosure of an Agency—whether domestic or foreign—to which we grant such sweeping powers in so important an area?

At the same time, this legislation continues the antitrust immunity given the international oil companies who participate in the operations of this Agreement and the Agency. That immunity is neither unimportant, limited nor desirable.

For one thing, it removes from these companies not only any threat of federal antitrust suit against them for any action "... taken to develop or carry out a voluntary agreement or plan of action ..." [Sec. 252(f)(1)], but also any possible suit under either State or Federal law by any State or private citizen. The States and citizens, in lieu of their normal right of self-protection, are given a

mere semblance of protection by superficial monitoring by the Federal antitrust agencies.

Clearly, the immunity provision Congress enacted was intended to be a narrow one. It was to be limited to actions which were clearly essential, and which were carried out only after public notice and after consideration by those affected, or by their representatives.

By this, Congress recognized that abuses might occur under the cloak of immunity, and so it provided a host of safeguards to prevent them. Among other things, there were provisions for publicity of the planning process to the maximum degree possible. [EPCA, Sec. 252.] If publicity was not possible, a right to participate in the planning process was to be accorded to the affected sectors of energy industry and to consumers. See H. Rep. No. 340, 94th Cong., 1st Sess. (1975). Significantly, these safeguards had not been included in similar prior legislation. [Defense Production Act of 1950, as amended, 50 U.S.C. § 2158.]

To allow private parties opportunity for essential input into the planning and policy behind IEA programs, the Act provided that whenever these agreements and plans were formulated, participants were to be representative, not only including independent sectors of the industry, but specifically including public and private consumers. [EPCA, § 252(c)(1)(A)(i).] Proceedings were to be pursuant to published agendas, and open to interested persons, even if they were not formally participants. [Id.] Such interested persons were to be given an opportunity to present oral and written data and opinions. [Id. at § 252(c)(1)(B).]

Beyond that, records of actions taken pursuant to the immunity grants were to be carefully kept by the companies pursuant to detailed regulations to be issued by the Department of Justice. [Id. at § 252(c)(3) and (e)(2).] These records—including plans discussed—were to be made available to the public substantially in accordance with the Freedom of Information Act. [Id. at § 252(c)(3).] And any plan of action contemplating the involvement of United States companies in an emergency IEA allocation was to be furnished to the FTC before its approval; and the plan and the FTC comments on that plan were to be published before the plan could become effective. [Id. at § 252(d)(1).]

In the face of this clear and consistent statutory record on safeguards, it is with wonder and amazement that we note the unblemished record of the Executive Branch disregard of them. Each of these safeguards has been completely and uniformly evaded by ingenious technicality.

Beginning with the 1975 Voluntary Agreement itself, the "new" International Energy Agency Agreement reads exactly like a copy of the earlier 1974 agreement which preceded the new "competitive safeguards". By the time the redraft was published, there still had been no participation by outsiders in the drafting process.

Indeed, not only have consumers never been permitted to participate effectively in any part of the planning process, as required by the Act, [EPCA, § 252(c)(1)(A)(i)], but the independent sector of the industry has not been represented. At one time, however, this requirement was "met" by classifying Standard Oil Company of Indiana as an "independent" refiner. Furthermore, despite the passage of some four years since the enactment of the EPCA, there have yet to be any regulations promulgated by Justice, specifying which records of company action are to be kept, and how and where they are to be maintained.

The technical basis for most of this evasion can be attributed to one casually drawn subsection in four pages of otherwise carefully drawn statutory directions. That subsection provides that:

meetings of bodies created by the International Energy Agency . . . need not be open to interested persons . . . [EPCA, § 252(c)(1)(A)(iii); (emphasis supplied.)]

Because the meetings did not have to be open, there have been no open meetings, at which outside interests could observe. Beyond that, neither independents nor consumers have been allowed to act as participants in any closed meetings, even where they could be placed under the same strictures of confidentiality as other participants.

The mantle of "secrecy" not only has shielded the proceedings of the IEA committees from outside scrutiny, but has even required censorship of a report by the FTC concerning some anticompetitive shortcomings of those operations.

This was accomplished by a misuse of "national security" classification authority. The FTC's Fifth Report, September 21, 1978, included some substantive references to matters discussed by multinational company groups. These references

supported recommendations for tighter control of information exchanges between IEA participants. This Report was thereupon classified "confidential" by the Department of State, so that no independent or consumer might know whether his ox had been gored.

This same national security classification protects records and transcripts of IEA activities. Of course the classification is not based on any independent evaluation of the national security interest in the data involved. It is, in fact, based upon request by the multinational corporations attending the meeting. If they say it must be classified, it is; if they say it is to be released, it is.

A good example of this security classification practice is in the State Department response to a 1978 request by me to determine the answer to the question "What time is lunch?" The answer to this seemingly harmless question had been deleted from the publicly available transcript of an IEA group meeting. I had to submit a formal request under the Freedom of Information Act to obtain the answer to that critical question. After more than six months, I received a copy of the State Department cablegram asking permission from the companies involved to tell me they, in fact, broke for lunch "between one to one-fifteen."

The relevance of this fact to national security escapes me. The fact that it took the State Department more than six months to obtain the permission of the companies to declassify such "sensitive" material is an appalling example of bureaucracy at its worst. But the fact that it was given a security classification in the first place is frightening.

The obsession with secrecy makes it extremely difficult for any private antitrust suit to challenge conduct on the part of IEA participants. To do so would require building a case in large part out of imagination and thin air. Thus, what was to have been a limited immunity, has been transmuted into a wholesale repeal of the American antitrust laws.

The effect of this wholesale repeal has been enhanced by the strangely complaint attitude of these federal agencies charged with the preservation of competition—the Department of Justice and the Federal Trade Commission. The Act carefully lists the duties of these agencies in insuring that activities of the IEA have no greater anticompetitive effect than absolutely necessary.

Each is to propose alternatives to avoid the anticompetitive consequences of IEA plans or agreements. [EPCA, § 252(d)(1).] There is, however, no record of either consideration or recommendation of any such alternative proposal by either. The Act directs Justice to promulgate regulations concerning the maintenance of records of action taken by the companies under a claim of immunity. This, of course, was to provide a continuing basis of review of the action the companies claimed to be immune; but it was also to protect private interests against an asserted document loss or destruction in any subsequent challenge. To date, no such regulations have been issued.

Finally, the Act requires that "each submit to the Congress and to the President, at least once every six months, a report on the impact on competition and on small business of actions authorized by this section." [EPCA § 252(i) (emphasis added).] Though the record of FTC is somewhat better, the Attorney General has yet to be even remotely prompt about issuing these required reports. Thus, the Attorney General's Fifth Report, just issued in July, "as of March 21, 1979," coincided with FTC's Sixth Report. It followed by only three months the Fourth Report, filed in March 1979 "as of September 21, 1978," which, in turn, covered activities between September 1977 and September 1978.

But, although the FTC has been more prompt and somewhat more thorough than Justice, neither has complied with the mandate of Section 252 to analyze the "competitive impact" of IEA activities. Each has limited its report to conclusory statements that the potential anticompetitive impacts have been minimized. But no report has yet described what those impacts might be, or whether they are serious or not.

It is quite possible that neither Justice nor the FTC has included such an analysis because neither has made an adequate investigation of the individual company activities to which the immunity has attached. They have apparently limited their observations to those actions disclosed or discussed in the course of various meetings. In this, the "close and careful monitoring" that takes place is thus nothing more than observation by one or two individuals sitting in a meeting, of discussions covering two-thirds of the world's petroleum production, and petroleum shipments spanning the entire globe. And making an "instant analysis" that no competitive problems are involved.

Absent more investigative background, it would be impossible to make even a remotely acceptable determination of whether any injury to competition was taking place. The authors of the Act anticipated this difficulty when they carefully authorized both Justice and the FTC to use their full investigative powers in aid of their review responsibility. [EPCA, § 252 (e) (4).] Neither has exercised that power for that purpose. Neither has assigned even staff sufficient for the investigation and analysis reasonably required. Furthermore, even with an adequate staff to investigate and to analyze, it is highly unlikely that either could accomplish the type of "superhuman" job which would be required to guard competition on a world-wide basis on the "instant replay" basis.

To be sure, Assistant Attorney General Shenefield has promised that:

the granting of clearances to companies to aid the IEA in no way lessens the Department's vigilance in seeking to guard against anticompetitive conduct in the international petroleum market. [Fifth Report of the Attorney General, at 40.]

Unfortunately, that statement is as accurate as it is discomfiting. For if one thing is absolutely clear, it is that the Department of Justice cannot effectively lessen a "vigilance" against anticompetitive abuses in petroleum markets, which on its track record, has been effectively zero. In the past ten years of obvious international price manipulation, Justice has failed to challenge any of the major multinational companies in any of their significant foreign or domestic markets. A most remarkable growth in oil production and pipeline joint ventures among the largest companies in this same period has escaped litigation. Indeed, although the Department recognized publicly three years ago that joint pipeline ventures among oil giants might have some anticompetitive effect, there has yet to be filed any litigation reflecting this vigilant conclusion.

Given this performance by Justice and the FTC, if the immunity is to be extended even briefly, some additional supervisory mechanism must be provided. Section 252 (f) (1) preempts States' antitrust prosecutions against multinational company activities under the aegis of the IEA. Clearly, States have a valid public interest in the economic and competitive impact of oil company activity affecting local independents and consumers. Indeed, Justice has many times paid lip service to the importance of State antitrust enforcement under federal as well as State statutes, as an important part of the overall enforcement scheme.

Indeed, at the moment, the State record on antitrust enforcement in oil is far in advance of the Justice achievement. Accordingly, if immunity is to be continued for IEA activity, specific directions should be made that the States must be allowed to participate directly in IEA activity. This, with even minimal observance of the existing provisions for participation by independents and consumers, would go far to improve the situation. For not only would the States and consumers enhance the effectiveness of the supervisory activity by bringing in new capabilities, they would bring a new and valuable antitrust perspective.

In summary, I urge that you carefully consider whether you really believe it necessary to continue the work of the International Energy Agency on its present basis. As noted, Congress has never reviewed its operations, or given any clear authorization for its programs. Neither the IEA budget, its pay nor personnel selection practices has ever been presented for congressional or public review, even though IEA exists in large part on American funds and American candidates. Yet, we are asked to rely on this entity to supervise the committees of giant companies as they evolve solutions to our energy problems.

Remember, IEA clearly intends to continue to act almost exclusively through these multinational company groups. And enactment of this legislation would implement this, entrusting much of our energy future to the tender mercies of these companies. Yet these companies, who already dominate the whole of the world trade in petroleum, have twice come to the public in the past six years, to say that huge price increases were really not their fault, and that it was merely coincidental that their returns were so remarkably increased.

Asking Exxon and its partners to help us guard against the possibility of an OPEC-triggered shortage increasing prices is asking the fox to watch the hen-house and the wolf to guard the sheep. For it is Exxon and its multinational partners who are the well-paid agents of the OPEC nations in producing and marketing OPEC oil. At the same time, they have vast investments in their own supplies in other areas. It is impossible to believe that Exxon, with these huge interests in foreign and domestic oil production, can really ration crude supplies

among the nations of the world to insure that no uncomfortable shortage would suddenly skyrocket prices.

The record during the Iranian crisis, as in previous emergencies, certainly does not give one a sense of security. The conversion of 60 cent gasoline in December to dollar gasoline today is not a singular instance. The 1948 Small Business and Reconversion Act "voluntary agreement" to provide home heating oil to the East Coast coincided with a very substantial series of product and crude oil price increases. The next large-scale domestic crude oil price increases came during the height of the "voluntary agreement" to boycott Iran in 1953. An added set of crude oil price increases came with the Suez War crises of 1956-1957, and its "voluntary agreement."

Finally, remember that the sharp crude oil price increases of 1971 occurred while these multinational companies sat jointly, with Justice Department approval, to negotiate price with the Persian Gulf producing countries. Similarly, the four-fold increase which occurred in 1973-74 occurred while this group sat as the Foreign Petroleum Supply Committee.

At the present moment, a very substantial majority of the American people believe that the shortages and price increases of the past few months resulted from the actions of the multinational oil companies. I most certainly do not believe they are wrong. But, whether they are wrong or not, it will be difficult indeed to give an atmosphere of credibility to any energy program which places on those companies the power, authority and immunity here proposed, as they plan for the international oil movements we must have. Particularly, to provide them with immunity from criminal statutes, both State and Federal, for exercising power and authority for personal gain, as this clearly permits, risks total public incredulity as to the reasonableness of any sacrifices the public must make.

I therefore urge strongly that there be no further extension of the immunity provisions. At the most, limit extension only for a period, not more than one year, just long enough to accomplish a real review of what this Agency is, how it is staffed, how it operates, and what, in detail, have the companies involved done which they believe must be covered by immunity. Most of all, find out for the public just what are the emergency allocation plans to protect them in an emergency. And, by the way, is there really a floor price agreement, and how much is it now?

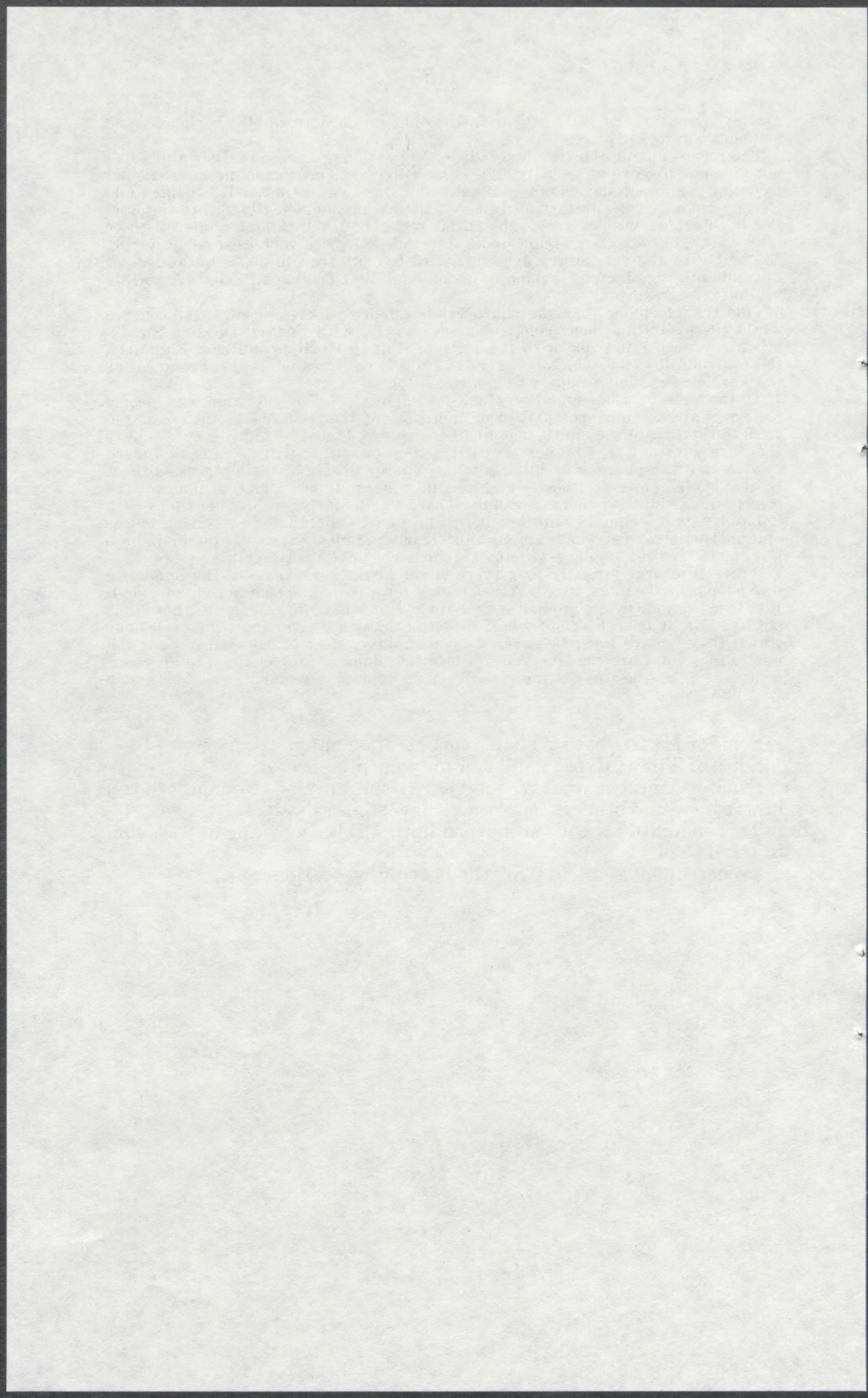
Senator METZENBAUM. Thank you, Mr. Lamont.

Senator THURMOND. Thank you for your presence.

Senator METZENBAUM. We may have some questions to submit to you in writing—and other Senators may have some as well.

This committee stands adjourned until Friday morning at 9:30 a.m. in room 6226.

[Whereupon, at 12:10 p.m., the hearing was adjourned.]



INTERNATIONAL ENERGY AGREEMENT, S. 1413

FRIDAY, OCTOBER 5, 1979

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST,
MONOPOLY AND BUSINESS RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to notice, at 9:40 a.m., in room 6226, Dirksen Senate Office Building, Senator Howard M. Metzenbaum (chairman of the subcommittee) presiding.

Present: Senators Metzenbaum and Thurmond.

Also present: Margery Baker, counsel; J. Michael Cooper, counsel; Marilyn Falksen, chief clerk; Walter Measday, economist; Peter Chumbris, minority counsel; and Joseph Lanham, minority economist.

Senator METZENBAUM. The hearing will come to order. The first witnesses today will be Mr. Harry Bergold, Jr., Assistant Secretary for International Affairs of the Department of Energy, and Mr. Lynn Coleman, General Counsel of the Department of Energy.

I gather you are accompanied by two other gentlemen, would you care to introduce them.

Mr. COLEMAN. Yes, Mr. Chairman, Martin Kaufman, of the Office of General Counsel, and David Oliver, of the International Affairs Office.

I will summarize briefly our statement rather than read it and it will be submitted for the record.

Senator METZENBAUM. The entire statement of both you and Mr. Bergold—does he have a statement also?

Mr. COLEMAN. No; it is one statement, Senator.

Senator METZENBAUM. It will be inserted in the record.

PANEL OF FEDERAL OFFICIALS:

STATEMENTS OF LYNN R. COLEMAN, GENERAL COUNSEL; HARRY E. BERGOLD, JR., ASSISTANT SECRETARY FOR INTERNATIONAL AFFAIRS; DAVID R. OLIVER, DIRECTOR, OFFICE OF CONSUMING NATIONS, OFFICE OF INTERNATIONAL AFFAIRS; AND MARTIN S. KAUFMAN, OFFICE OF GENERAL COUNSEL, DEPARTMENT OF ENERGY

Mr. COLEMAN. We are pleased to be here with you today to discuss S. 1413 which would extend the antitrust defense provided by section 252 of the Energy Policy and Conservation Act.

As you will recall, in 1974, at the Washington Energy Conference, agreement was reached.

Senator METZENBAUM. What did I understand you to say?

Mr. COLEMAN. The Organization for Economic Cooperation and Development agreed on the creation of an international energy program. This, following the embargo in 1973, the shortage of petroleum products that developed, the enormous price rises that followed, there was an evident need for closer cooperation among governments who were largely consumers of petroleum products as distinguished from the OPEC members who were net exporters of petroleum.

Senator METZENBAUM. Wasn't the IEA originally put together by the efforts of Henry Kissinger and Tom Enders with the thought in mind that it would be used as a counterforce to the OPEC cartel?

Mr. COLEMAN. I think that is generally correct.

Mr. BERGOLD. I think, Senator, that the idea was that there was no apparent reason if the suppliers of oil could organize why the consumers of oil should not also organize. Not in a confrontational way, but in a way to concert the interests of consuming and importing nations in a way to make more orderly the whole demand-supply equation.

Senator METZENBAUM. Has there been any one single instance where they have been used in that manner, because as best I can find out from all the objective observers, that particular objective of being a counterforce to the OPEC cartel—not in a confrontational manner, but as a counterforce—has not occurred.

Mr. BERGOLD. I wouldn't agree with you, Senator, especially the way you phrase the question. I think the construction of the data system within the IEA which is really the only good international data system we have, and the construction and testing of the allocation system which has never been used, but which you know has been tested, and even not being used, still has a force about it in a crisis situation. That both of these, indeed, have organized the consuming world or at least the 20 countries of the IEA in a way that makes them understand the realities of the world oil market in a way they did not before.

Senator METZENBAUM. Isn't it a fact, Mr. Bergold, that the data system has actually been so bad with errors of 9 to 13 percent that realistically speaking it can't be used for allocation purposes and wasn't useful for those purposes during the Iranian shortfall?

Mr. BERGOLD. We just began for the first time to collect company data under questionnaire A in January of last year, Senator.

Senator METZENBAUM. Of 1978?

Mr. BERGOLD. Of 1979, Senator.

Senator METZENBAUM. You said of last year.

Mr. BERGOLD. Excuse me, of this year, 1979. Certainly, the first couple of months showed some raggedness, some distortions, that is simply because the companies submitting the data had very little experience or none at all, indeed, with filling out their questionnaires so that in January and February we had errors of the dimension that you mentioned.

Once the companies got used to the system and there was an interchange on the techniques of submitting data between the executive Secretariat and the companies, which is of real value of what has happened over the past few months, those errors have diminished.

Now, there are errors in the projections. In other words, the system forces the companies to project two months forward. It is unquestionably true that some of those projections have been conservative, but in

terms of the real time data, we have gotten the errors down to a lesser margin and are continuing to work to make sure that these data submissions are just as accurate as they can be.

Senator METZENBAUM. You didn't agree with my characterization of the inability of the IEA to provide a counterforce to the OPEC cartel. It is a fact that it was formed for that purpose; at least that was one of the public statements that was made at that time. Mr. Coleman has just indicated confirmation of that. Now, then, in your own phrasing, tell me the manner in which it has worked effectively in the 5 years of its existence in that respect—not in the data collection, which we know has had these errors—but how has it worked as a counterforce?

Mr. BERGOLD. Well, I think there was some anticipation in some quarters in 1974 and 1975, there would be some way to use the IEA as a negotiating vehicle for the consuming countries to confront OPEC. That was never, I think, a view widely shared in the American Government, but it was the kind of facility, a view of the IEA that appealed to certain publicists.

Senator METZENBAUM. Did Mr. Enders or Mr. Kissinger ever make any statements indicating that was a view of our Government, and that it was one of the reasons that our Government wanted to see it formed?

Mr. BERGOLD. I am not personally aware of such statements, but there may have been some, Senator; I would not rule that out or statements that could be interpreted at least in the way that you suggest.

But in point of fact, I think that all of the IEA nations, all 20 nations, have now come to the conclusion that the value of the IEA lies not in a confrontational posture against OPEC, but rather, lies in the organization of the consuming world better to deal with the new realities of the oil market.

Senator METZENBAUM. As to the data, what is the present margin of error that you are finding?

Mr. BERGOLD. I'll have to ask Mr. Oliver to speak to that.

Mr. OLIVER. That is a difficult question to answer because it varies with the data element and also with the time period that we are talking about. As Mr. Bergold has indicated, the last 2 months of each report—there are 5 months reported in each of the monthly reports—2 of those months are absolutely projections of companies' anticipations rather than measures of performance. Much the same thing applies to the central month when the report is filed in the first days, between the 5th and the 9th of that month, so that is also projected data.

The best comparison that we can make is with the month before last—working backwards, which the report also does. When we compare that with the actual data from other sources, we find that the errors are much moderated.

In the case of the United States, for example, throughout this period, which included some of the anomalies in the early experience, U.S. error in import reporting, which is the most fragile to report, was about 2 percent.

Mr. METZENBAUM. Mr. Oliver, how do you account for the fact that the media have talked about 9 percent variation? There seems to have been an admitted 9- to 13-percent variation in January and February. What about the current-month data? After all, if there

is a shortfall which would occur, it would be important to have data that you can count upon for allocation purposes now. We are not too interested in what happened in January and February—that's history—but what about now. How reliable are the figures that we are getting on a current basis?

Mr. OLIVER. I think that data is as reliable as we can hope to get.

Senator METZENBAUM. What does that mean. I don't understand that.

Mr. OLIVER. This means, again, that this is anticipatory information; planning information from the companies, not measures of what was actually delivered, but what they expect to have delivered in that time period.

Senator METZENBAUM. What is so difficult about determining the facts on a current basis. Why do we have to talk about anticipated deliveries rather than talking about actual deliveries taking place in the month of September?

Mr. OLIVER. Because this is a planning document—it is a process that is put into effect to assist the IEA in the reallocation of oil that is currently in transit or that would be put in transit in the near future.

Senator METZENBAUM. If Saudi Arabia shut down its well tomorrow morning, we would need that data in order to make an appropriate allocation. Do we have it? Would we have it?

Mr. OLIVER. Not through this system, but we would have it from other sources of information.

Senator METZENBAUM. But not through IEA. Is that what you are saying?

Mr. OLIVER. It would arrive at the IEA and be used in the IEA plans. But it wouldn't be reported in this kind of monthly reporting system. That is a more timely bit of information and it really is intelligence rather than data.

Senator METZENBAUM. I am asking you, how would the IEA know how to make its allocations among the oil companies if we didn't have reliable data on a current basis? As I understand it, we do not have this, all we have is projection. How would it be done?

Mr. OLIVER. You are suggesting a real time information system.

Senator METZENBAUM. What is real time information?

Mr. OLIVER. One where information is available to the IEA at the same time or approximately the same time that the event occurs. It would be highly desirable if we could find a way to make it work.

Senator METZENBAUM. Why can't we? Why can't the information be obtained on a current basis? I cannot comprehend that.

Mr. OLIVER. This is one of the things that would be accomplished outside the formal data system, through the operation of the ISAG, the Industry Supply Advisory Group, which would advise the International Energy Agency in the event of a triggering of the emergency program. These are the people who have the hands on information relating to the daily movements in the industry system. It is important that we have this kind of augmentation of the formal data system.

Senator METZENBAUM. I meant why can't we have it on a current basis? What is there so complicated about this industry whether nationally or internationally that you can't find out, on a current basis,

how much oil is being delivered country by country? What is so difficult about that? We are not dealing with something nebulous that is in the sky; we are not dealing with some kind of medical thing that you can't understand. There are so many barrels that are delivered to India, to Canada, to England, to the United States—why can't we find out on a current basis?

Mr. OLIVER. I have to answer that question at a couple of levels. First, I don't know of any industry that has that kind of information. This system is in a very real sense, an innovative system. It is pioneering in its concept.

Senator METZENBAUM. What do you mean you don't know of any industry that has that kind of information. General Motors doesn't know how many Buicks they delivered today? They couldn't tell me this afternoon if I said "How many did you deliver today?"; General Electric couldn't tell me how many refrigerators they sold yesterday? I don't mean in the retail stores, but sent out of their factory. What is there that is complicated about this?

Mr. OLIVER. First I would have to differentiate between General Motors as a company and what we are doing here as a worldwide industry measure—far more comprehensive than a single company.

The second distinction is the distinction between actual information and anticipatory information. We are talking here and must talk about this for allocation purposes of oil on the high seas or of oil that has not yet been loaded but is expected to be loaded for delivery at some future date.

There is a great deal of flexibility in that system. For example, one of the reasons why we had an overstatement in the February figures—the 13 percent that you indicate is that there were duplicative anticipations.

Senator METZENBAUM. There were what?

Mr. OLIVER. There was more than one company expecting to acquire the same volume of oil. The market was in disarray, the producing countries were choosing their policies and the companies were looking 30 days forward at the time they prepared their report. Obviously, the cargo couldn't be delivered to all three or four companies, whatever the case may be, at the same time. So, there were duplications. Not in information, not in delivery, but duplications in anticipations.

Senator METZENBAUM. What would make you believe that if tomorrow there were a shutdown of the Saudi Arabian wells that there would be anything different—that the data would be any more reliable then as to this oil that is on the high seas.

Mr. OLIVER. In that aspect, I don't think anything would be any different. There would be improvements in the mechanical procedures—improvements that have already been put in place and the mechanics of the system. But where there is a disorderly market, I think we must expect, though we try to keep them to a minimum, some duplications, some misunderstandings, some error in the system that are inherent in a chaotic, basic market. It is inherent that some of the data will also be somewhat less than is desired; nevertheless, it is the best that can be attained.

Senator METZENBAUM. How valuable can a data system be then if there has got to be such error as you have just indicated?

Mr. OLIVER. I believe, Senator, that it can be extremely valuable.
 Senator METZENBAUM. Pardon.

Mr. OLIVER. I believe it can be extremely valuable and that it is the only tool and the best tool that we can muster, and we use that as a basis upon which to build the other information, the other intelligence that will become available both through our national sources and through company sources which will be channeled through the IEA and the ISAG organization to facilitate the allocations of oil.

Senator METZENBAUM. Mr. Oliver, what percentage cutback occurred in world oil allocations to our country as compared to the other nations who are parties to the IEA? To put it another way, didn't our Nation suffer a double the amount of cutback in imports that any other nation suffered?

Mr. OLIVER. No; I don't believe that is correct, Senator. I would have to check the absolute figures and I will have to provide you with those.

[The material referred to above is on file with the subcommittee.]

Senator METZENBAUM. Certainly.

Mr. OLIVER. The U.S. cutback was about 3 percent on the first 6 months of the year. I have to establish a term of reference here. The term of art in the International Energy Agency is the base period final consumption—that is the consumption in the four calendar quarters for which the most final consumption data are available. Using that base period, our consumption was down about 3 percent in those first 3 months. That is slightly larger than the average for the IEA.

Senator METZENBAUM. Slightly what? Slightly larger?

Mr. OLIVER. Slightly larger, yes.

Senator METZENBAUM. We lost 200,000 barrels a day during this period, didn't we?

Mr. COLEMAN. Mr. Chairman, you are referring to an apparent lower amount of oil imports that the United States received than it would have received had it gotten the same percentage of total imports among all IEA reporting countries as in the past year.

Senator METZENBAUM. What I am referring to is the DOE report to the President that we lost 200,000 barrels of oil a day.

Mr. COLEMAN. Then that is what you are referring to. That's correct. That was what the preliminary data indicated.

Senator METZENBAUM. France had agreed to no restraints and lost no oil, did it?

Mr. BERGOLD. France and many other countries are not members of the IEA. I think it is probably wrong to say that they didn't lose any oil, Senator, although I don't have figures on France. I think, for example, our estimates are that some of the less-developed countries, not members of the IEA, lost even more oil than any of the IEA members, and certainly the United States.

Senator METZENBAUM. How do you account for the fact that under this IEA arrangement, U.S. consumption in the first half of 1979 went down 2.2 percent. Consumption of Japan, Canada, the United Kingdom, Italy, and Germany all went up, respectively, 4.3 percent, 2 percent, 2.7 percent, 4.3 percent, and 3 percent. Now, some of those nations import 100 percent of their oil. Therefore, isn't one led to the conclusion that their imports were not cut back and that people of this

Nation were made to pay the price of cutting back by reason of our participation in the IEA.

Mr. COLEMAN. Mr. Chairman, I think the answer to that is that the trigger of the IEA was not pulled; the sharing mechanisms were not formally in effect and the statistic to which you refer merely tells us what happened through free market forces, that the United States didn't get quite as high a share of the world's imports as it did last year, but I don't think it tells us anything in particular about whether the IEA, in an emergency where the trigger would be pulled, would work effectively to fairly allocate the shortage.

Senator METZENBAUM. Mr. Coleman, or Mr. Bergold, or anybody, we have been in the IEA for 5 years. What has it accomplished for our Nation?

Mr. BERGOLD. I think it has introduced a framework of cooperation among the 20 countries of the IEA and the major oil companies who, for better or worse, are in the position of having to distribute whatever shortfall occurs.

I think it is, what it has done, is to put in place a data system, a sense of rationality in exchange for information that will better enable us to meet a shortfall of 7 percent or more, should one occur.

I don't mean to say that a perfect system has been put into place, Senator, I think it has a lot of flaws and you pointed out what some of them are. All I am saying is that it is considerably better than nothing.

Senator METZENBAUM. Mr. Bergold, were you party to the agreement when it was first made?

Mr. BERGOLD. I was not, Senator.

Senator METZENBAUM. Give me the rationale for the agreement, if you know it and if you can, as to why the allocation system, after it has been triggered, is based upon the Nation's total consumption rather than the amount of imports, particularly in view of the fact that our Nation produces about 50 percent of its total production, and many other nations import 100 percent.

Mr. OLIVER. That figure was arrived at after negotiation in a search for equity among the member nations. There are two concepts of equity and they differ quite seriously in the allocation of oil. One is on a consuming basis, and the other on an importing basis.

The question when the IEA was formed was whether or not the allocation should be made on one or the other of those bases. What was arrived at was a compromise; a compromise which means that the reductions in supplies in the first instance is 7 percent based on consumption. Beyond 7 percent the basis shifts the other direction—the direction which would favor the United States which is an allocation, not of the oil, but of the shortfall on the basis of imports. So between 7 percent and 12 percent, there is a joint formula which takes into consideration both the consumption base and the import base.

There is a shift again beyond the 12-percent level when we reach a severe disruption in the oil market. At that point, the base again shifts to a consumption base and then increments of the shortage above that are allocated on an import base. So there is a compromise involved here.

Senator METZENBAUM. Mr. Coleman, I didn't ever let you finish your statement. I didn't mean to do that.

Mr. COLEMAN. I just was going to come briefly to section 252 of EPCA and what we see as a need for its extension. The discussion so far, I think, has helped us understand that. In an emergency situation, the only system that we are aware of where you could effectively allocate supplies of crude oil and petroleum products from one country to the other, absent some supernational authority, which we do not have, is essentially by cooperation among the countries involved and of the international oil companies which are resident in those countries.

As you are fully aware, the international oil companies have the tankers, the contracts with the producing countries and the outlets, refineries, points of distribution, in consuming countries. It is a very complex system and to have information available on a real time basis in an emergency, it would be necessary to the IEA to avail itself of the knowledge and expertise of those people.

You have a problem if you are going to move crude oil from its normal port of destination to another country, another refinery, another harbor. There are questions of whether the tanker can get in there, whether there is storage available, whether the crude oil is a quality which can be run in the refineries that are present there, whether there are restrictions, pollution restrictions, with respect to the sulfur content of the crude oil and the like.

There would be need for knowledge to know what crude is available and where it is. This practical, logistical consideration will necessitate the active involvement of oil company representatives. It would necessitate their communicating and sharing information which, for the purposes of U.S. companies, would, in many cases, be highly suspect under the antitrust laws. So the judgment has to be made whether you want the capability for that kind of information to be obtained for an international allocation system, or if it is more important for the U.S. companies for the antitrust laws to be rigorously enforced and that kind of interchange of information not occur. It was obviously the judgment of the Congress that it was important for that capacity to be there and the checks on it that the Congress wrote into it, we think, are quite adequate.

Any such information, any meetings of this type, are to be cleared by the Attorney General, the Department of Energy, the Federal Trade Commission. The meetings must be attended by full-time Government employees, and it has been the fact that at almost all of the meetings representatives of the Energy Department and the Federal Trade Commission have been present. A verbatim transcript is maintained and members of Congress committees have access to those meetings, certainly to the transcripts, even the classified portions of them. So for that kind of activity to occur, a defense against the antitrust laws is deemed to be necessary.

For the normal ongoing functions of the IEA, the data-gathering process and for meetings to be held with the advisory groups from industry, to assist in preparing the plan of action, the *modus operandi* that would be used should an emergency occur—these kinds of activities which are in our national interest, I think, it is also necessary for there to be provided a defense against the antitrust laws. Otherwise, we cannot expect the participation of the U.S. oil companies and, obviously, they are of sufficient size and number that absent their partici-

pation, there would be no real effective participation by the United States. The allocation system and information system without the input of U.S. companies would be meaningless.

For those reasons, we think that an exemption under very carefully controlled circumstances, as I have described, is merited and we would commend it to the Congress. The only thing that we are suggesting is that the date be extended, that the existing protections would be continued.

Senator METZENBAUM. As I understand your position, the activities that take place at these meetings are not anticompetitive, they are merely an exchange of operational and technical information. Is that pretty much correct?

Mr. COLEMAN. I think the reports of the Federal Trade Commission and the Justice Department who evaluated these meetings have come to the conclusion that anticompetitive sometimes, these consequences do not often occur, but nevertheless, they are the kinds of meetings where because the information which may be exchanged, there would be great concern by any American oil company for its people to be present at such meetings and participate in the exchange of information and concepts given the existence of our antitrust laws and the history of their enforcement.

So, while the conclusion so far is that adverse consequences to competition have not occurred, the conduct at the meetings is nevertheless of the sort that we cannot expect the participation of the oil companies absent an antitrust defense.

Senator METZENBAUM. Do the oil companies provide confidential and proprietary data to the Department of Energy?

Mr. COLEMAN. Yes, they do.

Senator METZENBAUM. Am I correct that they do not have and do not need an antitrust defense for supplying this information to DOE?

Mr. COLEMAN. That's correct, Senator, but the problem is not their supplying confidential information to DOE. The problem is the possibility that that confidential information may become known to one of their competitors, which can occur at a meeting where you have all of these companies present.

Senator METZENBAUM. Do the companies demand antitrust defenses when they get together in their own self-interest for joint ventures like TAPS or some of the other joint ventures that the companies are involved in?

Mr. COLEMAN. Not as a general rule. There are occasions where the companies would approach the Antitrust Division for advance clearance of anticipated conduct, but as a general rule, when they have occasion to negotiate on something, they do not seek an antitrust clearance.

Here, however, you have a situation where in effect the U.S. Government and the International Energy Agency representing other governments put these companies into a position where they would feel very nervous about the possibility that they might commit a violation of the antitrust laws. So, I think the practical fact is, Senator, that absent an antitrust defense, they simply would not participate.

Senator METZENBAUM. They do get clearances under the IEA, but they also get an antitrust defense, don't they? They still get the clearances.

Mr. COLEMAN. Well, there is a clearance for the meeting to occur in that it must be noticed in the Federal Register and the agenda is approved by the Justice Department in consultation with the FTC, but that does not insulate them, absent the defense, from any charge of an antitrust violation based on the exchange of confidential information which might occur.

Senator METZENBAUM. You don't need a clearance and you're not subject to an antitrust complaint just because you share data, are you?

Mr. COLEMAN. You might be, it depends on the nature of the data and its significance to competition.

Senator METZENBAUM. If you are giving it to a government or an international body who needs it, would you then be subject to antitrust prosecution?

Mr. COLEMAN. If you are providing individual company data to a government body, and then the government body is going to do something with the data, that is one thing. If you are going to provide it at a meeting where the government is present, and your competitors are present too, that is another.

The concern is, I think the Justice Department would agree with this but you should ask them, that without an exemption from the antitrust laws, merely the fact that the Justice Department has approved the meeting taking place doesn't provide any insulation in and of itself.

Senator METZENBAUM. Does the DOE need oil company assistance to implement the domestic allocation program?

Mr. COLEMAN. It has advisory committees which are of a different kind and I don't believe that in those committees there is ever any interchange of confidential information. But the point is—

Senator METZENBAUM. I am not quite clear I understand your answer.

Mr. COLEMAN. My answer was I suppose in one respect, we have the assistance of the oil companies in that we receive input, recommendations, comments from them in rulemakings and the like, so there is constant interchange of information and viewpoint as to what the regulatory structure ought to be through the ordinary rulemaking process.

Senator METZENBAUM. Do the advisory committees of DOE get antitrust clearance?

Mr. COLEMAN. No; they do not.

Senator METZENBAUM. They do not.

Mr. COLEMAN. Because at those meetings, there is not the kind of exchange of information or discussion that occurs at the IEA, to my knowledge. The reason why we do not have to have active oil company assistance under Department of Energy allocation regulations is simply that we have all of these companies within this country and over a period of time we have built up sufficient information, sufficient reporting systems, the base periods have been established and the regulation system can work, in almost a self-executing fashion.

Senator METZENBAUM. Isn't it logical to assume that the same kind of buildup information would be available to the IEA without the antitrust clearance?

Mr. COLEMAN. Conceivably, the information system over time might be improved to the point where it would be as accurate as one within

a particular country. I do not believe that you could predict that in an emergency you could ever run an allocation system fairly where you are doing it on an informal basis, in other words, where there often are not established relationships between suppliers and purchasers or where you may be changing them, depending on which country has the most severe problem at a particular time, without the active participation of the oil companies. Now, that is a question that should be lodged with those who have more operational expertise in the IEA, perhaps, Mr. Oliver.

Senator METZENBAUM. Well, in the recent situation, Exxon decided on its own—and a number of other companies decided on their own—how they were going to make allocations. Neither the DOE nor the IEA had anything to say about it. Apparently, in spite of having a domestic Department of Energy and an international body, when push came to shove, the oil companies made up their own minds as to how the allocations were to be made.

Mr. COLEMAN. Well, Senator, I can respond to that by saying that within the United States, Exxon's allocation of crude oil, petroleum products, and gasoline was controlled by the United States. As far as its international shipments were concerned, of course it is true that Exxon had the full freedom to make those judgments because the IEA allocation system was not triggered. So, we obtain information on what happened but there was no force of law or the equivalent of law constraining Exxon's conduct as a consequence of the international energy program because the trigger was not activated.

Senator METZENBAUM. Mr. Bergold, have you seen any evidence that the IEA is willing to or wants to reduce the role of the oil companies and to expand the responsibilities and expertise of its own personnel?

Mr. BERGOLD. Well, I think it's clearly essential at this stage, Senator, that the direct contact between the oil companies and the IEA Secretariat go on in that it provides the best sensitivity of the data on the part of the IEA. Were these data to flow through governments, I don't think so much of our own Government, but of some other governments with state oil companies, the IEA could never be sure of the accuracy of its data, it could never feel secure in building up its own data base. I think over time, there will be more independent on the part of the IEA from companies. But I would be less than honest if I suggested that in the foreseeable future that there is any other repository of data that I can see on the horizon other than the oil companies to provide the majority of this information to the IEA.

Senator METZENBAUM. As I understand it, IEA personnel can only stay for a maximum of 3-5 years, and in all probability, as I see it, will go into the oil industry or will have come from the oil industry and go back to it. Doesn't that detract from the possibility of developing the IEA as an independent body with expertise to deal with the situation? Doesn't it mean that you have a constant rollover in continuing to look to the oil industry itself in order to get the people to run that international body?

Mr. BERGOLD. Actually, in terms of my own acquaintances there, Senator, the majority of them actually seem to come from governments. The executive director comes out of the German Government; his deputy, who is an American, comes out of the American Govern-

ment; several of the other senior people I know in the IEA are government people who plan to return to government, or in one case to the legal profession, after they depart. I think there will be some who come from oil companies and there will be some who go back but that is by no means an established pattern in the agency.

Senator METZENBAUM. What is the rationale for the 3- to 5-year limit?

Mr. BERGOLD. Well, there was a feeling that this should not be a burgeoning permanent bureaucracy. There was hope that with turnover, it could be kept small, that you would not have people with a stake in its being a perpetual growing bureaucracy within the OECD. In point of fact, there are already some tours that are running longer than the suggested 3 to 5 years and I think that in terms of practical outcome, the turnover will not be as great as initially foreseen in 1974.

Senator METZENBAUM. Whose interests would you say the oil companies represent through their participation in IEA, the OPEC countries from whom they get much of their oil, or the countries to whom they sell the OPEC oil?

Mr. BERGOLD. I would presume that they support their own interests, Senator, and one of those interests is not to have a mandatory allocation system imposed upon them. It is, therefore, in their interests to provide to the IEA as accurate a data base as possible, and as we have said, the IEA is developing a capacity to check that data and to audit it.

Second, when it comes to a crisis like we had this year, but one short of the 7 percent, it is in their interests to allocate fairly and equitably in order to avoid the much more onerous, from their point of view, system of a mandatory allocation scheme.

Senator METZENBAUM. Am I correct that the oil companies say that they will not participate in a type 2 voluntary allocation if there is no plan of action?

Mr. COLEMAN. Senator, I'm advised that they have indicated a desire for a more detailed—

Senator METZENBAUM. I'm sorry. I can't understand you. They what?

Mr. COLEMAN. They have indicated a desire, the companies have indicated a desire, for a more detailed plan of action and that is in process of preparation.

Senator METZENBAUM. But that is not yet in place?

Mr. COLEMAN. That is correct.

Senator METZENBAUM. And when do you expect it will be?

Mr. COLEMAN. I'm advised that it will be published for public comment by the end of November.

Senator METZENBAUM. By the end of?

Mr. COLEMAN. By the end of November.

Senator METZENBAUM. Do you have an opinion as to whether the IEA would better serve our Nation's interest—I'm not talking about the world interest, but I am talking about our Nation's interest—if there were greater applicability of that which we describe in this country as "sunshine laws"? If the American people could know more about what is going on by making it possible for members of the public to know what is taking place at the oil company meetings would that not be in our Nation's interest?

Mr. COLEMAN. You asked my personal opinion. I would not object and I think it desirable for there to be greater opportunity for public observation. The reality with which you deal is that a number of the oil companies, which are members of these advisory committees, are wholly owned by foreign governments and they regard it as a serious matter. My understanding is, and I have not participated in these efforts, that discussions aimed at seeing if it were possible to provide more openness in those sessions from our standpoint have not been successful. The alternative is to provide continuous representation by multiple Federal Government agencies, which I think can be said to fairly represent the American public, the Federal Trade Commission, the Justice Department, and then have a verbatim transcript which is available certainly to the Congress and the agencies which have an interest in it. Some of that is classified and that is a problem, I would agree. But I don't know what the U.S. Government is in position to do about that. I think it is just the reality of the situation that we deal with.

Senator METZENBAUM. I'm not certain that my recollection is accurate, but my best recollection is that when I looked at members of the industry advisory board, the A, B, and C subcommittees—do you have those present there with you, Mr. Kaufman?

Mr. KAUFMAN. Yes.

Senator METZENBAUM. May I see them, please?

Mr. KAUFMAN. Certainly.

Senator METZENBAUM. What is VEBA Oel?

Mr. KAUFMAN. VEBA Oel is a German oil company partially owned by the German Government and partially privately owned.

Senator METZENBAUM. You said, Mr. Coleman, that objection comes from the governments. Now, looking at subcommittee A, I read almost entirely companies that are domiciled in this Nation or at least the major part of the "seven sisters." I find British Petroleum that has a government ownership position but it is a private company. I find Exxon, Gulf, Mobil, Shell, Standard of Indiana, Standard of California, Standard of Ohio, Sun, Texaco, VEBA Oel, which is a private company partially owned by the German Government, and ENI, I gather that is an Italian company, that's right?

Mr. KAUFMAN. That's right, that is state owned.

Senator METZENBAUM. So that is the only one out of all of those that would even have governmental representation. In the next grouping, subcommittee B, I see none that I would recognize as representing national governmental participation, BP, Exxon, Gulf, Idemetsu Kosan Co., Ltd., that certainly sounds like a private company; Mobil, Petrofina, Shell International, and Texaco. Which of those are government owned? One hundred percent?

Mr. KAUFMAN. As you have noted, British Petroleum is partially Government owned, I believe Petrofina has some Belgium Government ownership. Shell International, of course, is partially owned by the British and Dutch Governments.

Senator METZENBAUM. Yes, but again, these are all private companies and this relates to Mr. Coleman's statement that the governments would be objecting. Then you go down to subcommittee C and you have the same: Texaco, Arabian Oil, Co., BP, Continental Oil,

Exxon, Gulf, Mobil, Shell International, Shell Oil, Standard Oil of California.

My point is, these are really corporate operations. Tell us, to be certain that the protection is provided by the FTC and the Antitrust Division and the State Department and DOE, why should the IAB meetings be closed, particularly if there is no competitive problem? What is there so secretative about it. If there is anything that seems to bother me about the IEA, in addition to some other things, it is that there is this cloak of secrecy about it. I mentioned it at the earlier meeting. I had to go to the White House and to the Secretary of State himself in order to be permitted to get into a meeting. Here are the IAB meetings, which are industry meetings. They are not even Government meetings. You mentioned Government, but I don't see that, Mr. Coleman. I don't agree with your concept of that. If there is no competitive problem, why shouldn't we insist that they be open to the American people so they can know what is going on. Most of these companies are American-domiciled companies and I don't understand why the Department of Energy is here and the State Department is here—not talking at all about the public's concern about what goes on at the IEA and particularly at the IAB. I just never could quite understand where you come from on issues of this kind, why I never hear any talk about a people orientation. Maybe the oil companies won't like it. That is really what we are talking about. Maybe the oil companies won't like it and it takes me back to the big headline that I remember seeing in the Washington Star: "Schlesinger Fears to Prod Oil Companies."

The question is, is it our Government and is there any reason why we can't say if you want this antitrust exemption, then you are going to have to see that you do business in the sunlight? When we say to government you have to do business in the sunlight, but the oil companies are too important. They are special—we are not going to be permitted to know what they are doing. I don't understand why the DOE is carrying the water for the oil companies.

Mr. COLEMAN. The Department of Energy I don't think fears or would be concerned at all about more openness in these meetings. I can let Mr. Bergold or Mr. Kaufman who participated in these meetings give you their personal impressions of the nature of the objections, whether it comes from the oil companies or it reflects also the view of the governments which are part of the IEA. As you know, our advisory committees, pursuant to the Advisory Committee Act, do hold their meetings in public—the public is invited to them.

Senator METZENBAUM. I am sorry, I didn't hear what you said.

Mr. COLEMAN. I say, in the United States, meetings of advisory committees of the Department of Energy, under the Advisory Committee Act, are noticed and the public can attend those meetings. The answer I gave before, I think, is the accurate one—that there is a resistance to making the meeting open because of the interest of the foreign governments and there is some considerable interest of those governments expressed through those corporations which are either owned by or partly by the governments.

Senator METZENBAUM. Well, Mrs. Thatcher says they are going to get rid of their ownership of BP. That is her statement within recent days—that they want to allow more public ownership of BP so that won't be a problem.

Mr. COLEMAN. Perhaps they will change their view.

Senator METZENBAUM. Mr. Bergold, I will be happy to hear from you as to why we have to permit the oil companies to do business in secret.

Mr. BERGOLD. The British Government will reduce its equity in BP, Senator, but certainly will not eliminate that equity.

We have taken this up over time with our colleagues in the IEA. We would have no objection at all to more openness and public participation and I think it is probably fair to say that the American oil companies who are used to this would not necessarily be those objecting.

Quite clearly, many of the governments in the IEA who have a full or partial participation in the oil companies based in their countries look upon this information as national security information. We do not, but they do. We have pushed them on the issue of transcripts. That is the reason we have the transcripts. They do not even like that. But we did force them to concede on the transcripts and, as you know, most of the, or all of the, submissions and statements made by the foreign companies in the meetings are classified.

They have given us very clear indications that at the national level, and not at the company level, that they would find it impossible to share the kind of information, the kind of information which is meaningful that is now shared, if that classification is broken and, if, therefore, you admitted public observers to these working meetings.

Senator METZENBAUM. I am going to make a phone call; my staff will ask a couple of questions. I want to press this point further when I come back.

Ms. BAKER. Mr. Bergold, are you suggesting that the foreign countries are concerned about some of this information somehow winding its way back to OPEC; is that the concern that these countries have?

Mr. BERGOLD. I think that would be part of it. There would be other competitive, depending upon the country concerned, and its relationships with its neighbors, friendly or not friendly. There would be a whole range of possible people they would not want to have knowledge about these issues. Once you open the meeting, of course, there is no way to be selective. You are either having an open meeting or a closed meeting.

Ms. BAKER. With respect to OPEC nations finding out, though, is it reasonable to assume that Exxon would not tell Saudi Arabia, for example, what went on at the meeting if Saudi Arabia wanted to know?

Mr. BERGOLD. You would have to ask Exxon that, I think. I think it would depend on what the issue was, whether it was related to a random call or quite a separate issue. I could guess the answer being either way.

Ms. BAKER. Either way?

Mr. BERGOLD. You would have to ask the company in question.

Ms. BAKER. But you think Exxon might refuse.

Mr. BERGOLD. I can conceive of it but I would not want to take a position from their point of view.

Ms. BAKER. Are you aware that several foreign countries' representatives and members of the Secretariat told the GAO that they did not need blanket classifications such as we now have?

Mr. BERGOLD. I think that there would be several foreign companies that would not need blanket classification. The point is that there are several key companies that do and that is the reason we have it.

Senator METZENBAUM. Since there are only two countries that seem to be involved, according to the list, one being British Petroleum, which has such a major interest in an American company—it has nationalized one of our own companies, Standard Oil of Ohio. It would seem to me that they would hardly be in that position. The other one is—

Mr. BERGOLD. There are five, Senator.

Senator METZENBAUM. Pardon.

Mr. BERGOLD. There are five as I recall it that were read out. I don't have it in front of me, but I recall Petrofina, VEBA, Shell International, ENI, and BP of the ones that you mentioned. Of course, there is also the possibility of other companies coming on and off of these subcommittees over time so even with this list, one cannot limit it to these companies.

Senator METZENBAUM. What do you think would happen if this committee recommends and the Congress sees fit to extend the antitrust exemption provided the meetings in which the oil companies participate are open to the public, except in those instances where there is confidential, proprietary information involved. What do you think will happen?

Mr. BERGOLD. Well, I think every meeting, prospectively and possibly will have proprietary information involved so I am not sure that I would understand that sort of a caveat in the approval. I think that would end this up more or less exactly where we are. If the intent, Senator, if the intent is to make contingent the continuing antitrust defense to, in fact, opening the meetings, and not opening them just once in a while, but, in fact, opening the meetings, I would predict from everything I know that it would destroy the system and the foreign companies, the key foreign companies, certain key foreign companies. will pull out.

Senator METZENBAUM. Has the IEA formulated a dispute settlement plant that is acceptable to the oil companies?

Mr. KAUFMAN. May I answer that question? The oil industry groups, particularly subcommittee "C" of the IAB, has formulated a proposal for a dispute settlement center which they have presented to the IEA and which the IEA is now considering. It has not been adopted.

Senator METZENBAUM. So that the dispute settlement plan, which might encompass a dispute between two countries or three or more, the whole conceptualization of that will be provided by the oil companies?

Mr. KAUFMAN. No; the dispute settlement center does not deal with disputes between member countries of the IEA, but rather deals with disputes between companies which might arise out of transactions mandated by the allocation system.

Senator METZENBAUM. Can a voluntary allocation program work without there being such a plan?

Mr. KAUFMAN. Well, it could work because one could conceive of ad hoc dispute settlement as exists in many commercial transactions

that would undoubtedly be less effective and probably less efficient than an established dispute settlement center, but it would conceivably work.

Senator METZENBAUM. If the oil companies won't voluntarily participate because of the absence of a plan of action and a dispute settlement plan, am I correct that the IEA must then go to a type 3 mandatory allocation in an emergency?

Mr. KAUFMAN. Well, given your two premises, the answer is yes. I am not sure that either of the premises is absolutely certain.

Senator METZENBAUM. If the oil companies were to be ordered by the President to adhere to an IEA type 3 mandatory allocation program, do you believe they face any risk of antitrust liability?

Mr. KAUFMAN. No; because they would have a defense of Government compulsion.

Senator METZENBAUM. Is DOE prepared to handle the U.S. mandatory allocation responsibilities if an emergency requires type 3 allocations?

Mr. KAUFMAN. I believe it is. We have regulations in place to that effect.

Senator METZENBAUM. Am I correct that the IEA was highly critical of DOE's performance during the most recent test of IEA's allocation system?

Mr. OLIVER. The test was precisely that, an effort to improve and discover weaknesses in the allocation procedure. There were suggestions made for improvement in the U.S. system, that is correct.

Senator METZENBAUM. And the IEA was or was not highly critical?

Mr. OLIVER. They were critical; I wouldn't say that they were any more highly critical of the United States than of other countries.

Senator METZENBAUM. They indicated that the U.S. allocation system failed, didn't they? Isn't that the word they used?

Mr. OLIVER. I don't recall the use of the word "failure," no.

Mr. BERGOLD. The excerpt I have, Senator, they called the performance, in general, good and encouraging.

Senator METZENBAUM. I have an internal report not circulated outside of the Secretariat but obtained by the U.S. operational head, which characterized the U.S. NESO's performance as a failure along with Turkey which dropped out of the test early. Now, isn't that highly critical?

Mr. OLIVER. That phrase is certainly highly critical from that particular source. I would refer you to some correspondence between the Executive Director of the IEA and Dr. Schlesinger in which the specific recommendations were made from improvement of the U.S. system. I wouldn't regard that as critical, but rather as a constructive exchange of views on how the U.S. system operates.

Senator METZENBAUM. Have all those recommendations been followed?

Mr. OLIVER. Many of them have.

Mr. BERGOLD. Some of them cannot be followed, Senator; for example, one of the areas of criticism, as I recall, is that they asked was Alaskan oil included in the IEA system for international reallocation. Well, we simply have to tell them that the Congress had mandated that Alaskan oil cannot be exported. So that there are some misunderstandings here that have to be worked out, and it is not a question so much of their being critical of the U.S. system as the test allowing

them a way to understand what our system is a little bit better than they did before.

Senator METZENBAUM. Is there anything classified in that letter?

Mr. BERGOLD. No.

Senator METZENBAUM. Then, perhaps that should be included in the record.

Mr. BERGOLD. We would be pleased to put it in the record.

[The letter referred to above can be found in the appendix.]

Senator METZENBAUM. Senator Thurmond, do you have any questions?

Senator THURMOND. Thank you, Mr. Chairman.

Mr. Coleman, on page 40 of your statement I believe you said that:

Section 252 provides an antitrust defense for U.S. oil companies without which they would not be able to participate in the activities of the IEA. This defense is contingent upon the oil companies' compliance with procedures developed by the Department of Energy in conjunction with the Department of Justice and the Federal Trade Commission and contained in the voluntary agreement.

Now, on October 31, 1979, the antitrust immunity for oil companies' participation in the voluntary agreements will expire, as you know. What activities of the companies would be affected if the immunity expired?

Mr. COLEMAN. If the immunity expires, the U.S. oil companies would be subject fully to the U.S. antitrust laws with respect to any and all of their activities in connection with the international energy program. Those activities basically are the advisory committee meetings, and the exchange of proprietary, confidential information, their participation in a test of the system to determine its readiness such as we were just discussing, or in the event of an emergency, their participation with the IEA in the operation of an international allocation scheme—all of which we think are absolutely vital to the continued operation of the IEA, and, more importantly, its operation in the event we had an emergency where resort was needful to an international allocation scheme.

Senator THURMOND. Now, it is my understanding that the major portion of the oil companies participation in the voluntary agreements is the operation of the oil sharing agreement, which is part of the International Energy Agreement.

What data are used to determine the rights and obligations of the several countries and oil companies participating?

Mr. COLEMAN. Are you assuming circumstance where there would be an allocation? Where the agreement was triggered and we were in an active allocation—what data would be utilized? In those circumstances, I think it would be a combination of the data that is supplied on questionnaires *a* and *b* which provide projections of the next 2 months, and actually a projection of the current month because the report is filed at the first part of the month, and actual figures from the preceding 2 months. But, obviously, those running the allocation program would heavily rely on data informally obtained through oil company participation in the advisory committees, from intelligence estimates of their own countries, from the usual data sources that are available to one in a situation like that. I think the sources for data for an actual operation of an allocation program on a day-to-day basis

would be multiple, the base data would be that supplied by the companies, the participating companies of the voluntary agreement.

Senator THURMOND. It has been suggested that the expiration of the antitrust immunity may affect the companies' participation in the daily collection efforts by the International Energy Agency. The question now is, could DOE collect the same information? Could DOE collect the same information from the companies and provide it to the IEA?

Mr. COLEMAN. It could. It is thought to be much preferable for the companies to respond directly to the IEA. The concern is that numbers which are filtered through a government which in any situation of shortage would obviously have its own interests at stake would not be, would not have the credibility of data supplied directly by the companies to the IEA as an international agency, charged with the responsibility of collecting that information and treating it fairly to all member countries.

Senator THURMOND. Mr. Coleman, what would be the affect of the expiration of the antitrust immunity on the International Energy Agency?

Mr. COLEMAN. In our considered judgment, it would lead to its demise. We think that an antitrust defense under these circumstances is an integral part of the ability to have an international energy program.

Senator THURMOND. Could you care to elaborate any further on that?

Mr. COLEMAN. I can, sir. To a large extent, the companies who report to the IEA and participate in these advisory committees are U.S. oil companies. They really dominate the international oil market from the point of purchase in the producer country to distribution.

Any information system that did not include information obtained from the U.S. international oil companies, or any emergency allocation system that did not have the benefit of their expertise and advice on moving oil around to places different from its ordinary destination, logistical assistance and the like, would be totally ineffective. The antitrust laws application to the U.S. oil companies is such, that absent an antitrust defense, it is our opinion they will not participate. So, absent that antitrust defense, you will not have the benefit of U.S. oil company input and, in our judgment, the system would be ineffective and collapse.

Senator THURMOND. Mr. Coleman, what steps have been taken by the Department of Energy to prepare for the possible expiration of the antitrust immunity?

Mr. COLEMAN. We have urged that that defense not expire. We have, of course, participated in the congressional process of these hearings and the ones this summer before Congressman Dingle's committee, and we would hope that before the end of this month, when the antitrust defense will expire, that the Congress will pass legislation which would at least, for a reasonable period of time, extend that exemption. We are not urging at this point that this committee come to conclusions on this question before it has had a fully adequate opportunity to make such investigations as it desires. We are aware of the fact that the General Accounting Office has a major study of this subject underway. Accordingly, it would be our hope that an extension would be agreed

to by both Houses for a sufficiently long period of time to allow the Congress in the ordinary course of business to conclude its work, its analysis of these issues, and to come to a judgment.

It will be our recommendation, I am sure, when this committee does conclude its hearings and proceeds to markup that it is of vital importance that an antitrust exemption or defense be permanently provided, and when I say "permanently," I mean through the term of the international energy program which I believe is to January 1986.

Senator THURMOND. On page 10 of your statement, the last page, your statement reads this way:

Even more important, failure of the U.S. Government to provide a means for its companies to participate in the IEA would be viewed by the other IEA member countries as a breach of our commitment to the agreement. It would indicate to them that we are not sincere in supporting mechanisms current in the place which remain the best available way of responding to a severe international oil crisis. Such a signal would seriously impair both the agencies cooperative efforts and the leadership position of the United States in future international energy activities. However, continued short-term extension of section 252 can only raise questions in the minds of our allies as to the degree of commitment of the U.S. Government to international energy cooperation.

Now, you obviously are tremendously concerned I assume from that that the United States establish strong, long-term international energy cooperative agreements, is that correct?

Mr. COLEMAN. I believe so, Senator. The term of the present agreement, I think, would run at least until January 1986.

Senator THURMOND. Is it also correct that you feel that the extension of section 252 of the 1975 act is essential to achieving that type long-term cooperation?

Mr. COLEMAN. Yes; we do.

[The prepared statement of Mr. Coleman follows:]

PREPARED STATEMENT OF LYNN R. COLEMAN

I appreciate the opportunity to appear before you to discuss the need to enact S. 1413 to extend Section 252 of the Energy Policy and Conservation Act (EPCA) on a more permanent basis.

The 1973 oil embargo and the consequent sharp increase in world oil prices severely disrupted the economies and strained the political and strategic relationships of most oil-importing nations. Inadequate cooperation among the industrialized countries resulted in competitive unilateral efforts by many to obtain oil supplies.

Recognizing the need to unite in a coordinated effort to lessen dependence on foreign oil and thereby reduce strategic and economic vulnerability, the United States and certain other members of the Organization for Economic Cooperation and Development agreed at the Washington Energy Conference in February 1974 on the creation of a framework for close consumer country cooperation. As a result, on November 18, 1974, the United States and 15 other nations concluded an Agreement on an International Energy Program.

In signing the Agreement, we and our partners agreed on emergency provisions that will result in a unified and coordinated response to future supply interruptions. The United States pledged to cooperate with other consumer countries in the equitable distribution of available supplies in the event of a substantial reduction in world oil supplies, thus minimizing the impact of a supply disruption on the Free World economy and upon U.S. defense and security. We agreed that the success of the allocation system required a mechanism to assure that the participating governments are sufficiently informed regarding the operation of the complex international oil market and the activities of the international oil companies. We also agreed on the need to develop a long-term program to reduce member country dependence on imported oil by undertaking

cooperative efforts in energy conservation, accelerated development of alternative energy sources, energy research and development and uranium supply and enrichment.

When the Congress enacted the Energy Policy and Conservation Act in December of 1975, it detailed in Section 252 of that Act procedures to be followed in developing and carrying out voluntary agreements and plans of action to implement the allocation and information provisions of the International Energy Program (IEP) agreement. In addition, it stipulated that there should be available to participating firms a defense to antitrust litigation against them arising out of actions taken by them to develop or carry out a voluntary agreement or plan of action. This defense was carefully limited—it would be available only to persons complying with Section 252 and the rules promulgated thereunder; one asserting the defense for acts in the course of carrying out a plan of action would have the burden of showing that his actions were within the reasonable contemplation of that plan; and the defense would be inapplicable to actions taken for the purpose of injuring competition. Moreover, a person interposing the defense would have the burden of proof, except on the question of whether his actions were taken for the purpose of injuring competition.

By its terms, Section 252 was to expire June 30, 1979. On June 30 of this year the President signed into law a temporary extension of Section 252, thereby avoiding a lapse in the continuity of the emergency activities of the International Energy Agency (IEA). This extension will expire October 31.

We appear here today to urge a further extension of Section 252, until January 19, 1986, the first date when the IEP can be terminated by its signatories.

Section 252 provides an antitrust defense for U.S. oil companies without which they would not be able to participate in the activities of the IEA. This defense is contingent upon the oil companies' compliance with procedures developed by the Department of Energy in conjunction with the Department of Justice and the Federal Trade Commission and contained in the Voluntary Agreement. These procedures include prior notification of industry meetings convened to advise the IEA, publication of meeting notices in the Federal Register, monitoring of industry meetings by U.S. Government representatives, transcription of industry meetings, and securing prior U.S. Government approval for the submission of confidential company data to the IEA.

Should the IEP be triggered, it is clear that U.S. oil company participation would be essential to ensure the successful operation of the IEA emergency allocation system. These oil companies, through the forum of the Industry Advisory Board, have advised the IEA concerning emergency oil sharing questions, including the development of emergency information systems, procedures to implement the allocation of oil supplies in an emergency, and creation of an emergency management organization to assist the IEA in its operation of the emergency allocation system.

The antitrust defense made available by Section 252(f) is essential to the participation of U.S. oil companies in the Voluntary Agreement and, through it, in the IEP. The IEP, in turn, can effectively function only with participation by U.S. and foreign oil companies which are primary sources of information about conditions in the international oil market and would be the primary actors in redistributing oil if the IEP's emergency sharing provisions were activated. The Department of Energy, the Department of Justice and the Federal Trade Commission have closely monitored industry participation in the IEP. In their reports to Congress, the Justice Department and the Federal Trade Commission have concluded that no anticompetitive activities have been carried out and no anticompetitive effects have been incurred by reason of industry activity under the Voluntary Agreement.

The utility of the IEP and the necessity of oil industry participation in the IEP have been graphically demonstrated in the past several months, when curtailment of exports from Iran created dislocations in the international oil market. In this period, the IEA's Standing Group on Emergency Questions (SEQ) and Standing Group on the Oil Market (SOM) have held frequent consultations with members of the Industry Advisory Board (IAB) to the IEA and the Industry Working Party (IWP) to discuss the nature, extent and effects of the shortfall in world oil supplies. These consultations (which were monitored by U.S. Government observers from the Departments of Energy and Justice and from the Federal Trade Commission) have enabled the IEA and its member governments to take concerted action to reduce dislocations.

In January of this year, the IEA implemented its Special Information System in order both to provide a test of the system and to obtain information vital to its monitoring of the current oil market situation overall and in each Member Country. Under this system companies provide monthly data on actual and scheduled oil production and inventories in IEA Member Countries, as well as imports to and exports of crude oil and products from these Countries. This is the same information system which would provide data essential to the determination of national allocation rights and obligations if the international oil allocation system were to be triggered. U.S. companies provide this information directly to the IEA pursuant to the provisions of the Voluntary Agreement, and in reliance on the antitrust defense contained in Section 252 of EPCA.

As part of its continual monitoring activities to assure that the international emergency allocation system is in readiness at all times, the IEA has conducted a series of consultations with international and independent oil companies, including U.S. companies, to consider measures to help improve the supply situation of countries experiencing unusual supply difficulties. U.S. companies have participated in these consultations under the provisions of the Voluntary Agreement. The U.S. oil companies would not provide proprietary information to the IEA in such bilateral consultations if the antitrust defense provided by the Voluntary Agreement were not available to them, because of the risk of litigation.

Moreover, since January, the IEA's Standing Group on Emergency Questions and the Standing Group on the Oil Market have met monthly on a joint basis with the Industry Advisory Board to analyze the nature, extent and effects of the shortfall in world oil supplies. These meetings all were attended by U.S. Government delegates from the Departments of Energy and State, as well as attorneys from the Departments of Justice and Energy and from the Federal Trade Commission. Appraisals emanating from these meetings led to an agreement at the Governing Board that the Member Countries would contribute to stabilizing the present situation by reducing their demand for oil on the world market by around two million barrels per day, or about five percent of IEA consumption, by the end of 1979. Without the antitrust defense provided for in Section 252, the U.S. oil companies would not have participated in these appraisals. In our judgement, their absence would have severely impaired the IEA's effectiveness.

In the event that the IEA allocation system is activated, the Special Information System would become an integral part of the allocation system. Although the ultimate responsibility for all international emergency allocation activities rests with the IEA, the 34 IEA-designated Reporting Companies would be called upon to play an essential role in the operational and logistical aspects of the emergency oil allocations.

The broad parameters of international oil allocation already have been determined by Member Countries in the International Energy Agreement. The physical redistribution of supplies needed to effect such allocation would be accomplished largely through voluntary actions by the companies, including adjustments in their internal supply schedules, commercial transactions with other companies, or voluntary offers to supply or receive oil, which would be coordinated by the IEA with the assistance of the Industry Supply Advisory Group.

The Industry Supply Advisory Group, comprised of industry oil supply experts chosen from among the Reporting Companies, would work under the guidance of the IEA Allocation Coordinator, who is responsible for the overall supervision of the allocation program. This group would provide technical advice on oil supply and logistics to the IEA, channel instructions to the Reporting Companies to ensure efficient operation of the allocation program and assist the Allocation Coordinator in evaluating and selecting from among the voluntary offers proposed by the Reporting Companies those which would best meet each Member Country's supply right. Of the eighteen companies which are members of the Industry Supply Advisory Group, twelve are U.S.-based companies currently participating in the Voluntary Agreement. It seems clear that U.S. companies would not participate in the Industry Supply Advisory Group if the antitrust defense were not available.

If the antitrust defense provided for in Section 252(f) were no longer available for U.S. oil company activities in connection with the IEP, those companies would cease their membership on the IAB and IWP and their subcommittees and as Reporting Companies in the IEA data system. Without U.S. oil company cooperation, the IEA information and emergency allocation systems would be ineffective and the IEP's purpose would be frustrated.

The pending bill does no more than extend the time Section 252 is effective. All of the other conditions and safeguards presently incorporated in that Section, and which have proven to be effective, including reports to Congress by the antitrust enforcement agencies, public notice of industry meetings, attendance at industry meetings by U.S. Government representatives and taking of verbatim transcripts or full and complete minutes, will remain unchanged.

Even more important, failure of the U.S. Government to provide a means for its companies to participate in the IEA would be viewed by the other IEA Member Countries as a breach of our commitment to the Agreement. It would indicate to them that we are not sincere in supporting mechanisms currently in place which remain the best available way of responding to a severe international oil crisis. Such a signal would seriously impair both the Agency's cooperative which remain the best available way of responding to a severe international energy activities. Moreover, continued short-term extension of Section 252 can only raise questions in the minds of our allies as to the degree of commitment of the United States Government to international energy cooperation. I solicit your support in extending the antitrust defense and other provisions of Section 252 on a more permanent basis, as provided in S. 1413.

I would be happy to answer any questions the Subcommittee may have.

Senator THURMOND. That's all the questions I have, Mr. Chairman. Thank you very much, Mr. Coleman. Thank you, other gentlemen, for your appearance.

Senator METZENBAUM. Thank you very much, Mr. Coleman. We will consider your suggestion about an interim extension and we will talk about that.

Our next witness is Mr. Calingaert.

Mr. Calingaert, we have you and the gentlemen from Texaco as our witnesses yet today and the Chair is going to have to adjourn at 12 sharp. We would like to put your entire statement in the record, if that would meet with your approval, and then ask you to summarize it for us. We might have some questions for you, and I want to be certain that the one oil industry spokesman who is speaking, as I understand it, for the entire industry, will have an adequate opportunity to present his views.

STATEMENT OF MICHAEL CALINGAERT, DEPUTY ASSISTANT SECRETARY FOR ECONOMIC AND BUSINESS AFFAIRS, DEPARTMENT OF STATE

Mr. CALINGAERT. Thank you very much, Mr. Chairman.

I brought with me Gerald Rosen who is Director of the Office of Fuels and Energy of the State Department and, I would add, has been involved in the International Energy Agency since its inception.

Senator METZENBAUM. Would you pull the mike closer to you, please? Thank you.

Mr. CALINGAERT. Should I repeat that, sir?

Senator METZENBAUM. No, I heard you.

Mr. CALINGAERT. Thank you. I do have a statement which I would be happy to submit for the record; let me very briefly touch on some of the main points, and then I would be very happy to answer any questions.

The State Department considers the passage of the legislation extending section 252 of the Energy Policy and Conservation Act to be of vital importance in serving our Nation's essential interests and in providing the best response to a possible energy crisis caused by a severe disruption in the international oil market.

As we stated, the International Energy Agency (IEA) was set up largely on U.S. initiative in the wake of the oil crisis of 1973-74 and has been extremely useful and important in providing, as Mr. Bergold has said, a framework of cooperation among oil consuming countries.

This has been proven, it seems to us, by the response to the recent crisis caused in first instance by the Iranian situation.

Senator METZENBAUM. As a matter of fact, Mr. Calingaert, in that connection, the IEA nations agreed as a response to the Iranian cutback that they would reduce their demand for oil on the world oil market by about 5 percent of IEA consumption. Would you tell us what evidence you have that any nation other than the United States made a serious effort to cut back on consumption. Certainly, you have heard the figures I have already stated, indicating quite the opposite of cutback in consumption. Many nations increased their consumption during that very period. What evidence do you have that the other nations lived up to their commitment?

Mr. CALINGEART. The IEA Secretariat has been collecting information. The goal was established for the end of the year and, of course, we are getting to the point where the IEA can state more specifically what performance has been.

Mr. ROSEN. Yes, Senator, I think part of the answer to your question rests on the different base periods being used, there have been increases over the base period final consumption. As was explained earlier, that is a period of a year ago. The commitment was to reduce oil imports by an amount equivalent to 5 percent of anticipated consumption in 1979. There has been a reduction in anticipated consumption in 1979, in fact. I think that when you say that consumption is increased, that is related to a different base period which was the period of a year ago.

In essence, what all that means is that the increase has been much less than otherwise would have been the case without various measures that have been taken by the IEA countries.

Senator METZENBAUM. Mr. Rosen, isn't that sort of preposterous to say that we get an agreement to cut back on what somebody says they think they are going to use? All you have to do is say you think you are going to consume more. You show that you expect to use more and you "cut back" on those expectations, but you really haven't cut back anything at all. Isn't that an indication of the absurdity of this whole IEA arrangement. The IEA nations agree to cut back 5 percent of their consumption. It was trumpeted throughout the world—great, wonderful. We got all done and found out that it was a little double talk and you had to watch what was underneath the nutshells, because that which we thought was going to occur did not. You found that you had to look at the fine print. It was 5 percent of anticipated consumption—not 5 percent of actual consumption and, as a consequence, the people of this Nation lost, while the rest of the nations in the world increased their consumption. Is that what being part of IEA means to our Nation?

Mr. ROSEN. Senator, I think it is complex, but not at all preposterous. If, indeed, each nation could determine with no check what its consumption would have been, if that were a fluctuating figure, perhaps your criticism would have been a just one. But, in fact, we did, within the IEA and the Secretariat, which is more objective, look at consumption figures for last year, took a look at growth rates, elasticities and

various ratios and came up with projections, the IEA Secretariat did, on a more objective basis. These are an internal benchmark against which we are checking progress.

Senator METZENBAUM. Mr. Rosen.

Mr. ROSEN. Thus, in fact, it was a much more rigorous system than might appear on the surface.

Senator METZENBAUM. I was at that meeting where the 5-percent agreement was talked about. Unless I am deaf or dumb, and I mean dumb from an intellectual standpoint, I never heard anything mentioned about 5 percent of anticipated consumption, and I am wondering where that came from, because I sat through all the meetings. It was only when I got back home and started looking at the facts and the figures that somebody said: "Oh, that meant anticipated consumption." It just seems to me that we were had. Now, tell me where, if at all, that anticipated consumption understanding came from.

Mr. ROSEN. Senator, I suspect that if you were not aware of it at the time it was because this was clarified in the preliminary consultations. Perhaps it was not expressed so clearly at the meeting, but it was discussed in the consultations that led up to this meeting and they were numerous and detailed so we really did know what we were about at the meeting.

Senator METZENBAUM. Then why wasn't it mentioned at the meeting? Why didn't the whole world know about it? Why was the world told that we were cutting back on 5 percent of consumption, and nobody ever said anything—nobody ever used the word anticipated consumption until after the fact. We in America were never told that. Nobody told us that. You in the State Department didn't tell us; the Energy Department didn't tell us. The President didn't tell us. Why? What is the matter? Are the American people second-class citizens, aren't they entitled to know? Why didn't you tell us? Nobody told me and I was there.

Mr. ROSEN. Senator, I would have to check the statements and releases at the time. It was my impression that they did refer to anticipated consumption but I would have to check, and I will go back and check and see if that was the case.

Senator METZENBAUM. This only ties in with my whole feeling on this. There may in the past have been a reason for our participation in the IEA, but every decision that I have seen the IEA make has always wound up with our Nation getting the short end of the stick. Our Nation gets the short end of the stick when you say that the trigger mechanism will cause a cutback based on total consumption, not upon imports. As a consequence, our Nation pays double what any other nation does.

They agree informally, or formally, in fact, to cut back 5 percent of consumption, but the American people aren't told that that is anticipated consumption but are told that it is 5 percent of consumption, meaning that which we had been using. In each instance, and I have looked at the decisions of the IEA, we, as so often in international trade, wind up getting the short end of the negotiating stick. I think we certainly have had it with the IEA, and what bothers me is that the State Department has been a party to it without feeling any responsibility to share the information and the facts with the people

of this country. Usually it only comes out when some aggressive newspaper reporter or some other part of the media digs into the situation. There was never any mention of this question of anticipated consumption.

Mr. CALINGAERT. Mr. Chairman, let me just repeat the remarks of Mr. Rosen that we are very happy to check the records and there certainly was no intention to mislead the Congress or anybody else. My recollection from the meeting was, indeed, that we were talking from the outset about 5 percent from anticipated consumption for this year and when we get to the end of the year we will, indeed, see how performance has been by various countries.

In so far as the trigger mechanism and the 7-percent reduction is concerned, the whole system, as I believe some of the witnesses from DOE mentioned, is a combination of consumption and import restraint and this was done in order to take account of the different situations of the countries involved. The first 7 percent, as you rightly pointed out, relates to a cutback in consumption and, of course, that is what relates directly to the level of economic activity. Then beyond that figure, there is a mix of consumptions and import restraint to try to take into account the different situations of the member countries.

Certainly, it is not the intention of the Department, or I would say anyone else in the Government, to hide the activities of the IEA, and I agree with you that it would be useful all around for more information to be available about what this organization has done and the benefits it does give to us. I would also add that, as in the past, we are fully ready and very happy to consult, formally and informally, with committees and staffs of the committees.

Senator METZENBAUM. There wasn't evidence that there was any willingness to cooperate when I attempted to attend the IEA meeting. It was your people at State who said "absolutely no." They couldn't have been anymore specific in indicating their opposition until the White House and the Secretary of State overruled them and caused them to change their minds. I don't find that degree of cooperation from State with the Congress in this particular matter.

Mr. Calingaert, why wasn't the IEA agreement submitted as a treaty so that the Congress might have an opportunity to consider it?

Mr. ROSEN. Well, Senator, by general agreement among the members, it was done in a form which in U.S. domestic terms, it was appropriate to submit as an executive agreement but it was concluded as an executive agreement subject to our obtaining the necessary legislative authority from the Congress. When we first joined the IEA, it was on a provisional basis. Then we did go to the Congress and sought the necessary authority to participate, to carry out the various aspects of the IEA, and that was largely provided in the Energy Policy and Conservation Act.

Senator METZENBAUM. That was mainly the antitrust exemption, wasn't it?

Mr. ROSEN. No, sir, there was a lot more. There was the authority to mandate movements of oil, for example, if it should be required in a type 3 situation. There were various information gathering authorities in the Energy Policy and Conservation Act. There were a number of authorities related to IEA.

Senator METZENBAUM. I understand that the major portions of the public transcripts of IEA meetings are deleted at the direction of the State Department, is that correct?

Mr. CALINGAERT. Mr. Chairman, the State Department has the responsibility for passing on classification of the transcripts. That is correct.

Senator METZENBAUM. Does anyone get a real sense of what goes on at these meetings if so much is deleted?

Mr. ROSEN. Mr. Chairman, I would say that the major portion of the transcript is not deleted, is, in fact, unclassified. The entire classified version is available, of course, to the Justice Department, the FTC, to the Congress, both staff and Members of Congress. So, there is widespread knowledge of what goes on.

Senator METZENBAUM. Why does it take 6 to 12 months to make a transcript available?

Mr. ROSEN. Because of the bulk of the transcripts, the procedures that we have developed to be sure that they are accurate, which involve having companies check them for accuracy and then submit possible changes, having the U.S. Government employees who were there determine whether these changes are accurate. Moving the transcripts around, getting them typed, all of these procedures take time; however, I must say that there can be improvements and we are working on improvements in timing. Some of the delay was inherent in the complexity, some of it was due to the fact that we were learning how to deal with masses of material. I think we are improving and I think we can improve further.

Senator METZENBAUM. Wouldn't you guess that as you move this around and the oil companies know what is going on and a lot of their personnel know what is going on, and various governments know what is going on, that, unquestionably, the OPEC nations know what is going on. Doesn't it actually come down to the fact that given the procedure that we follow the only people who don't know what is going on are the American people? And the Members of Congress. We don't even get the transcripts for 6 to 12 months.

Mr. ROSEN. Senator, the transcripts are available to the Congress as soon as we have them. At any time one of your staff, for example, would like to come to the Department, they can be made available, so the Congress does not have to wait for that period.

Senator METZENBAUM. How soon after the meetings are held can we get the transcripts?

Mr. ROSEN. About 6 weeks later, I am told, Mr. Senator, they are made available and, as I say, as soon as they are available to us, they will be made available to your staff.

Senator METZENBAUM. Why is it that it takes 6 weeks when we have a transcript of a meeting here that is actually available overnight. Why can't we get it within 24 to 48 hours?

Mr. ROSEN. Partly, Senator, it is because many of these meetings take place overseas.

Senator METZENBAUM. Many of these meetings take what?

Mr. ROSEN. Many of the meetings take place in different countries. We have to get the transcripts back here and typed and apparently it takes something on the order of 6 weeks.

Senator METZENBAUM. More than the 4 hours that it takes the Concorde to get here or 3 hours? Are you kidding? Are you kidding me when you tell me because it is overseas? You know, we live in a world where a plane travels overseas—dozens of them—every single day, so it is really no problem to get it to us. There is no need for it to require 6 weeks' time.

Isn't it just a question of the State Department sort of having some feeling that they have to shield the Congress and the public from so much information?

Mr. ROSEN. I don't think that's the case, Senator. In fact, the responsibility for the transcripts, I believe, is with the Department of Energy. But I am not shifting responsibility, we have consulted closely on this matter. Part of it is also a question of expense—getting a daily transcript apparently is extremely expensive.

Senator METZENBAUM. A couple of weeks ago there was a meeting in New York, right, is that correct?

Mr. ROSEN. Yes, sir.

Senator METZENBAUM. Is the transcript available?

Mr. ROSEN. I will have to ask my colleague from the Department of Energy, which really is responsible for these. It is not yet available, I am told.

Senator METZENBAUM. It is what?

Mr. ROSEN. It is not yet available, I am told.

Senator METZENBAUM. Why? Do you want to stand up?

Mr. OLIVER. We will address that question. As you recall, I am David Oliver from the Department of Energy. The contract that we have with the transcriber calls for 30 day delivery.

Senator METZENBAUM. For what?

Mr. OLIVER. As Mr. Rosen has pointed out, for 30 days. As Mr. Rosen has pointed out that is largely a function of cost.

We spend about \$100,000 per year for transcription of these meetings. We try to minimize the cost. If it would be the will of the Congress an appropriate way to spend the money, we may be able to increase that time, or reduce the delivery time. The transcriber who takes the notes, and I am in somebody else's professional area here, but I am told that the person who takes the transcription must also translate from his transcription, do his own typing on this. This is voluminous material. A full day or 2 days of meetings. I suspect that to increase this would mean hiring more than one transcriber to cover an individual meeting and the cost will go up accordingly.

So there are some economic considerations here as well as time considerations.

Senator METZENBAUM. Did BP chair one of the meetings where the Secretariat's report was made in New York?

Mr. OLIVER. Would you please repeat the question?

Senator METZENBAUM. British Petroleum chaired one of the meetings where the Secretariat's report was made in New York, is that correct?

Mr. OLIVER. The Secretariat's report? I didn't attend that meeting—I don't know.

Senator METZENBAUM. I am not asserting that, I am asking that question. I am not certain if my statement is correct.

Mr. OLIVER. Excuse me just a moment. Yes, it is correct that BP chaired one of those meetings. And, when we get the transcript, will the BP statement, remarks as well as the Secretariat's remarks, be included or will they be deleted?

Mr. ROSEN. In the public version of the transcript BP's remarks will be classified. In the version made available to the Congress, including congressional staff, of course, this material will be included.

Senator METZENBAUM. As well as the Secretariat's?

Mr. ROSEN. The remarks of the Secretariat will be classified. But of course, they will be made available to the Congress.

Senator METZENBAUM. Mr. Oliver, I have to say that I think when we are dealing with literally billions and billions of dollars in the oil industry, when we are dealing with the factor that has contributed more to inflation in this Nation than any other single factor. I have difficulty in concerning myself whether the costs of the transcripts are \$100,000, or \$120,000, or \$130,000, or \$140,000 per year. I think that there is a sense of urgency. I must say that I don't think it takes these committees 30 days to get transcripts of reports of our meetings, even when they are not on an accelerated basis.

Another point that I should make to the Energy Department is that your notification to us, advising us that meetings of the IEA and their committees, will take place arrive so tardily that it is impossible for us in Congress to avail ourselves of our right to send observers. The announcements are so late that they are practically meaningless. Will you see to it that that procedure is changed?

Mr. KAUFMAN. Senator, may I address that? My office has the responsibility for getting the notices published in the Federal Register and sending them to the Speaker of the House and the President of the Senate, and that is done within a matter of days of receipt of the agenda of those meetings from either the IEA or the industry groups. Perhaps, there is some lag time within respective Houses of Congress getting them from Vice President Mondale's office to the relevant committees. But we send it to his office within a matter of days of our getting them.

Senator METZENBAUM. And how much lag time is there normally between the point where you get it and the time when the meeting will take place.

Mr. KAUFMAN. We receive the notice formally, if it is not an emergency meeting, 2 weeks prior to the meeting. Notice is published in the Federal Register 1 week prior to the meeting.

Senator METZENBAUM. In order that we not have this problem in the future, would you be good enough to send the notices to the chairman of the Energy Committee and the ranking minority member of the Energy Committee as well as to the chairman of the Judiciary Committee, the ranking member of the Judiciary Committee and the chairman of the Antitrust Subcommittee and the ranking member of the Antitrust Subcommittee. I think that would help.

We had a State attorney general appear before us at our first meeting. Would they have access to preclassified transcripts, the State attorneys general?

Mr. ROSEN. Senator, I do not believe so. I think they would not.

Senator METZENBAUM. Why? You mean they couldn't get clearance? Couldn't you give them clearance?

Mr. ROSEN. I just can't answer that, Mr. Senator. I am not sure. I would have to consult with the State Department legal office. I suppose that it isn't inconceivable that it could be made available but I just don't know what the legal implications would be.

Senator METZENBAUM. Would you advise me in writing?

Mr. ROSEN. Yes, sir.

Senator METZENBAUM. Why did you classify the fifth FTC report?

Mr. ROSEN. There was, Senator, a level of detail in that report about embargo scenarios which we thought would be damaging if it were made public. It might indicate the kinds of embargo we were seeking to counteract; some of the detail indicated weaknesses in particular countries' logistic structures; it was information of a nature which we thought would be damaging if it were in the hands of unauthorized parties, particularly those who might wish to contemplate an embargo.

Senator METZENBAUM. Why did you want to classify the most recent report and then reverse your position after the FTC objected?

Mr. ROSEN. What may have been done on staff level I am not sure, Mr. Senator. I know when the question was raised with me, I offered no objection to the unclassified version. So I really can't comment on what was done on a lower staff level.

Senator METZENBAUM. Either one of you—isn't France through its arrangements with EEC getting the benefit of potential IEA allocations without committing itself to participation in IEA?

Mr. ROSEN. No, sir, Mr. Senator, it is not. The arrangement we have and those the Community has with France are such that whatever the Community members do among themselves in terms of helping out France, their allocation rights, the amount of oil they are entitled to receive through the IEA system, is not affected. In other words, if they are going to share with France, that will come out of their own "hides."

No oil that the United States would have gotten or other IEA members, non-Community members, would have gotten will be diverted for the benefit of France. That is purely an intra-Community arrangement which does not affect the other countries rights and obligations.

Senator METZENBAUM. Are you aware, Mr. Rosen, that the FTC has said that France would benefit from the arrangement and that they can get their full allocation without being cutback? Would you take issue with that.

Mr. ROSEN. I don't know the context in which that was said. I am quite convinced that what I have said is correct, that in terms of the IEA allocations, France will not benefit. If they benefit, it will be from intra-Community, European Community, actions.

Senator METZENBAUM. Are you saying that France won't get America's oil, but that somehow they will work it out with other European nations.

Mr. ROSEN. I am saying that the formula, the IEP formula, indicates how much oil each member is entitled to receive in times of a shortage. The rights and obligations of no country in the IEA will be affected by what some of the countries arrange with France. In other words, that formula will dictate how much the United States gets, Japan and so forth. Whatever the Community countries and France arrange among themselves, that formula will not be affected and oil will not

flow from Japan, the United States or any other non-Community member to France.

Senator METZENBAUM. No; but oil will flow to France on an unlimited basis if they can go out and procure it. They will get the benefit of the allocations, but they will not have to give up any share, any portion of their allocation, isn't that a fact?

Mr. ROSEN. Senator, I don't see how they would get the benefit of the allocations. They can go out on the world market. If we are assuming a shortage, presumably they are going to have difficulties like everybody else, and I do not see how they would benefit from the allocations.

Senator METZENBAUM. Senator Thurmond.

Senator THURMOND. Thank you, Mr. Chairman. Thank you for your appearance here.

What activities of the companies would be affected if the immunity expires on October 31, 1979?

Mr. CALINGAERT. If the immunity expires, they would no longer participate in the program.

Senator THURMOND. Well, what impact would that have?

Mr. CALINGAERT. Well, the sharing program is really the keystone of the IEA system, and that system cannot function in the absence of the participation by the companies, both of the United States and the other countries, and if because of the absence of the antitrust defense they did not participate which would certainly be the case, then the system could not function. This means that continuing work could not go on in preparing for an eventual triggering and, more importantly, the triggering of the allocation system simply could not function.

Senator THURMOND. Therefore, you feel that it is vital that it be extended?

Mr. CALINGAERT. Absolutely, sir.

Senator THURMOND. Do you know what data are used to determine the rights and obligations of the several companies in the several countries participating? It is my understanding that the major portion of the oil companies' participation in the voluntary agreements is the operation of the oil sharing agreement, which is part of the international energy agreement. And I am just wondering if you knew what data are used to determine the rights and obligations of the several countries and the oil companies participating.

Mr. OLIVER. The base period consumption determines is a basis for determining the amount of oil that goes to the companies. Now the base period consumption is based on firm information reported to the OECD, the sponsoring group of the IEA. It is based on the last four quarters which those data are available. That information is related to estimates of current supplies, and the questionnaire A provides one of the major basis for the determination of supply availability.

Senator THURMOND. Now, I am wondering if all of your gentlemen share, if you disagree, I would like to know, share the same type concern as the Department of Energy expressed that the United States must establish strong long-term international energy cooperative agreements. Do you feel that is important?

Mr. CALINGAERT. Yes, we certainly do. History has shown that certainly this was true at the time of the 1973-74 crisis, that if each coun-

try went off on its own, it would serve to the benefit of no one of those countries and that all of the industrial consuming countries must work together. They must work together, not simply in terms of some short-term situation, but in the longer term effort to reduce our dependence on imported oil.

Senator THURMOND. And so to make it clear, the Department of State considers the passage of this legislation extending section 252 to be of vital importance in serving our Nation's essential interest; is that right?

Mr. CALINGAERT. Very definitely, sir.

Senator THURMOND. On page 2 of your statement you said that failure to extend the limiting antitrust defense provided by Section 252 would create in the minds of other consumers with whom we must cooperate for our common good several doubts about the seriousness of our commitment to consumer country cooperation across the board and hurting the common efforts to meet our energy needs.

Would you care to elaborate any on that?

Mr. CALINGAERT. Yes, sir; the whole IEA concept has been one of cooperation among consuming countries and as I mentioned earlier, the United States has taken the initiative and the lead in much of that effort.

The keystone to this program has been the oil-sharing arrangement and if the United States were to be viewed as backing away from that through making it impossible for its companies to participate in the effort, then clearly the other countries would see that as an indication that the United States is less interested, or perhaps, not interested anymore in that kind of cooperative policy which has been to the mutual benefit of the consuming countries.

Senator THURMOND. Now, there we spoke of consumer countries. Now, on page 7, you speak of consumers. I believe you made this statement

To extend Section 252 will have very significant benefits for the United States and for oil consumers generally. Failure to do so would risk accentuating the loss to the American people in a crisis and would seriously hurt the international cooperation which is in the interest of us all.

Now here, you are distinguishing the consumers from the consumer countries which you refer to back on page 2.

Mr. CALINGAERT. I think I may have used the "consumers" as individuals and "consuming countries" somewhat interchangeably and I am sorry about that. The thought I intended to give in this last paragraph is that this program operates to the benefit and in the interest of the American people because it provides a system wherein, under a shortfall situation, there are assurances that the American consumer, the United States in general, will be equitably treated and that there will be a sharing of the shortfall and of the benefits.

Senator THURMOND. Is it your thinking in expressing it as you did that this is a benefit to the consumer countries and also to the consumers, generally? Is that your thought?

Mr. CALINGAERT. It benefits both of them—consumer countries and the consumers. Yes, sir, it is of benefit to the countries and to the consumers of the oil; yes.

[The prepared statement of Mr. Calingaert follows:]

PREPARED STATEMENT OF MICHAEL CALINGAERT

The Department of State considers the passage of legislation extending Section 252 of the Energy Policy and Conservation Act to be of vital importance in serving our nation's essential interests and in providing the best response to a possible energy crisis caused by a severe disruption of the international oil market.

In the wake of the 1973-74 energy crisis, the United States took the lead in negotiations among some of the principal industrialized countries which led, in November 1974, to an agreement on an International Energy Program. This agreement is the outcome of a joint endeavor to strengthen cooperation on energy policy among oil-consuming countries. In order to administer the agreement, the International Energy Agency was established in Paris as an autonomous body within the Organization for Economic Cooperation and Development. It was evident at that time—and it is still evident today—that it is strongly in the U.S. interest to work jointly with the other consuming countries. Otherwise, we will all be the losers in a competitive scramble for available oil. In addition, we must work together to reduce our medium and long-term dependence on imported oil. This essential long-term cooperation would also be impaired if we showed ourselves unable to cooperate effectively in short-term crises. Failure to extend the limited anti-trust defense provided by Section 252 would create in the minds of other consumers, with whom we must cooperate for our common good, severe doubts about the seriousness of our commitment to consumer country cooperation across the board, hurting the common efforts to meet our energy needs.

The effect on the world oil market of events in Iran during the last year demonstrate that the crisis which gave the impetus for the creation of the IEA was not an isolated event and that a disruption in the supply of oil could reoccur tomorrow, again placing our economic well-being in jeopardy. In response to the oil shortfall earlier this year, the IEA nations agreed to reduce their demand for oil on the world oil market by 2 million barrels a day or about 5% of IEA consumption. Good progress has been made thus far in meeting this goal and this has resulted in an easing of current oil market conditions.

The IEA plays an essential role in the implementation of initiatives resulting from the annual Economic Summit meetings. It will continue the process, begun in Tokyo, of setting individual country oil import targets and it will monitor progress toward achieving these targets through its annual review of the energy policies and performance of all its member nations. It is working on establishing a registry of oil market transactions in order to obtain greater information on the oil market, particularly the spot market. It will provide the staff support for the International Energy Technology Group, created at Tokyo. It is implementing an initiative, approved by IEA Ministers and endorsed by the Tokyo Summit, to expand the use, trade and production of steam coal. This is a program of particular importance to the United States. The IEA also conducts an active research, development and demonstration program, which will include almost 50 projects by the end of the year.

The heart of the IEA, however, is the emergency oil sharing program. This program was devised to provide a system to ensure that a future embargo or substantial supply interruption would not result in the disorganized, mutually destructive scramble for oil that occurred in 1973-74. The emergency oil sharing system was the first major accomplishment of the IEA. Participation in this system is the test of a nation's commitment to the organization.

The role of the oil companies in the sharing system was one of the first issues considered in the IEA. Under normal circumstances the oil companies are responsible for distributing oil among their customers; and it is they who have the expertise and logistical capability to do so. It was therefore the consensus of the member nations of the IEA that it would be unrealistic for national governments, which do not manage oil distribution under normal conditions, to directly take it over in a crisis. Distribution of the oil by the companies under government supervision, with the setting of allocation levels by national governments, was determined to be the best combination of control and efficiency for handling the type of emergency we would face.

Oil companies, both United States and foreign, participate in IEA activities in several ways. They consult individually with the IEA, giving their opinions and projections on oil supply and demand. They work jointly through the Industry Working Party in advising the Standing Group on the Oil Market on the data systems which that group administers.

Through the Industry Advisory Board the companies advise the Standing Group on Emergency Questions on emergency information systems, procedures for allocating oil supplies in an emergency and an emergency management organization to assist the IEA in its operation of the allocation system. In an emergency allocation, an Industry Supply Advisory Group would assist the IEA Secretariat by providing technical advice on the details of allocation implementation. But the fundamental decisions—how much oil goes to each country—are determined by the allocation system agreed on among governments. The companies' independent efforts to readjust their supplies are made without any benefit from the anti-trust defense. Companies' voluntary offers to help balance remaining inequities by supplying or receiving oil through the IEA system are monitored and approved by the IEA Allocation Coordinator, who himself operates under review and guidance by the participating countries, whose representatives would be meeting almost continuously in Paris.

Mr. Chairman, I think we must consider what would be the effect of not extending the legislation which grants the limited antitrust defense. Without this defense the U.S. oil companies would refuse to participate directly in the IEA. Given their share of the international oil market, the emergency allocation system could not function effectively without their participation.

In theory the other activities of the IEA which I have mentioned could be continued. Some data could be collected, research and development and long term planning projects could go on. But to render the allocation system inoperative, would cut out the heart of the International Energy Agency. It would be interpreted by our closest allies as a sign that the United States was no longer willing to cooperate fully with them on critical international energy problems through an organization which they joined in creating at our urging.

It would send a message to the OPEC nations that consumer solidarity was a myth and that a selective embargo or production curtailment could split the industrialized nations and set off a scramble for available oil, accompanied by skyrocketing prices.

It would tell the American people that we have no effective answer to the possibility of a severe market disruption, and that the gas lines and higher prices of the past could reoccur without any credible response on our part.

I wish, Mr. Chairman, that I could assure you today that the IEA sharing system would prevent gas lines and all the other problems which a future supply shortfall would bring. It would not go that far. What the IEA does do is give us the means to respond to such a crisis, to lessen its impact, and to provide for the equitable sharing of oil available to the countries of the industrialized world. This is a significant accomplishment. In the longer term we hope IEA nations will be able to reduce their dependence to the point where our economic well-being is no longer hostage to our ability to import oil.

In summation, Mr. Chairman, to extend Section 252 will have very significant benefits for the United States and for oil consumers generally. Failure to do so would risk accentuating the loss to the American people in a crisis and would seriously hurt the international cooperation which is in the interest of us all. It is important for the EPCA authority, which has already undergone one short-term extension, to now be extended for a period of years, preferably the seven years proposed by the Administration. This would avoid the creation of uncertainty among other IEA member countries about the reliability of the U.S. commitment to the sharing system and to consumer cooperation in general. I therefore urge the subcommittee to recommend extension of Section 252 for the requested time period.

Senator THURMOND. Thank you very much. That is the only questions I have.

Thank you, other gentlemen.

Senator METZENBAUM. Excuse us for the interruption, but the Pope is coming and people want to come to see the Pope and that creates problems for Senators, too.

I think we will hear our last witness.

Thank you very much for your participation. We appreciate it.

Senator METZENBAUM. Mr. Olmstead. We are very happy to have you, to welcome you. You are vice president of Texaco, Inc. Am I correct in understanding that you are testifying on behalf of the company, or on behalf of API?

**STATEMENT OF CECIL J. OLMSTEAD, VICE PRESIDENT,
TEXACO, INC.**

Mr. OLMSTEAD. Well, Mr. Chairman, I am pleased to be here. You are right, I am an officer of Texaco, but I would like to say that I am testifying for Texaco. I have been involved in the IEA and IAB activities rather intimately for sometime. Before beginning, Mr. Chairman, I would like to say a couple of things. First of all, as I sat here this morning, I would like to say that you are performing a real service here.

Senator METZENBAUM. Thank you, sir.

Mr. OLMSTEAD. You are building a record here about this agency which I think needs to be built. I share your thoughts about the public and the Congress in knowing more about this organization so I think this is a real service and I know it is some sacrifice to your own schedule.

Before beginning, I would like to introduce, for the record, Mr. Charles D. Mahaffie of the District of Columbia Bar. Mr. Mahaffie has served as counsel to some of the company who is involved in the IAB, but I would also, for the record, like to say that he is here today as counsel to me—Texaco.

Senator METZENBAUM. Let me just ask you a question before you lead into your testimony, and I appreciate your comments. You heard me ask of the State Department or maybe it was DOE, I am not sure—the question about making the IAB meetings and the subcommittee meetings more open to the public. Do you think the industry itself would object to that?

Mr. OLMSTEAD. Mr. Chairman, I would have no objection to that. I have never said anything there that I would not say to you right here or to the public. I see some problems, I would say largely mechanical, if I might allude to those for a moment. This is an international organization, it meets at various places, and it seems to me if you open it to the public, that means publics I gather around the world—we couldn't just have it open to the U.S. public, it would be publics, I gather, that is anybody who happens to be about that day. I would think that there would be some problems. Would you like to have, shall I say, OPEC observers in these meetings? I assume they are part of the public. I would have thought that just the mechanics—I guess you could have it sort of like in a medical school in a university, you could have the IAB sitting down and then, you know, then the audience around a big place watching what they do. But I, as a personal judgment, I have no objection to this because everything I have said I assume is going to be in the public domain, anyway. I have never even read one of those darn transcripts. I don't have time for that. If I want to read history, I want to read ancient history, I don't want to read last month's.

Senator METZENBAUM. Wouldn't you assume that the OPEC nations pretty well know what is going on at those meetings?

Mr. OLMSTEAD. Well, I suppose, Mr. Chairman, when these transcripts are declassified, made available for public reading, maybe they take the trouble to go down and take a look; I don't know. I would be doubtful if, other than from reading of the transcripts, that they are advised of what takes place.

Senator METZENBAUM. Well, I've come to the conclusion that the worldwide spy networks are so good that the Soviets know more about what the U.S. Government is doing than the people of this country do and maybe vice versa. The oil companies have their own means of obtaining information, and I don't underestimate the OPEC nations—and I don't say that critically. I just assume that everybody finds out pretty much what is going on. Besides everything else, what I seem to see happen so often is that the people of this country are the last to know. We guard our secrets so much—we find out that the Soviets have spied on the United States and have picked up a certain amount of information. But the American people cannot be told what that information is. Those who wanted that information learn about it though. That is about how I feel about some of these things.

I think that the more oil companies can do business in the public in this kind of meeting the better off we are. I don't mean when you have a corporate board meeting about making a special new investment. I am not talking about that. I am talking about an international agency. Wouldn't you agree?

Mr. OLMSTEAD. 100 percent. I agree. Of course, as you know, we have tried to conduct our business in a more open way. Our corporate business—the kind of information that we make public now, the explanations that we give for everything we do. I think that is all to the good. We do our best.

Senator METZENBAUM. And when you say something about heating oil, look at all the complications you get into. [Laughter.]

Go ahead. Mr. Olmstead. I have some questions but I will wait.

Mr. OLMSTEAD. We have submitted a statement for the record. I thought I would just hit a couple of highpoints of it, if that is agreeable to you, sir.

We do hope that we can be of assistance to you and the subcommittee and to the Senate as you consider S. 1314 to extend the antitrust defense for companies participating in the IEA.

Texaco, and I believe, the 20 other U.S. companies that are participating in this industry effort to assist the IEA and the member governments are doing so all at the request of the U.S. Government. This is a Government program. The companies were invited to participate in it and responded with their resources in an effort to be helpful.

S. 1314 and the antitrust defense which it would extend are of great significance to these companies. Without such a defense, I question whether the U.S. companies would be able to participate. My personal recommendation to my own executive management would be that we decline to participate without S. 1314 or something along that general line.

Whether the antitrust defense is extended or, indeed, whether the U.S. participates in the IEA is a question for the U.S. Government and the Congress. Not a question for the companies. The companies

again have participated by assisting in the IEP, the international energy program, basically, in two respects.

The first is, the emergency planning and allocation system which would operate in the event of a substantial interruption or disruption of supply.

Second, in the oil information system which is designed to provide the IEA and the member governments with data on the oil market what in the vernacular of the mid-1970's was called "greater oil transparency." The people would know more about what is going on in this business.

I suspect that you are mostly concerned with the companies' role in the emergency allocation and sharing program. I consider that the heart of the international energy program, anyway. It certainly is a major area of company participation in the effort. If a supply reduction results in a substantial decrease in available oil to the IEA as a group, or to individual countries, the so-called "trigger" would operate. Now, the effect of that triggering would be that the whole effort of the Secretariat and the assisting Industry Supply Advisory Group, ISAG, would be to carry out the IEP agreed method of balancing available supplies among the 20 member countries.

The company activity would involve furnishing data to the Secretariat and to this Industry Supply Advisory Group on production, imports, and stock levels within the companies' system. Data would also be furnished on the same subjects by the 20 member governments aggregated on an individual national basis.

Now, if I could, for a moment, take my own company. We would furnish, for the countries in the IEA where we operate, furnish production data in those countries. For the United States, we would furnish our domestic production data. We would furnish import data and we would furnish inventory levels. Those are the three elements of data that are needed to operate the emergency allocation system.

From these data and from comparing these data with base period consumption levels, the Secretariat and the Industry Supply Advisory Group would derive what are called allocation rights and obligations. Those would be derived for each member country.

After that determination has been made, the sole effort would be to balance those allocation rights and those allocation obligations from the supplies available to the IEA group. Obviously, since you could be dealing with a shortage, it would involve a reduction of the avails of oil in international oil movements, and a reduction of those movements.

Now, in carrying out the balancing process which I have just described, there are three types of supply actions with which the Secretariat and the ISAG would involve themselves.

The first would be that the companies, acting independently, individually, for example Texaco on its own, or the x company on its own, the y company on its own—they would use this allocation right and obligation balance which I have just described to make independent, individual movements of oil, redirecting their supplies in individual efforts to achieve the balance which the IEP formula prescribes.

The second type of action which would be involved—and these actions could go on simultaneously—here, actual intercompany coop-

eration and active participation of the IEA and the ISAG would take place. Companies still trying to achieve this IEP balance would advise the group at the IEA of certain oil that could be offered to the allocation group at the IEA for redirection. Texaco might say we have 100,000 barrels of oil on the water that we could make available to you to direct to a country that still has allocation rights that have not been satisfied.

Then, the allocation group, including company people at the IEA in Paris, would then try to match those offers that are made by the companies with the needs of other countries that still have allocation rights to be satisfied. That is the way the system would work—all trying to achieve that balance which I have described.

ISAG, the industry people would be directly involved in this process. They would be utilizing the data received by the Secretariat at the IEA. But, the industry group would not make any allocation decisions. Those are made by the Secretariat under the supervision of the Government. The industry doesn't make any allocation decisions. That is done by the government representatives and the Secretariat people of the IEA. Rather, it lends its supply facilities and expertise to the IEA and the governments in this effort.

It seems clear to us that the process I have described, particularly the type 2 action, involves antitrust risks. It doesn't matter whether the risk is real or only apparent, as I shall describe. I think these risks are too great for our government to ask U.S. companies to participate in without some form of antitrust protection. You have competitors there, admittedly under very close Government supervision and monitoring; the FTC and Justice Department are right at the elbows of those who would be assisting the supply. But as you know, Senator, you are a very distinguished lawyer yourself and you know that sometimes perceptions are as important as realities.

The industry, has had a lot of what I would call "strike antitrust suits". These take a lot of resources of the company, both personnel and financial; the incentive to management is strong to settle some of these suits because they go on forever. I just don't think that I would advise my company to participate in something where these perceptions and risks would be present without some form of protection. I believe you understand that. So that we do feel that for that type of operation, some type of protection is absolutely essential.

Senator METZENBAUM. Mr. Olmstead, would you be willing to work with the committee staff—and Mr. Mahaffie as your counsel—work with the staff if the committee should decide that the proper protection of our Nation's people in connection with this subject would best be accorded by more open meetings, IAB, IEA meetings. Would you be willing to work with our staff to see whether or not some language might not be drafted to cause that to come into being since the companies don't seem to have an objection to it since there aren't any anti-competitive activities occurring there.

Mr. OLMSTEAD. Mr. Chairman, I am speaking for Texaco, as I told you. I am not speaking for anybody else. First of all, yes, anything you ask me to do. I am prepared in principal to work with you.

Senator METZENBAUM. I think that is good. I might say that it is my understanding that when we have talked with API, they had indicated first that a representative of one company was coming and—

Mr. OLMSTEAD. Well, I am that one, but—

Senator METZENBAUM. I gather that API did not indicate that you would be here on their behalf but that, as you stated, just on behalf of Texaco.

Mr. OLMSTEAD. You just got me here by myself, with Mr. Mahaffie.

Senator METZENBAUM. Would Texaco be willing to provide production, shipment, inventory and similar data to IEA on a timely or a daily basis? You probably were here when I was talking with the DOE people about the information coming in so late and so obfuscated that it probably would help very little as far as resolving an international oil shortage.

Senator THURMOND. Mr. Chairman, could you let me interrupt just a minute. I have another appointment and I have to go. I have just a few questions here for Mr. Olmstead. Mr. Olmstead, would you mind answering these and sending them to the committee for the record?

Mr. OLMSTEAD. Be glad to, sir.

Senator THURMOND. I would appreciate it if you would.

Mr. OLMSTEAD. Nice to see you sir, thank you.

Senator THURMOND. Without objection then I ask unanimous consent that they be done, Mr. Chairman.

Senator METZENBAUM. No objection. It will be done. Thank you for your participation, Senator Thurmond.

Mr. OLMSTEAD. Well, Mr. Chairman, I was saying in regard to a daily data submission, that is pretty difficult to contemplate. I suppose it is possible, anything is possible today with the kind of data processing equipment that I suppose is available but at a cost. I would have not thought that daily data submissions would be necessary, indeed, even if they were possible. I think monthly reporting is about what is needed if it is good data. If it is good data, reliable data, and certainly we try to furnish the most reliable data that we can, both to the Secretariat in Paris and to the DOE here for its compilation of the schedule Bs which it sends on the U.S. national basis.

Senator METZENBAUM. What kind of time lag occurs after the end of the month before that information gets to IEA?

Mr. OLMSTEAD. On the present system, which has been in effect this year, we submit it by the 10th of the following month. For example, before the 10th of October, September data will be transmitted.

Senator METZENBAUM. Have the oil companies exchanged any information during their IEA participation that would assist them in fixing prices or allocating markets?

Mr. OLMSTEAD. Absolutely not, Senator.

Senator METZENBAUM. Does Texaco submit similar information to DOE?

Mr. OLMSTEAD. Yes, sir. They get copies of everything we send to the IEA and, then of course, they get our material for their preparation of the questionnaire B.

Senator METZENBAUM. But, submitting the information to DOE doesn't require an antitrust defense; submitting it to the IEA does?

Mr. OLMSTEAD. I am glad that you asked that question because I know you asked it earlier this morning. If information that we submit to the U.S. Government is done pursuant to an act of this Congress or legislation or regulation by the U.S. Government, there are several

things I can say about that. First of all, I assume that if we are compelled to submit it, that we have a Government compulsion defense.

Second, this material, to the extent it is confidential or proprietary, we have confidence in the U.S. Government treating it that way. We don't think the U.S. Government is going to be used as a conduit for passing along confidential and proprietary information among companies.

Senator METZENBAUM. But your submissions to IEA are actually by act of Congress, aren't they? It is very confidential, as well?

Mr. OLMSTEAD. Yes, sir, it is in the sense that when we submit this data to the IEA, we are submitting it pursuant to a voluntary agreement and a form of plan of action and, incidentally, we think we need a new one as we said earlier this morning; voluntary agreements and plans of actions which are contemplated by section 252 of the EPCA.

On the other hand, Mr. Chairman, as you know, that were we to get into a situation where there would be a triggering, that this data sent by the companies representatives which we described, would be made available to companies—the industry supply advisory group—so that the Secretariat is not necessarily the final repository of that data.

Senator METZENBAUM. Are you worried about the IEA using the data on someone else's behalf to injure competition?

Mr. OLMSTEAD. About the IEA using the data in a way that might injure competition?

Senator METZENBAUM. Yes.

Mr. OLMSTEAD. No, sir, I am not worried about that. I think that the IEA Secretariat's record, data handling and treating it confidentially as is prescribed has been a good record. Indeed, you say it is so good that we don't even know what is going on. I am inclined to agree with you.

Senator METZENBAUM. Well, if you are not worried that it is going to hurt anybody on a competitive basis, why is there a need for the antitrust defense? Because of this perception question?

Mr. OLMSTEAD. Yes, sir, that is part of it but the other one is the point I just made. Were we to get into a trigger situation, that data that goes in from the companies would be utilized by the industry supply advisory group which are representatives of companies that are competitors.

Now, every conceivable means making sure that data would be under the strictest control and not in any way filtered back to the principals of the industry supply advisory group members will be taken and during the test has been taken. But still, there is a risk.

Senator METZENBAUM. But the industry makes no allocation decisions, how does the antitrust problem exist? The sharing of information is not an antitrust violation.

Mr. OLMSTEAD. Sharing of information can be an antitrust violation, certainly, sir.

Senator METZENBAUM. Yes, it could be under certain circumstances.

Mr. OLMSTEAD. Yes, sir, it could be, but the way it works is as follows, Mr. Chairman.

Senator METZENBAUM. It has to be acted upon in order to make it

Mr. OLMSTEAD. Conspiracies.

Senator METZENBAUM. But you would have no actionable offense unless something occurred as a result.

Mr. OLMSTEAD. Unless competition had been adversely affected, yes, sir.

But, do you and I want to spend our lives defending those kinds of actions?

Senator METZENBAUM. You, not I. [Laughter.]

Mr. OLMSTEAD. Well, you might go back to that business some day yourself. [Laughter.]

Senator METZENBAUM. I didn't know there was an opportunity in the oil business.

You are not suggesting that I get out of the Senate and go back in practice?

Mr. OLMSTEAD. That would be one of the greatest losses to us that I can conceive of.

Senator METZENBAUM. Flattery will get you everywhere. [Laughter.]

Mr. Olmstead, you said that the ISAG exists to furnish supply expertise to the IEA in an emergency. The ISAG does not, itself, make final decisions as to reallocation. Those are made by the IEA. In these circumstances, am I correct that Texaco's ISAG representative does nothing that violates the antitrust laws?

Mr. OLMSTEAD. I, well, there is an industry group there, the ISAG, composed of representatives of competitors. That group is going to be receiving offers to direct oil from oil companies, 34 of them, and it is then going to try to match up those offers with countries with outstanding supply rights, allocation rights. It seems to me that certainly it could be charged that this is somehow fixing markets among the 20 countries in which the ISAG is assisting. I say it could be charged that because here, you know, this supply group receives an offer sent by Texaco *x*, *y*, *z*, have supply rights and then they say, well, here is Belgium that needs a cargo and would you deliver that, Texaco, to the *y* company in Belgium pursuant to the allocation right and obligation balance sheet. And this is the kind of thing, you know, Mr. Chairman, that if that were done outside of something like the IEA or if it were done, well, it wouldn't be done without an IEA or an antitrust defense.

Senator METZENBAUM. Would a voluntary allocation program work without there being an acceptable dispute settlement plan?

Mr. OLMSTEAD. Well, I am certainly glad that you raised that question with us. Mr. Mahaffie and I have been intimately involved in trying to get that developed. I wouldn't say it couldn't work without it but we think it could work better with a dispute settlement center as has been recommended by the industry to the IEA. We think that there would be a certain expertise that would develop in such an arbitration system that would be better than say just going to the International Chamber of Commerce Center in Paris or to ICSD here in Washington. But we think that the risk of disputes arising between sellers and buyers, now this arbitral system will not involve the governments, this system of arbitration that has been recommended would only involve sellers and buyers of oil during emergency allocation and as to such matters as quality of the oil, price, whether you could pass through added costs, demurrage, all of these things that we know occur even in everyday ordinary commercial transactions,

much less if you are going to be in this system that we have just been discussing. Certainly we think that disputes are going to arise and if you will, Mr. Chairman, suppose you redirect—you are mandated by the United States to deliver a large cargo of oil, you can imagine the value of one of those cargos of oil today to some customer in Sweden you never have had any dealings with, you've never even seen or heard of him before, but you are mandated by the U.S. Government to do that. Certainly, you want a sure system that if disputes arise out of the transaction, you can get the rule of law applied to that transaction because you are mandated to deliver the cargo.

Now, the U.S. Government international allocation rules take note of this and they would not issue an order to a U.S. company under its jurisdiction, if that company wanted to condition the delivery on some form of arbitration or other form of dispute settlement mechanism. We feel it is absolutely essential that we have a sure method of applying the rule of law to disputes arising from the IEP system.

Senator METZENBAUM. Would you want to comment on the fact that the Trinidad refinery cut back its production 50,000 barrels a day, that the United States suffered disproportionately and that Texaco shipped more of its oil to foreign markets in order to take advantage of higher prices there.

Mr. OLMSTEAD. Well, that was a report in the press which was rather unfortunate. It has been answered by a press release which I did not bring with me because I did not think that we were going to get into that. I would be pleased to send you a copy of that press release that explains how that erroneous reporting occurred in that publication; it was a special publication dealing with the oil industry.

Senator METZENBAUM. It was the Energy User News, I think. Why don't you just send it to me.

Mr. OLMSTEAD. I would be delighted to send it to you.

Senator METZENBAUM. I don't consider it particularly relevant.

Mr. OLMSTEAD. That is an erroneous piece of reporting and I would be glad to explain it to you but I did not bring it with me.

Senator METZENBAUM. Well, I raised it more as a matter of curiosity because I have read about it.

Mr. OLMSTEAD. Well, it was a mistake.

Senator METZENBAUM. And I have a concern.

Mr. OLMSTEAD. Well, it was wrong.

Senator METZENBAUM. But I will be very happy to hear from you personally on it.

Mr. Olmstead and Mr. Mahaffie, the staff would like to be in touch with you to talk about some possibilities on this other subject. We are very grateful to you for your participation. Thank you very much for being with us today, and always, being very helpful.

Mr. OLMSTEAD. Thank you, Mr. Chairman.

[The prepared statement of Mr. Olmstead follows:]

PREPARED STATEMENT OF CECIL J. OLMSTEAD

Texaco is one of a group of 34 oil companies made up of U.S. companies and companies from other countries of the International Energy Agency (IEA) that participate in activities to assist that Agency in developing and implementing the allocation and information provisions of the International Energy Program. That group includes 21 United States companies, all of which are participating at the request of the United States Government.

I am very pleased to appear before this Subcommittee. I hope that I can be of assistance in your consideration of S. 1314. That bill is only four lines long, but it is of considerable significance. If the present antitrust defense for U.S. companies participating in IEA activities is not extended past the end of this month, those 21 U.S. companies will have to consider seriously whether to continue their participation in most IEA activities. Some or all of those companies will undoubtedly discontinue such activities. Without their participation the IEA's programs will be severely affected. The IEA's most important program, its emergency oil sharing system, very likely cannot function at all without the participation of U.S. companies.

Let me, first of all, say something about the International Energy Program (IEP). As you know, that agreement was negotiated and signed in 1974, largely at the instance of the United States. It was the response of the major oil-consuming nations to the 1973-74 oil embargo. Twenty countries are now members. They include all of the OECD member nations except Iceland, Portugal, Finland and, most notably, France.

Put very simply, the rationale of the IEP is that the consuming countries acting together can better deal with their common dependence on imported oil than if they were acting independently. This would be particularly true if there were a severe shortfall in imports to the IEA countries.

During the fall and winter of 1973-74 the consuming nations experienced cuts of up to 25 percent of exports from most of the Arab producers, and specific embargoes were directed at the United States and Holland. Governments had no effective means to deal with the crisis, and no machinery to coordinate their reactions. The response was by the international oil companies acting individually who were able to use the then flexibility of their supply systems to allocate available oil on an equitable basis among their customers in various countries. I think that it is agreed by people who have taken the trouble to study the 1973-74 embargo that the companies did an effective and a fair job. But like the consuming nation governments, the companies did not coordinate their efforts. They could not. The antitrust laws of the United States and the Common Market would have made that impossible.

It was generally realized that the 1973-74 crisis would have been met more effectively if the consuming countries had acted together. It was that realization that gave rise to the IEP and the development of the IEA's emergency sharing system. That system would permit coordinated action by the IEA on behalf of the member countries to reallocate available supplies in a crisis. Given antitrust clearances from the United States and the European Commission, the participating companies would assist in implementing the allocation decisions made by the IEA, and the control of governments.

The IEP is a unique international agreement. I know of nothing like it. It has four principal aspects. First it establishes the emergency sharing system. Under that system the twenty participating countries have agreed to build common levels of emergency reserves and to develop demand restraint programs for activation in an emergency. And they have agreed on an equitable method to allocate available oil among themselves in an emergency. Second, the IEP establishes a framework for a long-term cooperative program to reduce participating countries' dependence on imported oil. Third, it establishes an oil market information system which is designed to improve governments' knowledge of the way the international oil market works and to provide greater "transparency" as to oil developments. And fourth, it establishes a framework for coordinating participating countries' relations with both the producing countries and the lesser developed countries of the world.

Oil companies are directly involved in two of these aspects. The Agreement provides for company participation in the development of the oil market information system and in the development and implementation of the emergency sharing system.

I suspect that the Subcommittee's principal concern is with the sharing system. Let me try to explain how it works.

First of all, it is important to understand that the sharing system only goes into operation when the IEA group of countries as a whole, or one or more individual countries, suffers a reduction of available supplies that is equal to 7 percent or more of consumption during a base period. Available supplies are domestic production plus imports. The base period is the most recent four quarters, less one quarter.

That 7 percent figure was determined by the governments who negotiated the Agreement. I should point out that the oil industry was not involved in that negotiation or in determination of the 7 percent figure or any of the other provisions of the Agreement. The companies' role is limited to advice and assistance in the implementation of the Agreement. The IEP is in no sense an industry program. It is a government program. The oil companies are only involved with it because their governments have asked them to be involved, and this is certainly true as regards the U.S. Government and the U.S. companies.

I understand that the IEA country governments are giving consideration to lowering the 7 percent threshold figure. The shortfall earlier this year did not reach 7 percent—and there are those who think that this year's crisis might have been better handled if the IEA sharing system had been invoked. That, again, is a decision for governments.

In any event, if the threshold shortfall is reached the so-called IEA "trigger" may be pulled. If it is pulled, several things happen.

First, a special information system is put into operation. This consists of data submissions by the twenty participating countries and the thirty-four oil companies that are assisting the IEA. Those companies are known in the IEA system as the "Reporting Companies". Their data and the governments' data is furnished monthly on what are called Questionnaires A and B. Those questionnaires are reports of past, current and projected production, liftings, imports and stock changes. The special information system was temporarily activated during this year's period of supply difficulties, and is still in operation this fall.

Second, participating countries have agreed to activate standby demand restraint measures. These can include rationing or other measures to compel reduction of consumption. If the overall cut is between 7 and 12 percent, each country will impose demand restraint sufficient to reduce its consumption by at least 7 percent of the base period. If the overall cut is 12 percent or more, each country will restrain demand by at least 10 percent.

Third, each country will draw down its emergency reserves in accordance with its share in the overall group emergency reserve commitment.

Fourth, the IEA, based upon provisions of the IEP Agreement, will calculate each country's "supply right". That supply right consists of consumption during the base period less the country's demand restraint and emergency reserve drawdown obligations.

Fifth, once each country's supply right is calculated, the IEA will use Questionnaires A and B to determine the amounts by which each country's available supplies exceed or fall short of its supply right. These plus or minus figures constitute each country's allocation right or obligation.

Finally, the IEA Secretariat and an Industry Supply Advisory Group (known as "ISAG") will work directly with the Reporting Companies and governments to redirect the companies' international oil movements to balance out the allocation rights and allocation obligations among the member countries.

That last step, of course, is crucial. That is where the statisticians and computers stop, and international oil shipments are actually redirected to balance the allocation rights and allocation obligations. It has three phases. In the jargon of the IEA, they are known as Types 1, 2 and 3.

Type 1 consists of rearrangement of individual supply schedules by each Reporting Company. Except for furnishing information concerning the allocation rights and obligations of the participating countries, the IEA and the ISAG have nothing to do with this process. The expectation is that a large part of necessary reallocation will be accomplished by the companies acting individually, without any coordination or assistance from the IEA or the ISAG.

Type 2 activities do involve inter-company cooperation and active participation by the IEA and the ISAG. The companies will submit what are called "voluntary offers" to redirect supplies. A voluntary offer might be a proposal to divert a particular identified cargo from its original destination. The IEA Secretariat and the ISAG will match offers such as that with others to receive cargoes, and they will suggest other possible voluntary offers for companies to consider. It is expected that this voluntary offer process will accomplish the necessary reallocation of supplies that is not accomplished by companies acting individually in *Type 1*.

Type 3 occurs when all else fails. In *Type 3* governments will order companies to make particular movements of oil that are suggested by the IEA to balance allocation rights and obligations if *Types 1* and *2* have failed to achieve the balance. The Congress has given the President authority to do that with respect to companies subject to U.S. jurisdiction in Section 251 of the EPCA. And the

Department of Energy has issued implementing regulations. Those are found in 10 C.F.R. Part 218.

It is obvious that this IEA sharing system is not going to work unless it has the full cooperation and the active participation of international oil companies. The various IEA governments have requested that of the companies. And the companies have cooperated and participated from the beginning. They have participated jointly through an Industry Advisory Board and subcommittees of that Board to help the IEA develop and test its sharing system. They are currently submitting Questionnaire A data and will submit that data in a future crisis. They have agreed that they will cooperate with the IEA and the ISAG by redirecting international oil flows in Type 2 of the allocation process. And they have made their own expert supply personnel available to the IEA to form the ISAG.

You should note, by the way, that although the ISAG is an industry group it functions under the direct supervision and control of the IEA Executive Director who during a crisis would serve as the Allocation Coordinator. It exists to furnish supply expertise to the IEA in an emergency. The ISAG does not itself make final decisions as to reallocation. Those are made by the IEA. This relationship of industry supply experts and the IEA has been tested twice in tests of the emergency system and found to work very well.

The ISAG is made up of employees of companies that are competitors. Even though its role is advisory, the ISAG will be involved in an emergency in rearranging supplies between companies so that country allocation rights and obligations can be balanced. And the participating companies will cooperate by rearranging supplies at the request of the IEA and the ISAG. I think it is clear to all the U.S. companies, as it is certainly clear to Texaco, that the antitrust risks, real or apparent, in these and other IEA activities are too great to permit participation without some form of protection.

Let me explain why that is so.

The supply actions of individual U.S. companies, at least with respect to Type 2 reallocation, will necessarily be taken in concert with competing companies acting through the ISAG. This kind of activity might be viewed as a combination or a conspiracy to divide international markets. If an activity affects U.S. commerce, as this activity certainly will, a combination or conspiracy to divide markets can be a violation of the Sherman Act. See, e.g., *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951). Indeed, market division agreements are treated as *per se* violations of the Sherman Act. See *United States v. U.S. Alkali Export Ass'n*, F. Supp. 59 (S.D.N.Y. 1949). That means that they are not subject to justification, or a "rule of reason" defense.

Other IEA company activities, even in non-emergency periods, may also be questionable under U.S. antitrust law. The Federal Trade Commission, for example, reviewed the 1978 IEA Allocation Systems Test and in its Report recited a litany of hypothetical anticompetitive effects that might have resulted from company participation.¹ Although the Commission concluded that there actually were no anticompetitive effects in that case, the companies cannot afford to take the chance that a similar list might appear with a different conclusion in an administrative complaint.

Since the IEA activities of U.S. companies are all under the aegis of an international governmental organization and are taken at the invitation of and with the full knowledge and approval of the U.S. Government, it might be argued that the Department of Justice and the Federal Trade Commission would not proceed against the companies or individuals involved, and that an antitrust defense is therefore unnecessary. But whether that premise is or is not correct, it must be remembered that the principal antitrust risk here is from suits by private plaintiffs who may allege injury from reallocation during an emergency or from other IEA activities, and seek treble damages. The treble damage remedy is also available to plaintiffs in class actions where the potential for recovery of crippling damages is particularly great. Potential plaintiffs in individual or class actions would not be at all constrained by the considerations of good faith and reasonableness that might deter civil or criminal proceedings by the Government.

It is theoretically possible that despite the *per se* rule of liability a "rule of reason" defense might be successfully interposed in a case attacking company IEA activities. Those activities are obviously undertaken in the utmost good

¹ Federal Trade Commission, Fifth Report to the Congress and the President, September 21, 1978, as revised January 1979.

faith, and are entirely reasonable. It would seem that a court might permit that fact to be asserted as a defense.

But reliance on the rule of reason in this situation would also seem risky and unwise. The *per se* rule of liability, which prohibits the interposition of a rule of reason argument, is firmly imbedded in U.S. antitrust law. In this connection I note Judge Weinfeld's recent treatment of a somewhat similar argument in defense of the Libyan Producers Agreement (LPA).

As a preliminary matter, the defendants assert that the Court has no subject matter jurisdiction over the First Claim because the LPA falls outside the scope of the antitrust laws. They claim that the Agreement was "an unprecedented political response blessed by both the State and Justice Departments and inspired by equally unprecedented threats to world oil supplies by the Libyan and other OPEC governments" and that the LPA was "designed to benefit energy consumers by combating production restrictions, price increases and the desire of the host governments to acquire control of the oil production facilities within their borders" * * *

The annals of antitrust law are replete with cases where the defendants have sought to justify their conduct on the ground that it promoted the common weal. * * * But the Supreme Court has made clear that decisions to exempt allegedly anticompetitive conduct from the purview of the antitrust laws "must be made by Congress and not by private forces or by the courts." * * * The defendants cannot withdraw their conduct from judicial scrutiny by reciting a litany of good intentions. *Hunt v. Mobile Oil Corp.*, 465 F. Supp. 195, 212 n. 32 (S.D.N.Y. 1978).

As Judge Weinfeld put it, the decision to exempt conduct like that of the U.S. companies assisting the IEA is for the Congress. The 94th Congress, in the EPCA, did not exactly grant an exemption. It did, however, grant a defense, in Section 252(f). And the U.S. companies have found that sufficient to permit their participation in IEA activities, although in all candor I would prefer an exemption.

I think it is worth noting that other governments with antitrust laws similar to ours have also granted some form of antitrust exemption or defense for their companies' IEA activities. I understand that the United Kingdom, Canada, and the Federal Republic of Germany have done that. The European Commission has also granted a clearance that protects companies operating in the Community from application of Articles 85 and 86 of the Treaty of Rome. The Commission's clearance contains conditions that are somewhat similar to some of those that were imposed by the Congress in Section 252 of the EPCA.

The question before you now is whether Section 252 should be extended. I suggest that the answer turns on whether the Congress believes that the United States should continue to participate in the IEP. I leave that question to witnesses from the Department of State and Energy, who are much better qualified than I am to address it. If the Congress should agree that continued United States participation is desirable, then I think it is clear that Section 252 should be continued in effect, or that some immunity, exemption or defense similar to it should be enacted. It would be anomalous, to say the least, if the United States should continue to participate as a country, but should at the same time make it impossible for its domiciliary companies to participate.

I recognize that exemptions from the antitrust laws are not favored, and are not lightly granted. I hope that I have adequately described what I think are the important reasons for this exemption. Let me say a few words about its possible consequences. What are the risks to competition and small business in this exemption, or defense, for oil company IEA activities?

I suggest that there are none.

In the first place, actual company assistance in reallocation will only take place if there is a supply emergency sufficient to trigger the IEA sharing system. That has not happened yet. Let us hope that it does not happen. If it does, the companies will cooperate with the IEA and the ISAG to reallocate supplies in the ways I have already described, and actual supply actions will be necessary. They will be performed in accordance with what we expect will be a detailed Plan of Action to be issued by the DOE pursuant to Section 252 of EPCA, after public comment and a public hearing. The Federal Trade Commission and the Department of Justice will see to it that the Plan of Action contains whatever antitrust safeguards they consider necessary.

In any case, there is nothing anticompetitive about company activities to reallocate supplies under the IEA system. The only purpose of the system is to

allocate oil fairly between countries. If there were no antitrust defense, and the U.S. companies could not participate in the IEA system, they would do the best they could, acting individually, to allocate fairly. That is what happened in 1973-74, and it worked pretty well. But perhaps allocation will work better in a severe crisis if it is coordinated and member governments are fully aware of what will take place. That is the theory of the IEP. And from the point of view of antitrust policy, it may be preferable to have this activity supervised, and coordinated by governments and monitored by antitrust enforcement authorities of the U.S. Government.

In the absence of an IEA trigger, company activities are limited to advice and assistance to the Agency in setting up, improving and testing its allocation and information systems. This is what the companies have been doing since 1974. Except, possibly, for the Federal Trade Commission's very hypothetical assumptions about conceivable anticompetitive effects from the 1978 systems test, the two law enforcement agencies that have monitored these activities and have reported on them pursuant to Section 252 of the EPCA have found nothing anticompetitive in them and have found no effect on small business.² Those reports have been thorough and have displayed a good understanding of what has gone on. I should think they would be convincing evidence that this activity is consistent with our national interests and harmless from an antitrust perspective.

The Federal Trade Commission's Fifth Report, dated September 21, 1978, did purport to identify certain types of company information that was made available to ISAG members during the 1978 systems test and that might be used for anticompetitive purposes. This was data included on companies' Questionnaires A which had to be used by ISAG members in advising the IEA. The Commission did this, as it said in its Report, "for purposes of worst case analysis" and on the basis of various hypothetical anticompetitive scenarios. It concluded in the case of each of those scenarios "that too many tenuous assumptions must be true for there to be any actual anticompetitive effect."

A few further words should be said about the exchanges of company information that may appear to be taking place in connection with IEA activities. The DOE has on several occasions granted clearances for U.S. companies to furnish or exchange confidential and proprietary information and data to further IEA objectives. The mere existence of those clearances, which are required by the terms of the current Voluntary Agreement, may make it appear that something sinister is taking place. That is simply untrue.

Almost all of the confidential and proprietary information involved in these several clearances has been furnished by the companies only to the IEA Secretariat, not to other companies. The principal exception has been Questionnaire A data that has been made available by the Secretariat to ISAG members, at Paris, during the two systems tests. In each case that data was substantially distorted by the supply disruptions that were simulated for purposes of the tests. And in any event, even if it could have been used by companies for anticompetitive or other purposes, the ISAG members would have had no way to communicate that data back to their employers.

There have been very few other occasions when it has been necessary for the DOE to grant a clearance for the furnishing or exchange of confidential and proprietary information and data to anyone other than the IEA Secretariat. A series of very narrow clearances was granted in connection with this year's supply problems. Those clearances to permit exchanges of some data that might be considered confidential or proprietary during meetings of the Industry Advisory Board held for the purpose of giving joint advice to the IEA concerning the crisis. As a matter of fact, however, almost all of the confidential and proprietary information and data that is the subject of those clearances has been furnished directly by the companies to the Secretariat, on a bilateral basis. I have personally attended each one of the meetings of the IAB at which company confidential and proprietary information and data could have been exchanged under those

² Federal Trade Commission Reports to the Congress and the President, dated September 21, 1976, as of March 21, 1977, as of September 21, 1977, as of September 21, 1978, and as of March 21, 1979. Reports of the Attorney General dated September 21, 1976, as of March 21, 1977, as of September 21, 1977, as of September 21, 1978, and as of March 21, 1979. See also the Report of the Attorney General Pursuant to Section 708(e) of the Defense Production Act of 1950, as of April 14, 1976, and a Report of the Comptroller General entitled "U.S. Oil Companies Involvement in the International Energy Program," dated October 21, 1977.

clearances. I can state with certainty that nothing I would consider confidential or proprietary to Texaco has been furnished to any of our competitors during those meetings. And I do not believe that I have heard anything at those meetings that was confidential or proprietary to any of Texaco's competitors.

Everything that I have said about this year's meetings, and indeed everything I have said about company IEA activities thus far, can be confirmed by an examination of DOE's meeting transcripts. I understand that those transcripts are freely available to this Subcommittee. Representatives of the Subcommittee are also entirely free to attend meetings of any industry group. I wish that the Subcommittee would exercise that right. I can assure you that the companies have nothing to hide, and will welcome your presence.

Senator METZENBAUM. That concludes our hearing today.
[Whereupon, at 12:12 p.m., the hearing was adjourned.]

APPENDIX

II

96TH CONGRESS
1ST SESSION

S. 1413

To extend the existing antitrust exemption for oil companies that participate in the agreement on an international energy program.

IN THE SENATE OF THE UNITED STATES

JUNE 26 (legislative day, JUNE 21), 1979

Mr. JACKSON introduced the following bill; which was read twice and referred jointly to the Committees on Energy and Natural Resources and the Judiciary

A BILL

To extend the existing antitrust exemption for oil companies that participate in the agreement on an international energy program.

- 1 *Be it enacted by the Senate and House of Representa-*
- 2 *tives of the United States of America in Congress assembled,*
- 3 That section 252(j) of the Energy Policy and Conservation
- 4 Act of 1975 (42 U.S.C. 6272(j)) is amended by striking out
- 5 "June 30, 1979" and inserting in lieu thereof "January 19,
- 6 1986".

QUESTIONS OF SENATOR THURMOND AND RESPONSES
OF TEXACO, INC.

TEXACO
INC.

2000 WESTCHESTER AVENUE
WHITE PLAINS, N. Y. 10650

CECIL J. OLMSTEAD
VICE PRESIDENT

OCT 15 1979

October 11, 1979

The Honorable Strom Thurmond
United States Senate
209 Russell Senate
Office Building
Washington, D.C. 20510

Dear Senator Thurmond:

At the October 5, 1979, hearing of the Senate Subcommittee on Antitrust, Monopoly and Business Rights on S-1413 you requested that I furnish written answers to you in response to four questions. Those answers follow, preceded by your questions.

1. QUESTION: You have indicated that 21 United States oil companies are participating in the International Energy Program at the request of the United States Government. Please give us a brief explanation on this request to the oil companies for participation in the International Energy Program.

ANSWER:

Texaco was first formally requested to participate in the activities of the International Energy Agency by letter dated March 29, 1975, to me from the Administrator of the General Services Administration, pursuant to Section 708 of the Defense Production Act of 1950. I understand that similar letters were sent to other U.S. oil companies. Prior to that date, companies' cooperation had been sought by the Department of State through attendance and participation in a series of meetings directed towards planning and implementation of the International Energy Program.

Participation by Texaco and other companies was again formally requested on March 22, 1976, by letter from the Administrator of the Federal Energy Administration. This was pursuant to the new Voluntary Agreement and Plan of Action to Implement the International Energy Program developed pursuant

to Section 252 of the Energy Policy and Conservation Act of 1975.

2. QUESTION: You stated on page 2 that "the rationale of the International Energy Program is that the consuming countries acting together can better deal with their common dependence on imported oil than if they were acting independently. This would be particularly true if there were a severe shortfall in imports to the International Energy Agency countries."

Would you describe for us some instances of circumstances where this program has been effective or helpful in recent years?

ANSWER:

The International Energy Agency's Emergency Sharing System has never been activated. The International Energy Program provides that the system may be activated if there is a shortfall of supplies to the International Energy Agency participating countries as a group, or any one or more participating countries that exceeds 7 percent of base period final consumption. Since the adoption of the International Energy Program, there has not been a shortfall of that magnitude.

I believe, however, that the mere existence of the sharing system is beneficial to the consuming countries, at least in that it acts as a deterrent to any one or more producing countries that might wish to use a selective embargo for political purposes. I also believe that the International Energy Agency's information systems, both the general system concerning oil market information and the special emergency system, are valuable to the governments of participating countries. The general system helps those governments to understand developments in the oil market. And the special system, which has been activated in connection with this year's supply shortage, gives governments a very useful current picture of the international demand and supply situation and inventory levels as these affect the different participating countries.

3. QUESTION: With respect to the International Energy Agency sharing system you state that this "sharing system is not going to work unless it has the full cooperation and the active participation of international

3. QUESTION (cont'd):

oil companies. The various International Energy Agency governments have requested that of the companies. And the companies have cooperated and participated from the beginning. They have participated jointly through an Industry Advisory Board and subcommittees of that Board to help the International Energy Agency develop and test its sharing system."

Apparently you feel that the International Energy Agency sharing system is working well and making an effective contribution to the overall program. Is this correct, or do you have other suggestions for improvement of this sharing system?

ANSWER:

As noted in response to question 2, the International Energy Agency sharing system has not been activated to date. It has, however, been tested on two occasions. Those tests, I believe, demonstrated that the sharing system will probably be effective to carry out the International Energy Program objectives when and if its activation is required.

The International Energy Agency is constantly working to improve the operation of the sharing system, with the active advice and assistance of the companies. I am sure that improvements can and will be made. I have, however, no specific suggestions.

4. QUESTION:

With respect to the antitrust immunity, you state that you "think it is clear to all the U.S. companies, as it is certainly clear to Texaco, that the antitrust risks, real or apparent, in these and other International Energy Agency activities are too great to permit participation without some form of protection."

You also state that you "think it is worth noting that other governments with antitrust laws similar to ours have also granted some form of antitrust exemption or defense for their companies' International Energy Agency activities. I understand that the United

4. QUESTION (cont'd):

Kingdom, Canada, and the Federal Republic of Germany have done that. The European Commission has also granted a clearance that protects companies operating in the Community from application of Articles 85 and 86 of the Treaty of Rome. The Commission's clearance contains conditions that are somewhat similar to some of those that were imposed by the Congress in Section 252 of the EPCA."

It seems, from your comments, that we are discussing here whether the United States desires to have a viable International Energy Program (as it currently functions) or whether we withdraw our U.S. support for the program and (by so doing) very likely create some undesirable international feelings among other nations for the U.S. Would you comment on this for us?

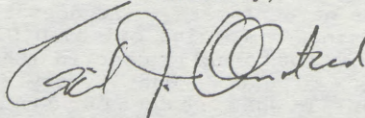
4. ANSWER:

I agree that the basic question before the Congress is whether the United States desires to have a viable international energy program. If the Congress agrees with the Administration that the program is desirable, it should renew Section 252 of the EPCA or grant some other form of anti-trust protection to enable U.S. companies to participate. Without the participation of U.S. companies, the International Energy Agency's programs would be very severely affected, and the emergency sharing system probably could not function.

There can be little doubt that withdrawal of U.S. company participation in International Energy Agency activities because of failure to provide an appropriate antitrust exemption or defense would cause other International Energy Agency participating countries to conclude that the U.S. was failing to carry out its international obligations.

In closing, I want to express our appreciation for your keen interest in this matter and our hope affirmative action regarding the extension will occur well in advance of October 31.

Sincerely,



CJO:aw

Prepared Statement of Melvin A. Conant

WORLD ENERGY AND RESOURCES

October 5, 1979

The Honorable Howard M. Metzenbaum
United States Senate
347 Russell Senate Office Building
Washington, DC 20510

OCT 10 1979

ATTENTION: Mr. Walter Measday

Dear Senator Metzenbaum:

Your hearings on the International Energy Agency interests me and I regret I shall be overseas while they are held. Nevertheless, Mr. Measday and I reviewed my own appraisal of the IEA -- its possible strengths and probable weaknesses.

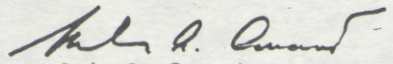
In my view, the utility of the exercise was greatly weakened when, in the very midst of negotiations aimed at curbing the race for preferential access to someone else's oil, the U.S. itself got its agreements with Saudi Arabia, then with Iran. I'm not sure the IEA could have regained strength after that.

Next, the tricky, complex voting rules virtually precludes IEA doing anything without U.S. approval. Such a situation literally invites evasion and end-runs.

The original IEA charter was to deal with emergency, contrived oil shortages; the need remains but there is now the added task of dealing with the consequences of chronic shortages. IEA cannot presently cope with this issue.

As for the increased "transparency" of the world oil market, IEA gathers data -- as does the DOE now (at long last) on the lifting of foreign oil by U.S. or U.S.-controlled companies. What is actually done in IEA and DOE with the unprecedented flow of data? What timely alerts do we get from the information? To what use does our government, in particular, put the information?

Sincerely yours,



Melvin A. Conant
President

jcf

Letter from International Energy Agency to
U.S. Department of Energy

OCDE

ORGANISATION DE COOPÉRATION ET
DE DÉVELOPPEMENT ÉCONOMIQUES

AGENCE INTERNATIONALE
DE L'ÉNERGIE

Le Directeur Exécutif

OECD

ORGANISATION FOR ECONOMIC
CO-OPERATION AND DEVELOPMENT

INTERNATIONAL ENERGY
AGENCY

The Executive Director

IEA/ED/78.310

The Honorable James R. Schlesinger
Secretary
Department of Energy
1000 Independence Avenue
Washington DC 20858

4th October 1978

Dear Mr Schlesinger,

Re: IEA Emergency Oil Reallocation System

The overall results of the International Energy Agency's second Allocation Systems Test (AST-2) in April and May 1978, involving for the first time the IEA Participating Countries National Emergency Sharing Organisations (NESOs), were positive.

Concerning specifically the NESOs' performance we think that the degree of their preparedness, their functioning and their interaction with the other groups in the IEA Emergency Organisation, although varying one from another, were in general good and encouraging. Some problems, however, were found to exist in various NESOs, and the Secretariat has reported to the IEA's Standing Group on Emergency Questions (SEQ) that it would contact the Administrations concerned directly on these specific problems.

You will find in the following sections our analysis of three areas in which we think that improvement could be made in the performance of the NESO of the United States. We have already discussed this matter in general terms with the Assistant Secretary for International Affairs and members of his staff. In addition, we think it would be appropriate and useful for the Department of Energy to have an official expression of the Secretariat's views on these matters, including its suggestions and proposed measures to contribute to the solution of problems it has identified. The views expressed below are those of the Secretariat, based on its experience during AST-2 and in particular its observation of the performance of the NESOs of the United States and other Member countries of the IEA.

I. Internal Organisation of US NESO

The US NESO was established only very shortly before the Test, partly due to the recent organisation of the Department of Energy. One of the consequences was some difficulty in the internal preparation of the NESO for AST-2, as evidenced by some misunderstandings about the legal and procedural provisions relating to the IEA Emergency System. This problem could be diminished in the future by a series of presentations and/or short training sessions which could be held at various intervals in Washington, involving management and operational audiences and in which the Secretariat would be pleased to participate to any extent desired.

In addition, the US NESO team was called upon to test simultaneously the IEA Allocation System and the domestic allocation system of the United States. To carry out these tasks, the Team was made up of 3 groups participating directly or indirectly in the Test - the Department of Energy statistical office, the experts concerned with the internal allocation programs and the international office. During the Test there seemed to be difficulties of coordination and communication between these three groups, despite the impressive efforts, made by the operational head of the team. These difficulties were reflected in communications with the IEA Team in Paris, and caused deadlines to be missed throughout the Test.

In future tests and most particularly in a real emergency, a fulltime segment of the overall NESO Team should be assigned to deal exclusively with the IEA Allocation System, sufficient in number and well briefed in advance. This segment should, of course, be in constant communication not only with the IEA but with the other segments of the US NESO. Moreover, the NESO as a whole should be directed by a strong central management with sufficient authority to assure coordination of its various segments and to resolve any differences should their activities overlap or conflict with one another.

II. The interface Between the US domestic allocation system and the IEA Allocation System

The simultaneous testing of the US domestic and the IEA allocation systems revealed the following areas of disharmony between the two systems, which at times created some degree of confusion for the oil companies participating in AST-2, and for the emergency management organisation in Paris:

- Under the IEA Allocation System Governments indicate demand restraint measures to oil companies for a three-month period, the current month and two forecast months. Due to the required steaming time of oil import cargoes to consuming countries, the future two months often become more important for reallocation of supplies than the current month. The US system, however, indicates measures only for the current month, leaving oil companies to speculate and make their own decisions as to what demand restraint measures will be in effect for two succeeding months.
- It is neither feasible nor desirable to rely on Reporting Companies alone to reallocate oil between countries to achieve the IEA's emergency sharing objectives. This is particularly important in certain countries which depend heavily on non-Reporting Companies, but especially for the United States since such companies account for up to 25% of available supply. AST-2 was designed to bring non-Reporting Companies into the reallocation process through the intermediary of the NESOs and this worked very successfully in many countries. The US NESO informed the Secretariat during AST-2 that there were legal obstacles to developing US non-Reporting Company offers to reallocate oil internationally since such companies were not party to the Voluntary Agreement, and because the small size of individual companies afforded very limited possibilities for their assistance in the international process. The Secretariat understands that many purely domestic companies may not be able to help, but continues to believe that it would be beneficial from both US and IEA viewpoints if those non-Reporting Companies with access to international oil (particularly importers to the US East Coast) can be integrated into the IEA system, through the NESO. Inviting major non-Reporting Companies to become Reporting Companies might well overcome the legal obstacles noted above, but perhaps other modalities would need to be developed to achieve the desired coverage and coordination through the NESO.
- In a real emergency oil which is produced in Participating Countries and is logistically capable of international reallocation would be one of the most flexible elements in Companies' reallocation possibilities to achieve IEA objectives. For example, the flexibility afforded by the ability to divert additional cargoes of North Sea crude to the United States in AST-2 was extremely useful in balancing the US position. The current legal position regarding the

disposition of Alaskan oil is appreciated. However, AST-2 demonstrated that the exclusion of Alaskan oil from international reallocation may create substantial difficulties for IEA allocation activity and could lead to additional costs of oil supply for Member countries because of lengthened supply routes. Indeed, the complicated supply deals constructed during AST-2 to reallocate foreign oil destined for the US West Coast to Japan might prove impossible to conclude in an emergency when all cost and price factors are taken into account.

III. Data and Information

On several occasions during AST-2 the Secretariat/industry team in Paris encountered major difficulties in understanding and using data material originating from the US NESO. Underlying problems appear to be both organisational and technical. We would like to make the following comments and suggestions in this respect:

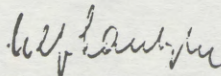
- We think that it is extremely important that, on a permanent basis, sub-sets of the US oil data base - with relevance to the international reallocation - are reviewed within the international section of the Department of Energy so that the burden of interpretation of such data does not rest solely on statistical experts who may not be specifically trained for these purposes and do not have prime responsibility in an emergency for the interface to the IEA system. This should lead to a detailed knowledge of the data base by key operational staff and facilitate an active cooperation between data-submitting companies and the experts in the international section of the Department of Energy so that the meaning and importance of all data can be fully and correctly understood.
- US non-Reporting Company data still gives rise to considerable concern. Methods used in the United States to derive such data as the difference between national totals and that reported by Reporting Companies led to substantial errors in AST-2 (up to 25% of the total amount of oil to be reallocated among Participating Countries) and would be inappropriate in an emergency. While we do not have a complete knowledge of data generation in the United States, we understand that such short-cut methods are necessary because non-Reporting Company data currently can only be collected on a voluntary basis. We strongly hope that a way can be found to require non-Reporting Companies to report to the US NESO in an emergency. This is particularly important if non-Reporting Companies are to be integrated through the NESO in international reallocation as discussed above.

- The possibility of IEA actions to help resolve national product supply/demand imbalances was tested for the first time in AST-2, with very mixed results indicating the need for further work in this area between the Secretariat and member countries. For example, after requesting "the urgent assistance of ISAG and the IEA Secretariat in alleviating a serious heavy fuel oil shortage on the US East Coast", it appeared that the US NESO was unable to provide supporting quantification of its need. After extensive activity by the Test team in Paris, the request was withdrawn due to an apparent misunderstanding within the NESO. Detailed data available to the Department of Energy to implement the US domestic crude oil and product allocation programs in an emergency should permit essential regional analysis, and any requests to the IEA to help solve product imbalances should be broken down geographically.
- In general, we have noted the concern of Participating Countries that, given the size of the US oil consumption and imports relative to the IEA area as a whole and the consequent impact on IEA allocation calculations, particularly for small countries, the US data be as accurate and dependable as possible.

Finally, we are advised that the United States will be testing in the near future its domestic emergency crude oil and product allocation programs and hope this may provide an opportunity to address the points raised in this letter.

It goes without saying that my colleagues and I remain fully disposed to provide further assistance if you think that anything beyond our present suggestions and offers would be of help.

Sincerely yours,



U. Lantzke

cc His Excellency Ambassador Herbert Salzman
United States Permanent Representative to OECD

The Honorable Julius L. Katz
Assistant Secretary of State for Economic and
Business Affairs

