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European Community Energy Policy and Its Significance to American Coal Exports

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European Community Energy Policy and Its Significance To American Coal Exports

JAMES J. FRIEDBERG*

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Introduction

The European Community (EC)¹ has had difficulty in formulating a comprehensive energy policy for a number of reasons. Legally, the authority for such action by the EC is ambiguous. The major treaty (the EEC treaty) that forms the basis for the Community does not mention energy policy. While the two other multilateral agreements (the ECSC and the Euratom treaties) that complete the triad of constitutional documents creating the Community deal specifically with coal and nuclear energy, their limited substantive scope makes them inadequate for formulating a comprehensive energy policy. Political problems add to the legal/constitutional ones to inhibit a coordinated energy policy. Energy issues have tended to touch the most sensitive political nerves of national governments, both as to their domestic and their foreign policies. At times, individual European states have preferred an independent approach to international problems such as dealings with OPEC. In areas such as acid rain, the domestic interests of the Community members have conflicted

¹ The European Community or "Common Market" really consists of three communities: the European Coal and Steel Community (ECSC), the European Economic Community (EEC) and the European Atomic Energy Community (Euratom). Each of these communities was created by treaty, the ECSC in 1951 by the Treaty of Paris, the EEC and Euratom in 1957 by the Treaties of Rome.

directly. Despite such obstacles, the Community has moved haltingly toward the outlines of a common energy policy.

Although half-hearted attempts at formulation of a common energy policy started as early as 1964,² that movement was most directly precipitated by the oil shocks of 1973 and 1979. Thus, it is not surprising that the overriding goal of the developing EC policy is the achievement of greater independence from Mid-east oil and the political uncertainty related to dependence on oil imports.³ A subordinate goal is to achieve independence at the lowest cost possible. As the sense of crisis diminished after each oil shock, the goal of independence became less important, highlighting the inherent tension between security of supply and short-term economic savings. The Community's attitude toward coal supplies exemplifies this and other tensions and inconsistencies within Community energy policy. Now that oil is relatively inexpensive, the Community's commitment to shift to alternatives such as coal seems to be wavering in word and in deed. Furthermore, because coal requirements would be met by imports, there has always been the issue of substituting one international dependency for another.

This article discusses the legal and political obstacles to European Community energy policy coordination and the inherent tensions that such a policy must face, especially in respect to coal imports from the United States. The first half of the article examines the institutions of the European Community in a general overview. Where the structure or function of a particular institution has some significant relevance to energy policy, especially to coal use, that relevance is noted. The second half of the article examines specific areas of energy policy where the activities of the EC or its member states affect the potential for coal trade with the United States.

² European Community debate over common energy policy occurred even prior to 1964. After discussions held throughout the late 1950's, however, the EC decided on December 21, 1963 to commission a working group to study long-term energy prospects. On April 10, 1964, the council adopted the protocol on Energy Problems, which concentrated on long-term coal development and supply. 7 O.J. EUR. COMM. 69 (1964); see COMMISSION OF THE EUROPEAN COMMUNITIES, THIRTY YEARS OF COMMUNITY LAW 414 (The European Perspectives Series, 1981) [hereinafter cited as THIRTY YEARS OF COMMUNITY LAW].

³ Evans, *Shorter Articles and Notes: EEC Oil Policy*, 17 J. OF WORLD TRADE LAW 54 (1983).

Three general routes exist by which the EC energy policy could affect United States coal exports to Europe. First, some policies increase or decrease the total amount of coal consumed by Europeans. Examples of such policies are air pollution and acid rain control, the promotion of nuclear energy, and fuel efficiency guidelines.

Second, some EC policies increase or decrease the proportion of such demand that is met by domestic European supplies. The more demand met by such supplies, the less room for imports. An example of one policy is the EC legislation allowing state subsidies to local coal industries.

Third, some EC policies affect the competitiveness of American coal with other "third-country" coal available for European import. Source diversification plans and policies promoting shared technology or joint venturing might fit into this category. It is probably true, however, that United States policies — for instance, those affecting the strength of the dollar and the coal transportation costs — are more determinative than EC policies in regard to competition from other non-EC producers.

This article is also a guide for American decision makers. It provides a description of the institutional context in which energy policy is formulated in Western Europe, the substantive nature of that policy, the inferred effects on the United States coal industry, and the possible routes to affect European policy in a positive way.

Part One: The Community and Its Energy Problem

I. HISTORICAL PERSPECTIVE

Energy has always been a fundamental concern to the European Common Market.⁴ At the end of the Second World War, coal was still the primary energy source in Europe. Coal was of crucial importance to the European economies, particularly as an element in the production of steel. The formation of the

⁴ European Common Market, European Community and EC are used herein as synonymous terms.

European Coal and Steel Community in 1952⁵ recognized the importance of the coal industry in the movement toward European economic integration.

The European Coal and Steel Community was the precursor of the European Common Market. Today it constitutes one of the three communities of that common market. It was formed as a product of the European unity movement which gathered tremendous momentum at the end of the Second World War. Numerous European statesmen of that era perceived that the recent devastation suffered by their continent was largely attributable to economic competition. In particular, the competition between continental Europe's two major powers, France and Germany, especially in the coal and steel sector, had created geopolitical tensions that escalated to unlimited war, involving not only the entire continent, but much of the rest of the world.⁶ One statesman, the French Foreign Minister Robert Schuman, proposed the formation of the European Coal and Steel Community as a first step toward European union.⁷ He recognized that integrating France and Germany's coal and steel markets would stimulate regional economic recovery and alleviate the inefficient national market barriers that previously hurt the industry. Most importantly, integration would create a community

⁵ The Treaty of Paris, which created the European Coal and Steel Community, was concluded on April 18, 1951, and became effective on July 23, 1952. See K. BORCHARDT, *THE ABCs OF COMMUNITY LAW* 5 (European Documentation Periodical 2) (1984).

⁶ At the end of the Franco-Prussian War in 1871, the German nation took a large section of Lorraine from France. As steel production expanded in the 1880's, iron ore from Lorraine was used in steel mills located both in Lorraine and in the coal producing Ruhr region. After World War I, the French recovered Alsace-Lorraine, acquiring much of Germany's iron mines, blast furnaces and steel mills. As a consequence, new steel plants were built in the Ruhr valley. These more modernized plants competed with the older Lorraine plants for coke produced in the Ruhr. When Germany regained tariff autonomy in 1925, the nation imposed duties on iron and steel from Lorraine. Because such shifting of national boundaries and conflicts disturbed the natural economic unity of this industrial region, many people sought to restore links between the Ruhr and Lorraine after World War II. See W. DIEBOLD, JR., *THE SCHUMAN PLAN: A STUDY IN ECONOMIC COOPERATION 1950-1959* at 21-25 (1959); see also D. SWANN, *ECONOMICS OF THE COMMON MARKET* 13 (2d ed. 1972); D. HENE, *DECISION ON EUROPE: AN EXPLANATION OF THE COMMON MARKET* 1-15 (1979); A. SAMPSON, *ANATOMY OF EUROPE* 72-83 (1968).

⁷ DIEBOLD, *supra* note 6, at 21.

of interest between France and Germany that would make another military conflict between them impossible. By extending this community to the rest of Europe, prosperity would be more likely, war less likely, and a European *union* would be achieved.⁸

Realizing a goal, that of establishing a European union, through a means as mundane as coordination of the coal and steel industry might appear incongruous at first glance. However, it was just such a mundane but fundamentally important area that visionaries like Schuman perceived as fertile ground for progress toward unity—much more so than the highly charged political arenas, where proposals for immediate political union (i.e., a United States of Europe) would receive sensational publicity, but be doomed to failure.

The success of the ECSC in reviving the coal and steel industries in post-war Western Europe and in promoting cooperation between the states involved led to the formation of the European Atomic Energy Community and the European Economic Community in 1958.⁹ Like the ECSC, the European Atomic Energy Community was a specialized organization aimed at cooperation in only one area. The European Economic Community, however, was a much more ambitious undertaking which sought eventual full integration of the various European economies. In part, this meant creation of a “common market”—an area of free trade where commodities, capital and labor could move unimpeded by tariffs or similar barriers and where goods from third countries could enter under restrictions common to the entire market.¹⁰ Such a common market has largely been

⁸ *Id.*

⁹ The Treaty of Rome, creating the European Economic Community and the European Atomic Energy Community, was concluded on March 25, 1957, and entered into force on January 1, 1958; see E. NOEL, *THE EUROPEAN COMMUNITY: HOW IT WORKS* 78 (Commission of the European Communities, the European Perspectives Series, 1979) [hereinafter cited as *THE EC: HOW IT WORKS*].

¹⁰ A common market is often defined as one stage in the development of an economic union within a group of countries. A *free trade area* is first formed when a group of countries eliminates restrictions on trade among themselves, although each member country retains its own tariff and quota system on trade with third countries. Free trade areas can cover all products or products in just one area such as industrial products.

A group of countries can then form a *customs union* by setting up a common tariff and quota system for trade with third countries in addition to eliminating restric-

achieved.¹¹ However, the Community is far from the total economic integration envisioned in the Treaty of Rome. The lack of a comprehensive common energy policy is one example of this shortcoming—one which shall be examined later in this article.

II. INSTITUTIONAL STRUCTURE AND PROCEDURE

The European Community is unique in the international arena. It is not a sovereign state, but it is much more than just another international organization. Essentially, it is a customs union providing a tariff-free zone of trade for its members. However, its powers go well beyond those normally possessed by a customs union. On a broad range of subjects, including energy and coal policies, it may create policy binding on its member states and law binding on both the states and their citizens.¹² In this regard, the community has inherited that sovereignty which historically was the exclusive attribute of its constituent states. Such a phenomenon represents a very real, albeit partial, step toward European union. The following sections examine what Community institutions are responsible for exercising these powers and the means by which they do so.

tions on trade among themselves. A *common market* is a customs union in which all restrictions on factors of production (labor, capital and enterprise) are eliminated.

Some authorities claim that the EEC is a fully realized common market which is proceeding to the final stage of *economic union*. In an economic union, member states' economies are fully integrated and supranational authorities make all economic policies. An economic union is much more difficult to achieve than a free trade area, customs union or common market, all of which result from the progressive elimination of restrictions. This is because the economic union also requires states to transfer economic sovereignty to new supranational institutions so that a single monetary system, central bank and common foreign economic policy can be created.

See STEIN, HAY & WAELBROECK, *EUROPEAN COMMUNITY LAW AND INSTITUTIONS IN PERSPECTIVE: TEXT, CASES & READINGS* 364 (1976) [hereinafter cited as STEIN]. See generally F. R. ROOT, *INTERNATIONAL TRADE AND INVESTMENT THEORY AND POLICY ENTERPRISE* 378-79 (1973) (definition of a free trade area).

¹¹ A common market with no tariffs among countries and a common external tariff has generally been achieved for goods. Such a common market, however, has not been extended to services in financial, legal and other professional fields.

¹² See, e.g., International Herald Tribune, June 29-30, 1985, at 1, col. 6; International Herald Tribune, Aug. 2, 1985, at 1, col. 8.

A. Structure

1. The Commission

The Commission is the executive arm of the European Economic Community. It is responsible for the enforcement of Community rules and the administration of most Community business. It is staffed by a large bureaucracy headquartered in Brussels, Belgium. In addition to executive powers derived directly from the treaties establishing the Community (e.g., Commission authority to enforce competition policy), numerous powers have been assigned to the Commission by the Council, mostly involving the adopting of rules by the Commission for implementing Council decisions. The Commission is a rather weak executive. Its ability to make independent policy decisions and to speak for the Community is limited since the Council has the final word on most major issues. However, much of the Council's power to make law for the Community is contingent on the Commission first submitting a proposal. This power of initiative makes the Commission the moving force behind Community policy. The Commission has law-making powers of its own under the ECSC treaty, subject to right of veto by Council under certain circumstances.¹³

The Commission is responsible for ensuring that Community law, whether found in treaty or legislation, is properly implemented. Where such law is infringed upon the Commission must intervene, at times in a prosecutorial capacity and at times in an adjudicatory one. If necessary, it may refer the matter to the European Court of Justice.¹⁴

The Commission's role is to serve the collective interests of the Community exclusively. Its members are expected to represent community, not national interests. This contrasts with the Council's role, discussed below. The Commission consists of fourteen members. Although appointed by "common accord"¹⁵ of the governments of the member states, each of the smaller

¹³ BORCHARDT, *supra* note 5, at 17.

¹⁴ *Id.*

¹⁵ *Id.* at 16-17.

states has one of its citizens on the Commission, while France, Germany, Great Britain, and Italy each have two.¹⁶

2. The Council

The Council, composed of representatives of the governments of the member states, is the chief legislative authority of the Community and the most powerful of its institutions. Such power reflects, in part, the inability of the Community in recent years to influence the sovereignty and individual interests of its member states. Therefore, member states' interests are given priority in the Council.

Although the Council is obliged to consider the goals and needs of the Community as a whole, inaction (or weak action) has often resulted from the collision of narrow interests within that body. A Commission publication claims "The Council is a Community institution and not a meeting place for governments. Consequently, it is not the lowest common denominator between the Member States that is sought in the Council's deliberations, but the highest between the Community and the Member States."¹⁷ Such sentiment may not reflect reality. In fact, energy policy itself may be a prime example of minimal action due to the inflexibility of individual national interest.

For the EEC and Euratom, the Council is the undisputed supreme legislative body, and responsible for most important policy decisions. Political power is more divided in the ECSC, with the Council's role being more restricted to that of endorsing or rejecting Commission decisions.¹⁸

The shift in the two latter communities to greater relative power for the Council at the expense of the Commission is another example of individual sovereignty of the members asserting itself against the Community supranationalism which reflected idealistic hopes for European union in the early 1950's when the ECSC was formed. This shift clearly makes common policymaking more difficult.

¹⁶ Commission of the European Communities, *European Community Facts and Figures 7* (1974).

¹⁷ BORCHARDT, *supra* note 5, at 17-18.

¹⁸ *Id.* at 21-31.

The difficulty is heightened by the present voting practice in the Council. While under the treaties most policy decisions in Council are to be made by a weighted ("qualified") majority, a French walkout in 1965 resulted in a revised practice.¹⁹ Under the Luxembourg compromise of January 1966, all important decisions, except budgetary ones, are made by a unanimous vote.²⁰ The constraints on policymaking are obvious. This voting practice, combined with the vagueness of the legal mandate for an EC energy policy, have served as obstacles to such a common energy policy.²¹

3. The European Parliament

The European Parliament appropriately named itself in 1958.²² Although it aspires to be the legislature for Europe, it actually has very little power outside of some budgetary authority.²³ Real legislative authority in the Community resides in the Council and, to a limited degree, in the Commission. The Parliament is consulted on proposed legislation but its opinions are only advisory. It has the power to dismiss the Commission, but such action is so extreme that its practical value is limited. Furthermore, there is nothing to prevent the member state governments from reappointing a new Commission with the same composition. The Commission is obliged to report to Parliament annually and to respond to questions posed on particular issues by individual members.²⁴

¹⁹ *Id.* at 18.

²⁰ *Id.*; see *infra* note 77 (for discussion of the compromise).

²¹ The addition of Spain and Portugal to the Common Market will aggravate such difficulties in decisionmaking. See *International Herald Tribune*, July 9, 1985, at 1, col. 3.

²² Although the treaty refers to the Assembly, Assembly members renamed themselves in 1962. 5 O.J. EUR. COMM. 1045 (1962) (resolution of Mar. 20, 1962). The treaty initially provided that the 198 Assembly representatives be selected from the national parliaments of member states by their respective parliaments. See STEIN, *supra* note 10, at 43. The revised name "European Parliament" has since become more appropriate. On September 20, 1976, the European Council signed an act which introduced the election of Parliament members by direct universal suffrage. See E. NOEL, *WORKING TOGETHER: THE INSTITUTIONS OF THE EUROPEAN COMMUNITY* 29 (The European Documentation Series, 1985) [hereinafter cited as *WORKING TOGETHER*].

²³ STEIN, *supra* note 10, at 45-50.

²⁴ *Id.* at 45.

The members of the Parliament are now elected directly by citizens of the member states. Symbolizing the supranational nature of the body, members are organized and seated according to party affiliation (Socialist, Christian Democrat, etc.) rather than by national group.²⁵

4. The European Court of Justice

The Court of Justice of the European Communities is the final interpreter of Community law. Its holdings on issues of Community law are binding on member states and their citizens. In certain areas, it may have compulsory jurisdiction directly over the parties and subject matter of a lawsuit. In other instances, a question of Community law may be referred to it by a national court, much like the certified question procedure in this country.²⁶ By successfully insisting on the supremacy of Community law and the binding nature of its interpretation thereof, the Court has done much to further the cause of European economic integration.

B. Institutional Procedure

Formulation of policy by the European Commission follows consultations with political leaders, with government officials, and with organizations representing workers and employers. Numerous and lengthy meetings may be held. Weeks of detailed consideration and negotiation may intervene between one reading of a proposed measure before the Commission and the next. Once the major policy lines have been agreed upon, the Commission has access to the consultation of national experts to work out the practical arrangements to be adopted or the proposals to be submitted.²⁷ Of course, the question may be raised whether these national experts serve more to facilitate Community policy or to advance national interests, thereby frustrating Community policy. In any event, Commission officials from the relevant departments convene and chair meetings with these var-

²⁵ NOEL, *WORKING TOGETHER*, *supra* note 22, at 29-30.

²⁶ STEIN, *supra* note 10, at 134.

²⁷ NOEL, *THE EC: HOW IT WORKS*, *supra* note 9, at 66; NOEL, *WORKING TOGETHER*, *supra* note 22, at 39-41.

ious national government experts who advise the Commission in its search for a technical formula acceptable to the ten member states. This procedure by which the Commission frames proposals to the Council is also the procedure by which it formulates regulations or decisions that it could issue on its own, but which it deems advisable to prepare with input from member states.²⁸

When it receives a general memorandum as a proposal on a specific point from the Commission, the Council refers it to the Permanent Representatives Committee.²⁹ The Committee's discussions are prepared by its various working committees. The Commission is represented at all meetings of the Permanent Representatives Committee so that dialogue begun with national experts can continue with ambassadors and other government representatives.³⁰ The Council's decisions must be made by the ministers themselves; thus, important questions with political implications are the subject of detailed discussion by the ministers and the Commission members. Ministerial meetings are not mere formalities (as might be suspected at such a high level), but often involve extensive debate.³¹ At the risk of oversimpli-

²⁸ NOEL, *THE EC: HOW IT WORKS*, *supra* note 9, at 67.

²⁹ The Committee of Permanent Representatives which works under the authority of the Council plays an important role in the development of community legislation. After devising an initial legislative proposal, the EC Commission gives the proposal to the Council which decides whether the European Parliament or the Economic and Social Committees need to be consulted. If so, the European Parliament can forward an opinion to the Council and Commission. The Commission decides whether or not to make amendments and sends amended versions to council. Amended proposals are discussed at length in working groups or subgroups in the presence of commission officials. These groups which form the lowest organizational level of council and are comprised of expert civil servants from member states, attempt to reach consensus on the amended legislative proposals.

The results of these working group discussions are passed on to the committee of Permanent Representatives which tries to reach consensus on all remaining points at issue. If an agreement is reached, the committee includes the amended proposal on the agenda for the next council session where the proposal would be adopted without further discussion. If issues remain unsolved, the Permanent Representatives Committee will either refer the proposal back to the working groups which can tackle technical difficulties, or to Council, which would address unsolvable political questions and adopt proposals which are successfully resolved. See STEIN, *supra* note 10, at 60-61; NOEL, *THE EC: HOW IT WORKS*, *supra* note 9, at 68; OFFICE OF OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, *THE EUROPEAN COMMUNITY'S LEGAL SYSTEM* (European Documentation Periodical 5 (1984)).

³⁰ STEIN, *supra* note 10, at 36-37.

³¹ NOEL, *THE EC: HOW IT WORKS*, *supra* note 9, at 68 (1979).

fyng for the purpose of background understanding, the above process can be viewed as one where the Commission proposes and the Council disposes, with the final law-making power resting with the Council.

The main purpose of Community energy policy is the defining of objectives. Each year the Community reviews the energy situation and tries to formulate policy. The objectives are not rigid; the objectives are only indications or expressions of a certain policy to be followed. The specific means of attaining goals are left to the individual governments. For example, a stated objective of producing a certain amount of coal means that the EC shall introduce measures deemed necessary to cause that quantity to be produced. If the EC intends to promote the production of a certain amount of nuclear power, an objective is formulated. Action is then supposed to be taken at both the national and Community levels to reach that objective. These actions are reviewed annually to see if progress is consistent with stated goals.³²

III. THE LEGAL BASIS FOR COMMUNITY ENERGY POLICY

As noted earlier, the European Community consists of three originally distinct legal entities: The European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (Euratom). Each entity exists by virtue of international agreement among member states. The ECSC treaty (Treaty of Paris) was signed in 1951. The EEC and Euratom treaties (Treaties of Rome) were signed in 1957. Although a merger agreement was instituted in 1965³³ to combine the administrative functions of the three communities, their substantive powers are still governed by the terms of the individual treaties.³⁴ Unlike other treaty policies such as agriculture and transportation, general energy policy has no

³² Brondel, *Energy Policy and the EEC*, 6 ENERGY POL'Y 232 (1978).

³³ The merger agreement was instituted on Apr. 8, 1965. NOEL, *THE EC: HOW IT WORKS*, *supra* note 9, at 83; *see also*, THIRTY YEARS OF COMMUNITY LAW, *supra* note 2, at 1-3.

³⁴ The EC treaties are unique because they are the only international treaties in which sovereign nation states delegate to supranational authority the right to make policies in certain areas on behalf of the nation states.

specific treaty provisions devoted to its formulation.³⁵ At the time of treaty formulation, more than a decade before the first hint of an energy crisis, energy was not identified as an area requiring common action. Initially, the ECSC dealt with coal, while Euratom dealt with nuclear power. All other forms of energy came under the generic provisions of the EEC treaty. Given this inherent split in substantive responsibility, it was very difficult to progress toward a common energy policy prior to the administrative merger of the communities in 1967.³⁶

One of the most common legal bases for Community energy policy is EEC Article 103.³⁷ This provision requires member states to regard their conjunctural policies (short-term economic measures designed to meet certain crises) "as a matter of common concern."³⁸ Article 103(2) empowers the Council, acting unanimously on a Commission proposal, to decide on measures appropriate to the crisis being dealt with under this article.³⁹ Article 103(3) permits the Council, on a qualified majority after a Commission proposal, to issue directives necessary to give effect to measures decided upon under Article 103(2).⁴⁰ Article 103(4) triggers the previous provisions when difficulties arise "in the supply of certain products".⁴¹ As a result of the Arab oil embargo of 1973, Community energy measures have concentrated on avoiding just such disruptions of supply by another energy crisis. To this extent the EC energy strategy is crisis oriented and legally supported by Article 103.⁴³

Certain aspects of the Community's energy policy focus on information gathering. EEC Article 213 gives the Commission the power to "collect any information and carry out checks

³⁵ Green, *The Implementation of Treaty Policies: The Energy Dilemma*, 8 EUR. L. REV. 186 (1983).

³⁶ G. PARKER & B. PARKER, A DICTIONARY OF THE EUROPEAN COMMUNITIES 21 (1981) [hereinafter cited as EC DICTIONARY].

³⁷ See, e.g., Green, *The Legal Basis of a Community Energy Policy*, 8 EUR. L. REV. 52, 53 (1983).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* at 53-54 (crisis language noted in O.J. EUR. COMM. (L 308) 14 (1968) Council Directive 68/414/EEC and O.J. EUR. COMM. (L 228) 1 (1973) Council Directive 73/238/EEC).

required for the performance of the tasks entrusted to it.”⁴⁴ The Council can set conditions that limit the Commission’s power under this Article. The extent to which the Council may use Article 213 as the legal foundation for legislation is unclear, because the article is silent on the issue of legislative competence. However, the Council has issued measures under Article 213 requiring states and private organizations to provide the Commission with various types of information.⁴⁵

As mentioned, none of the Community’s constituent treaties make any explicit reference to a common energy policy. However, EEC Article 235 provides that the Commission may make proposals not specifically provided for in the treaty.⁴⁶ Most Community energy policy measures have been formulated under this article, which is probably the most convincing legal basis for energy policy legislation. The Article permits Community action where the treaty has not otherwise provided the necessary powers and where such action is necessary to attain “one of the objectives of the Community.”⁴⁷ A significant limitation on action under this Article is that proposals must be unanimously adopted by the Council. This requirement has caused many proposals with majority support to stall under Council consideration.⁴⁸

There are other provisions in the Community treaties under which action relevant to energy matters can be taken. Examples are competition rules, state aids, and the common customs tariff. Legal authority is clear in such areas, stemming from express provisions. However, the narrow substantive scope of such pro-

⁴⁴ Treaty of Rome, 1957 art. 213. One authoritative source on community law says the following concerning the somewhat opaque term “conjunctural policy”: “[T]his is a literal translation of the term used in the original texts. In English such terms as ‘policy on current trends,’ ‘short-term economic policy’ and ‘cyclical policy’ are also commonly used.” SWEET & MAXWELL, B III Encyclopedia of European Community B10091.

⁴⁵ Green, *supra* note 37, at 55-56.

⁴⁶ *Id.* at 56.

⁴⁷ Objectives are defined as harmonious development of economic activities throughout the community, a continuous balanced expansion and an increase in stability. *Id.*

⁴⁸ Letter from J. C. Guibal, Director—General for Energy, Commission of the European Communities, to Sarah Stump (July 3, 1984).

visions make them ineffective for implementing a general energy policy.⁴⁹

Finally, EEC Article 5 requires member states to "ensure the fulfillment of the obligations arising out of this Treaty or resulting from actions taken by the Institutions of the Community."⁵⁰ Implementation of energy policy objectives is largely determined by member states. Each is required to harmonize its energy policies with the mandates of Community policy. Each reports at frequent intervals on the progress it has made toward achievement of Community objectives.⁵¹ These requirements are effected by Article 169 of the EEC Treaty, which contains enforcement procedures concerning non-compliance by a state with treaty obligations.⁵² Thus, if the Commission considers a member state to be breaching its obligations in regard to energy policy, the former "shall deliver a reasoned opinion on the matter after giving the state concerned the opportunity to submit its observations."⁵³ If the member state does not comply with the Commission's opinion within a specified time, the Commission may bring the matter before the European Court of Justice.⁵⁴

IV. THE 1973 ARAB OIL EMBARGO

The European Community is the largest oil importer in the world.⁵⁵ This vulnerability was made clear in the wake of the 1973 Arab-Israeli Yom Kippur War. When the Arab oil producers who dominated OPEC⁵⁶ declared a boycott against Western nations

⁴⁹ Green, *supra* note 37, at 55-56.

⁵⁰ *Id.* at 55.

⁵¹ THIRTY YEARS OF COMMUNITY LAW, *supra* note 2, at 424.

⁵² Treaty of Rome, 1957 art. 169.

⁵³ *Id.*

⁵⁴ EC DICTIONARY, *supra* note 36, at 25.

⁵⁵ H. MAULL, EUROPE AND WORLD ENERGY 77 (1980).

⁵⁶ OPEC, the Organization of Petroleum Exporting Countries, was formed in 1960 by the countries Iran, Iraq, Kuwait, Saudi Arabia, and Venezuela. By 1973, OPEC's members included Qatar, Algeria, Libya, Egypt, Nigeria, Indonesia and Abu Dhabi. Members of OPEC in North Africa and the Middle East include Libya and Algeria and the Persian Gulf states of Iran, Iraq, Kuwait, Saudi Arabia, Qatar and Abu Dhabi. OAPEC, the Organization of Arab Petroleum Exporting Countries, was found in 1968 and is comprised of the nations, Saudi Arabia, Libya, Kuwait, Iraq, Syria, Egypt, Qatar, Bahrain, Abu Dhabi and Algeria. THE ENERGY QUESTION: AN INTERNATIONAL FAILURE OF POLICY 44, 57, 59 (E. Erickson & L. Waverman ed. 1974).

purportedly aiding or sympathizing with Israel, Europe experienced a devastating shock. The United States was inconvenienced, at the very least. With its relatively large domestic and western hemisphere energy supplies, the United States was not faced with the spectre of economic disaster as was Europe.

Coal was noticeably absent in the 1973-74 energy crisis. This absence was particularly prominent in light of the dominant role coal had played in the European energy sector little more than a decade before. When discussing the failure of EC energy policy during the 1973-74 oil crisis, one author cites politicization of such policy as a principal cause for the failure. Linking this to the decline of coal in Europe, he writes "The causes of this politicization are not difficult to identify. They lie in a combination of long-term trends involving the change from an economy based on domestic coal to one based on imported oil, and in the crisis events of the October War with its attendant oil embargo, supply fears, and fourfold rise in oil prices."⁵⁷

To understand the relationship between the decline of coal and the EC's failure to adequately deal with the energy crisis of 1973-74, some additional history is necessary. Between 1960 and 1970, the relative positions of coal (overwhelmingly domestic) and oil (overwhelmingly imported from the Mideast) in meeting Europe's primary energy requirements reversed themselves, with oil rising from about 33% to 60% and coal falling from 61% to 29%.⁵⁸ This decline of coal can be partially attributed to the failure of coal to meet basic goals of economic integration implicit in the community. Not only was there no common energy policy, but the lack of a common external tariff on coal and other energy imports meant that there was not a true common market.⁵⁹ Prior to 1970, imported Mideast oil was significantly less costly than European (or even American) coal.⁶⁰ Thus, those EC nations that chose to protect their local coal industries by placing tariffs on cheap imported energy placed their own manufacturing industries at a competitive disadvantage. Their

⁵⁷ R. Lieber, *Oil and the Middle East War: Europe in the Energy Crisis*, 35 HARV. STUD. INT'L AFF. 1, 46 (1976).

⁵⁸ *Id.*

⁵⁹ See *supra* notes 10 and 11 (providing more information on Germany's separate coal tariff and why it is not subject to common tariff rule).

⁶⁰ Lieber, *supra* note 57, at 4.

higher energy costs were reflected in higher production costs, a phenomenon attributable to lack of a common coal tariff. This situation could not last. European manufacturers made increasing use of imported oil. Thus, by not providing for a common tariff on imported energy, the ECSC treaty "helped to insure the decline of the European coal industry and the movement of Europe from a coal-based to an oil-based energy economy."⁶¹

Given the special role that coal has played in the movement toward European integration by being a subject of the first Community treaty, it is remarkable that it is less well protected than many other goods which are shielded by common external tariffs which were imposed pursuant to the EEC treaty. This situation is one of the effects of having a separate treaty for coal. During the 1960's, some Community efforts were made to halt or slow the decline of coal. Those involved in such attempts predicted the very kind of vulnerability to oil supply and price problems that was later to haunt Europe. But there was little tangible result to come of it.⁶² The ECSC did adopt a "Protocol of Agreement" on energy policy in 1964.⁶³ However, the document was more politically palatable than practical, calling for security of supply and low prices for consumers. It did nothing to provide the kind of substantial Community subsidy for coal that was provided for agricultural goods. While individual national subsidies were eventually permitted, they were less effective than the agricultural subsidies because of their piecemeal nature, smaller scale and delayed implementation.⁶⁴ An Arab oil embargo following the Six-Day War of 1967 was a total failure due to the abundant alternative supplies in the market. However, this abortive attempt should have put Europe on notice that, in different market conditions, it could be extremely vulnerable to economic warfare where oil was the weapon. Nonetheless, no significant EC crisis planning, let alone a comprehensive energy policy, had emerged by the time the Yom Kippur War broke out six years later. The discussions continued. The warnings about

⁶¹ *Id.* at 3.

⁶² *Id.* at 4.

⁶³ *Id.*

⁶⁴ *Id.*

the impending energy crunch continued.⁶⁵ The reports about the need for a policy ensuring plentiful energy supplies continued.⁶⁶ But no policy was formed. The only concrete accomplishment was a stockpile requirement—originally 65 days, raised to 90 days—for crude oil and petroleum products.⁶⁷ When the first oil crisis struck in fall 1973, the Community was not well prepared for it.

Shortly after the Arabs announced their boycott in November, 1973, the Dutch government threatened to cut off supplies of cooking gas to Parisian kitchens if the French government continued to cooperate with the Arab oil embargo against its Dutch EC partner. Contrasting the roles played by France and the Netherlands after the Arabs instituted their 1973 oil embargo depicts the inability of the Community to react to the embargo on a unified basis.⁶⁸

⁶⁵ In October 1972, the Commission submitted a lengthy memorandum on energy policy which contained forecasts and policy recommendations for the period ending in 1985. The memorandum projected that oil supplies would be threatened by widespread interruptions and advised that long term security replace temporary price advantages as a policy priority. The Commission recommended that 90-day stockpiles be established in Europe and that negotiations begin with the United States and Japan to improve OECD procedures on information and stockpiling. The Commission also recommended that agreements be made to promote economic and social development of oil-producing nations in exchange for guarantees on exports of oil to the EC. See COMMISSION OF THE EUROPEAN COMMUNITIES, NECESSARY PROGRESS IN COMMUNITY ENERGY POLICY 15 (Bulletin of the European Communities, Supp. 11/72) (communication from the Commission to the Council forwarded to Oct. 13, 1972); see also Lieber, *supra* note 57, at 6-7.

⁶⁶ The Commission published "Guidelines and Priorities for a Community Energy Policy" in April 1973. The guidelines recommended the development of local energy sources, increases in the use of coal, decreases in projected oil imports, development of relations between Europe and producers, cooperation with U.S. and Japan to avoid overbidding by oil-importing nations, and the establishment of an OECD energy consulting group.

Europe's options and failures in dealing with the energy crisis a year later can be measured by these commission targets. For example, in May 1973, the Council of Ministers could not reach any agreement on consumer collaboration of emergency energy sharing. In another instance, the French vetoed any talks with the U.S. and OECD, arguing that Europe had not reached agreement on their own policies and talks should therefore be conducted by governments rather than by the Commission.

See COMMISSION OF THE EUROPEAN COMMUNITIES, GUIDELINES AND PRIORITY ACTIONS UNDER THE COMMUNITY ENERGY POLICY 5 (Bulletin of the European Communities, Supp. 6/73) (communication from the Commission to the Council, Apr. 27, 1973); see also Lieber, *supra* note 57, at 7.

⁶⁷ 15 O.J. EUR. COMM. (No. L 291) 154 (1972) (Council Directive of Dec. 19, 1972, Amending Council Directive 68/414/EEC).

⁶⁸ See, e.g., *The Economist*, Nov. 24, 1973, at 63; *N.Y. Times*, Nov. 20, 1973, at 9, col. 1-8.

The Dutch, along with the Americans, were designated by the Arabs as "unfriendly" to their cause and therefore were made the objects of an attempted total boycott. No Arab oil was to go to the Netherlands. The French, on the other hand, who had been pro-Arab for years and highly critical of Israel, were classified as "friendly," entitling them to their entire pre-embargo allotment of Arab oil.⁶⁹ It is important to keep in mind this anathema to the notion of a common market. Free movement of goods between members is one of the first principles of such an entity. Yet the Arab boycott could not be enforced unless nations like France, which continued to receive Arab oil, refused to allow its free movement to boycotted EC partners like the Netherlands. Incredibly (at least in light of the philosophical and economic underpinnings of the European Community), the French went along with the Arabs. The Dutch dampened such willingness when, as the major supplier of natural gas to Northern France, they indicated that they would be forced to cut off such supplies if their own supplies of oil were significantly reduced by the boycott. The Dutch warning extended to its other EC partners receiving large amounts of natural gas from the Netherlands, Germany and Belgium. Nonetheless, the attitude of *sauve qui peut* (every man for himself) characterized French behavior throughout the energy crisis. While a few countries like the Netherlands called for a more unified EC front, the French approach of an individual national response seemed to be more characteristic of the initial reactions of most community members. Another example of French *sauve qui peut* was its lone refusal to enter into any serious cooperation within the context of the Atlantic alliance to present a common front regarding the energy supply threat. It preferred to strike separate supply deals with individual Arab producers and to promote within the EC a special long-term relationship with the Arab states.⁷⁰ Thus, when the Western industrialized nations of the

⁶⁹ See, e.g., *The Economist*, Nov. 24, 1973, at 63; see also Lieber, *supra* note 57, at 12-13.

⁷⁰ The French, fearing that they might jeopardize Arab ties, rejected Dutch requests to share supplies with the Netherlands in the event of a boycott. EC Minister Messner declared that a common energy policy would have to be a precondition for such sharing. See, e.g., *N.Y. Times*, Nov. 5, 1973, at 61, col. 8; see also, Lieber, *supra* note 57, at 14-15.

OECD created the International Energy Agency (IEA) in November, 1974, France refused to join.⁷¹ It wanted to avoid the perception, both domestically and in the eyes of the Arabs, that it was following what it perceived as the confrontational and anti-Arab lead of the United States.⁷² The most significant concrete achievement accompanying the formation of the IEA was its supply sharing agreement for periods of critical shortage.⁷³ The EC had failed to legislate this form of arrangement as an element of its then nonexistent, but oft-proposed energy policy.

Since 1974, as the following sections of this article discuss, the Community developed at least the beginnings of an energy policy due to the experience 1973-74. The broad targets of that policy in terms of reducing dependence on imported oil have been met, despite the fact that the policy lacks any enforceability. Therefore, the question is whether Europe has improved its energy situation due to EC policy or whether Europe has improved its energy situation totally irrespective of the EC.⁷⁴

⁷¹ Although France remained outside the IEA, all eight of its EC partners became members. France, therefore, was able to benefit from IEA actions by virtue of its association with the rest of the EC members. See Lieber, *supra* note 57, at 38.

⁷² In the end, France did not benefit all that greatly from its go-it-alone tactics. The multinational oil companies found themselves in the unlikely costumes of white knights. Faced with the necessity of allocating the international oil supplies in their control, they did so on a pro-rata basis undercutting Arab attempts to isolate and punish least favored nations and French attempts to avoid sharing in the cutbacks. See Lieber, *supra* note 57, at 16-17.

⁷³ This IEA supply sharing agreement provided that when one or more members suffered supply cuts of 7% or more of its previous year's oil consumption, then all members would be obliged to reduce their own oil consumption by 7% and cooperate to reallocate available oil imports. This particular sharing formula would apply automatically at a 7% shortfall unless the action would be blocked by a weighted 60% majority vote of IEA members. For a country's 12% consumption loss, other countries would reduce consumption by 10% as well as use some reserve oil stocks. For losses in consumption that exceed 12%, the other member countries would devise measures to further restrain demand. See Lieber, *supra* note 57, at 38-39.

⁷⁴ See Lieber, *supra* note 57, at 1, 44. While Lieber finds the Community to have failed to react effectively to the 1973-74 oil crisis, such a conclusion may be overdrawn. While it is true that the community was unable to formulate a unified short term response to the crisis, the oil embargo did prompt the community to articulate energy objectives for the future which have largely been met. The underlying goal of those objections, greater independence of OPEC oil, has been achieved. So have the means to that goal of supply diversification, increased energy efficiency, and decreased demand relative to economic output. Thus, it could be argued that Lieber's finding of policy failure might be true for the short term reaction to the oil crisis, but not for the long

Part Two: Law & Policy Responses & Their Impact on United States Coal

I. COMMUNITY ENERGY LEGISLATION

While no comprehensive common energy policy exists for the European Community, there does exist much Community legislation in the energy area. Taken collectively, this legislation does not mandate any uniform practice on consumption, production, fuel selection, or any other major issue of energy policy. The legislation reflects the general consensus, felt within the Community for over a decade, that less dependence on Mideast oil is a necessity. It also reflects the lack of consensus on what kind of coordinated policy, if any, is needed to lessen such dependence. Certainly the dependence has decreased from October, 1973. To what extent that reflects any success of Community efforts related to energy and to what extent it reflects market conditions that have improved (temporarily or permanently) independent of Community action are matters for debate.⁷⁵

A. *Obstacles*

Some of the reasons for the absence of a truly comprehensive energy policy have been discussed earlier in this article. Most of these reasons relate to the basic conflict between national prerogative and collective Community authority. Constitutionally, the Community lacks comprehensive authority in the energy area, with only limited specific grants of power in the nuclear and coal industries pursuant to the Euratom and ECSC treaties. Thus, the Community must rely on the "catch-all" Article 235 of the EEC Treaty as the basis for its general energy policy.⁷⁶

term. On the other hand, any finding of long term success for community energy policy must be qualified to the extent such success was in no way related to EC actions, but solely the result of national decisions or other external circumstances.

⁷⁵ See generally note 79 *infra* and accompanying text.

⁷⁶ Article 235 of the EEC treaty authorizes Council to take "appropriate measures" if action by the community is necessary to attain an objective of the community and the treaty has not otherwise provided the necessary power. Council must act unanimously on a proposal from the commission and must also consult the Assembly:

If action by the Community should prove necessary to attain, in the course

However, Article 235 can be acted upon only by a unanimous vote of the Council, where the ministers represent their individual governments.⁷⁷ The difficulty in reaching agreement in such matters will be increased with the entry of two more countries, Spain and Portugal, into the Community. Two more votes on the Council may mean two more potential vetoes of any proposed energy legislation.

If certain energy interests of two of the most important EC members — Britain and France — are compared, concrete illustrations can be made of the difficulty in reaching a consensus.

Of all the EC nations, Britain has an abundance of energy resources. It is the only one of the ten which is a net exporter of energy. In addition to its substantial coal reserves, large amounts of oil are produced from its North Sea fields. Britain is not anxious for control of that wealth to pass from its national authority to that of the Community. Thus, any European Community attempt at legislation that mandates price, production levels, or distribution rules for energy (even in time of crisis) almost certainly would be blocked by Britain.

France is no more of a team player than Britain when it comes to the development of a common EC energy strategy. France maintained an independent attitude during the 1973 Arab Oil embargo, and since that time has invested much national effort and capital in its nuclear program. It chose to develop that program, not as a cooperative European venture through Euratom, but as an independent entity. France is unlikely to allow its nuclear program to be subjected to the constraints of

of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the commission and after consulting the Assembly, take the appropriate measures.

Treaty establishing the European Economic Community, signed in Rome on March 25, 1957, Article 235. See also THIRTY YEARS OF COMMUNITY LAW, *supra* note 2, at 50-62.

⁷⁷ Even if energy policy did not fall under the Article 235 unanimity requirement, many policies would still be required to be made with unanimity according to the Luxembourg voting Compromise of 1965. The Luxembourg agreement redefined the commission's role and extended the unanimity requirement in Council beyond treaty provisions in response to a French boycott of all policy making meetings of community bodies for seven months in 1965. According to the compromise, discussions on issues which are fundamental national interests must continue until a unanimous agreement is met. See STEIN, *supra* note 10, at 63-66.

a collective EC energy policy. A true common market for energy would require the free flow of energy produced in one EC nation to another member state with no price discrimination. The French, however, plan to sell neighboring Europeans surplus electricity produced by its nuclear reactors at higher prices than in its domestic market.

Britain and France are not alone in their willingness to protect their self-interest in energy matters. Germany's coal and the Netherland's natural gas undoubtedly raise similar national sentiment. These cases merely illustrate the difficulty in forming a Community policy by unanimity.

B. General Aims

No comprehensive common energy policy has been formulated by the EC in the sense of obligatory legislation that mandates fuel choice, production figures, prices, and sharing arrangements. However, that is not to say that there is no EC energy policy at all. As incomplete as it may be, such a policy does exist. Its boundaries are imprecise, owing largely to the present stage of European federalism, with national policy either following or leading Community policy, depending on the observer's perception. A small area of authority does indeed exist, manifested by a small number of mandatory regulations and directives, surrounded by a larger region of moral persuasion and voluntary concerted behavior expressed in general resolutions and some specific targets.

The underlying goal of virtually all EC energy policy became apparent only after the first "oil shock" of 1973. The cited goal is reduced dependence on foreign, especially Mideast oil. Implicitly, the EC wants freedom from its vulnerability to political and economic pressure imposed by these oil producers.

A Council Resolution of December 17, 1974 "concerning community energy policy objectives for 1985" was the first EC act to enunciate general objectives and to set specific targets for energy policy.⁷⁸ The very first objective listed was the reduction

⁷⁸ 17 O.J. EUR. COMM. (No. C 153) 2 (1974) (Council Resolution of Dec. 17, 1974 concerning Community energy policy objectives for 1985).

of dependence on imported energy. The objectives included reducing energy consumption, fuel switching, maintaining EC coal production, increasing coal imports, increasing EC and imported natural gas supplies, increasing EC oil production, and encouraging research and development related to use of old and new energy sources. The tension between the goal of increasing coal imports and other stated aims can be observed. It is apparent that reduction of dependence on imported energy and maintaining domestic coal production could not be taken as unyielding imperatives, if increased coal imports were also desired.

There was nothing obligatory in any of these objectives. The very form of this Council action, a "resolution," highlights its non-binding character. The Treaties do not mention "resolution" in describing the various legislative enactments available for Council use.⁷⁹ The only hint of enforcement action is found in the last paragraph of the resolution, which requests that the commission submit proposals for the implementation of this Resolution. However, despite the non-binding nature of these objectives, progress has been made on virtually all of them. While much of that progress is attributable to national or international circumstances unrelated to EC efforts, one would suspect that EC actions had some impact.

C. Enactments of the Council and the Commission

The specific enactments by the Council and the Commission that have sought to implement the objectives outlined by the Council on 17 December, 1974, have not taken the form of rules mandating or prohibiting particular sectoral activity. More often they have articulated targets or established monitoring proce-

⁷⁹ Article 189 of the EEC Treaty, Article 161 of the Euratom Treaty, and Article 14 of the ECSC Treaty authorize Council to enact various types of legislation. A regulation or an ECSC decision is a legal act which is binding in its entirety and which is generally and directly applicable. A directive or an ECSC recommendation is binding as to its result on each member state. The ECSC recommendation can also be binding upon citizens of the common market. Decisions are directed exclusively at individuals and are binding in entirety and directly applicable. EEC and Euratom recommendations as well as opinions are not binding, and therefore confer no legal rights or obligations to addresses. Recommendations are initiated by an EC institution, where as opinions are initiated by outside parties. See THE EUROPEAN COMMUNITY'S LEGAL SYSTEM, *supra* note 29, at 17-22.

dures for individual state energy programs, leaving specific rule making and enforcement to the state.

1. Targeting and Other Goal Articulation

The following enactments are principal examples of legislation by the Community which enunciate non-binding goals for energy use or production by the member states. Council resolution of February 13, 1975, discusses measures to be implemented to achieve the community energy policy objectives adopted by the Council on December 17, 1974. In this resolution, Council directs the Commission to set periodic, long-term energy guidelines to pursue these objectives and to set targets in individual energy sectors. These targets are to ensure economical and energy supplies and provide for research and development programs. Another council decision describes community targets for reductions in consumption of energy in the event of difficulties in the supply of crude oil.⁸⁰ Other Council resolutions set short term targets for the reduction of oil consumption and imports and for energy saving in the member states.⁸¹

The EC Council also has passed many recommendations on conservation and efficient use of energy. These recommendations require rational use of energy in heating systems of existing buildings,⁸² in space heating and in the production of domestic hot water and heat in new buildings,⁸³ in electrical household appliances,⁸⁴ and in industrial enterprises.⁸⁵ Recommendations

⁸⁰ 20 O.J. EUR. COMM. (No. L 292) 9 (1977) (Council Decision 77/706/EEC of Nov. 6, 1977).

⁸¹ 18 O.J. EUR. COMM. (No. C 153) 6 (1975) (Council Resolution of June 26, 1975); 18 O.J. EUR. COMM. (No. C 289) 1 (1975) (Council Resolution of Dec. 9, 1975).

⁸² 19 O.J. EUR. COMM. (No. L 140) 12 (1976) (Council Recommendation 76/493/EEC of May 4, 1976).

⁸³ 20 O.J. EUR. COMM. (No. L 295) 1 (1977) (Council Recommendation 77/712/EEC of Oct. 25, 1977); O.J. EUR. COMM. (No. L 52) 32 (1978) (Council Directive 78/170/EEC of Feb. 13, 1978).

⁸⁴ 19 O.J. EUR. COMM. (No. L 140) 18 (1976) (Council Recommendation 76/496/EEC of May 4, 1976).

⁸⁵ 20 O.J. EUR. COMM. (No. L 295) 3 (1977) (Council Recommendation 77/713/EEC of Oct. 25, 1977).

also urge rational use of energy by road vehicles through better driving habits⁸⁶ and in urban passenger transport.⁸⁷

2. Monitoring and Other Information Gathering

Gathering information about a member state's activities in regard to energy consumption, production, importation/exportation, and investment serves a number of purposes. First, the pressure of opinion by a state's own public and by other Community members may tend to enforce the EC's otherwise non-obligatory energy goals, if the monitoring reveals an unsatisfactory effort by a particular government. Second, full information makes a market more transparent, increasing the efficiency by which resources are allocated. Perhaps more importantly in terms of the Community's energy objectives, market transparency may help avoid a short term crisis. Panic buying and skyrocketing prices are sometimes the result of buyers acting out of the fear of shortages that do not really exist.

Community legislation concerning the monitoring and gathering of information about member states' activities in the energy area applies to both member states and undertaking therein. In the area of energy production, a council regulation requires that member states communicate to the Commission information on their energy supply situations.⁸⁸ The Commission communication "on the amended text . . . of Decision No. 4-53 on the publication of price lists and conditions of sale applied by undertakings in the coal and iron ore industries" describes publication requirements for individual enterprises in the coal industry pursuant to the January 1, 1973 amended version of Decision No. 4-53.⁸⁹

⁸⁶ 19 O.J. EUR. COMM. (No. L 140) 14 (1976) (Council Recommendation 76/494/EEC of May 4, 1976).

⁸⁷ 19 O.J. EUR. COMM. (No. L 140) 16 (1976) (Council Recommendation 76/495/EEC of May 4, 1976).

⁸⁸ 19 O.J. EUR. COMM. (No. L 198) 1 (1976) (Council Regulation 1729/76/EEC of June 21, 1976).

⁸⁹ 16 O.J. EUR. COMM. (No. C 29/28) (1973) (communication of the Commission on the amended text at present valid of Decision No. 4-53 on the publication of price lists and conditions of sale applied by undertakings in the coal industries). The existence of competition and antitrust laws in industrial societies is a recognition of the belief on the

Other enactments require monitoring of energy imports and exports. Council regulations establish common rules and surveillance procedures for Community imports and exports.⁹⁰ In the coal sector, a council decision discusses the surveillance of imports of hard coal to the EC from third countries.⁹¹ According to requirements elaborated in another council regulation⁹² and its accompanying legislation,⁹³ member states must notify the Commission every six months of imports by all undertakings of member states of crude oil and natural gas for consumption. Member states must also report expected oil and gas imports for the coming year. Member states are required to notify the commission of exports of crude oil and gas to third countries.⁹⁴ These regulations also require that members who plan to export or import 100,000 metric tons or more per annum of crude oil or natural gas must notify member states in advance to facilitate the Commission's monitoring task.

A council regulation requires member states to notify the Commission of investment projects which would affect the EC in the petroleum, natural gas and electricity sectors.⁹⁵ Legislation

part of legislators, at least, that concerted activity, even when not required by enforceable rules, does affect markets. It follows that the consultations and exhortations associated with EC energy policy could have significant market impacts (such as the intended decrease in energy demand or increase in energy supplies) even when the policy lacked enforcement mechanisms. There is little reason to believe in the effectiveness of unwanted collusion prohibited by antitrust policy while denying the possible effectiveness of desired collusion by energy consumers.

⁹⁰ 17 O.J. EUR. COMM. (No. L 159) 1 (1974) (Council Regulation 1439/74/EEC of June 4, 1974); 12 O.J. EUR. COMM. (No. L 324) 25 (1969) (Council Regulation 2603/69/EEC of Dec. 20, 1969).

⁹¹ 20 O.J. EUR. COMM. (No. L 292) 11 (1977) (Council Decision 77/707/ECSC of Nov. 7, 1977).

⁹² 15 O.J. EUR. COMM. (No. L 120) 3 (1972) (Council Regulation 1055/72/EEC of May 18, 1972).

⁹³ 16 O.J. EUR. COMM. (No. L 113) 1 (1973) (Commission Regulation 1068/73/EEC of Mar. 16, 1972); 17 O.J. EUR. COMM. (No. L 349) 1 (1974) (Council Regulation 3254/74/EEC of Dec. 17, 1974); 18 O.J. EUR. COMM. (No. L 275) 1 (1975) (Commission Regulation 2677/75/EEC of Oct. 6, 1975).

⁹⁴ 18 O.J. EUR. COMM. (No. L 45) 1 (1975) (Council Regulation 338/75/EEC of Feb. 13, 1975); 18 O.J. EUR. COMM. (No. L 275) 8 (1975) (Commission Regulation 2678/75/EEC of Oct. 6, 1975).

⁹⁵ 15 O.J. EUR. COMM. (No. L 120) 7 (1972) (Council Regulation 1056/72/EEC of May 18, 1972); 16 O.J. EUR. COMM. (No. L 113) 14 (1973) (Commission Regulation 1069/73/EEC of Mar. 16, 1973); 19 O.J. EUR. COMM. (No. L 140) 1 (1976) (Council Regulation 1215/76/EEC of May 4, 1976); 20 O.J. EUR. COMM. (No. L 358) 12 (1977) (Commission Regulation 3025/77/EEC of Dec. 23, 1977).

also requires the exchange of information on investment projects and on the siting of power stations in the nuclear energy sector.⁹⁶

3. Mandatory Stockpiles

The notable exception to the Community's failure to mandate or prohibit any specific actions in regard to individual members' energy policies is the legislation concerning stockpiles. A council directive imposed an obligation on member states to maintain stocks of crude oil and/or petroleum products equivalent to at least 65 days of national consumption.⁹⁷ This requirement was later raised to 90 days.⁹⁸ The obvious purpose of such legislation is to avoid crises and to mitigate those which occur. During supply shortages, stockpiles can take up some of the shortfall. Furthermore, exporters who attempt to create shortages for whatever political or economic reasons have less leverage if consumer nations have a supply buffer. Finally, as with the market information efforts mentioned above, stockpiles may provide some brake to panic buying.⁹⁹ However, as demonstrated by the oil shocks of 1973 and 1979, stockpile legislation alone is not enough to ward off crisis.

4. Use of Resources

At first glance, it would appear that the Community had chosen to regulate the uses to which natural gas and oil could be used. Council directives "on the restriction of the use of natural gas in power stations" and "concerning the restriction of the use of petroleum products in power stations" seem by their titles to be the legislation.¹⁰⁰ However, the regulation in

⁹⁶ See, e.g., 1 O.J. EUR. COMM. 17/417/58 (1958) (Regulation 4/58/Euratom); 1 O.J. EUR. COMM. 25/511/50 (1958) (Regulation 1/58 Euratom); 21 O.J. EUR. COMM. (No. C 286) 1 (1978) (Council Resolution of Nov. 20, 1978 concerning the mutual exchange of information at the community level on the siting of power stations).

⁹⁷ O.J. EUR. COMM. (No. L 308) 14 (1968) (Special Ed. 1968 (II)) (Council Directive 68/414/EEC of Dec. 20, 1968).

⁹⁸ O.J. EUR. COMM. (No. L 291) 154 (1972) (Special Ed. 1972 (Dec. 28-30)) (Council Directive 72/425/EEC of Dec. 19, 1972).

⁹⁹ See generally *supra* note 89 and accompanying text.

¹⁰⁰ 18 O.J. EUR. COMM. (No. L 178) 24 (1975) (Council Directive 75/404/EEC of Feb. 13, 1975); 18 O.J. EUR. COMM. (No. 178) 26 (1975) (Council Directive 75/405/EEC of Apr. 14, 1975).

question is illusory. EC Directives, by definition, leave enforcement responsibility to the individual member states. Combining this discretion with the directives' generous exceptions to the general prohibition against use of oil and gas in power generation makes for little real Community regulation in this area. Thus, it cannot be said that the EC has legislated significantly in the area of resource use.

5. Production Subsidies

Energy-related research and development programs have been created and funded through EC legislation. Examples are certain subsidies in the form of matching grants to Britain and Germany for work related to technological advancements in coal use, such as fluidized bed combustion or coal liquifaction.¹⁰¹ However, these programs have not been large relative to the size of the total energy market, nor do they seem to have had, as yet, any significant effect on energy production. Of course, as discussed in the section of this paper dealing with environmental constraints on coal import expansion, some of these projects could have significance for the future if any breakthroughs are made which produce a cleaner and more economical way to burn coal.

The chief production subsidies for coal come not through direct EC action, but *through the suspension of EC law*. The legislation allowing this¹⁰² cannot be viewed as part of a common energy policy, as it really constitutes the rejection of common market principles and not their implementation.

II. THE SIGNIFICANCE OF EUROPEAN ENERGY POLICY FOR AMERICAN COAL PRODUCERS

To some extent the reasons generally given in the past for the depressed state of the coal export market are correct. An

¹⁰¹ The legislation authorizing such subsidies is found at 27 O.J. EUR. COMM. (No. L 177) 7 (1984) (Council Regulation of June 26, 1984 introducing special measures of Community interest relating to energy strategy). For an example of an approved grant, see 27 O.J. EUR. COMM. (No. L. 283) 48 (1984) (Commission Decision of Oct. 17, 1984 granting financial assistance within the framework of the special energy development program). For a discussion, including breakdowns, of Community financial support to the energy sector, see COMMISSION OF THE EUROPEAN COMMUNITIES, ENERGY IN EUROPE 33-35 (Apr. 1985) [hereinafter cited as ENERGY IN EUROPE].

¹⁰² 19 O.J. EUR. COMM. (No. L 63) 1 (1976) (Commission Decision on Feb. 25, 1976 regarding the Community system of measures taken by the member states to assist the coal-mining industry).

American dollar made artificially strong by United States budget deficits financed by American borrowing on international markets at favorable rates certainly makes it more difficult for all United States companies to sell their goods and services abroad. The coal industry is, of course, subject to this general problem. Additionally, the size and unpredictability of American inland transportation costs, particularly since the recent rail rate deregulation, deters coal sales to Europe. Depressed demand may also be a relevant factor, though less significant than a few years ago when both this country and Western Europe were in the midst of deep recessions. However, these arguments are used to prove too much. American coal need not be consigned to boom or bust export cycles with European buyers, being sought in substantial quantity only when those buyers face a supply or price crisis in the energy markets, as was the case in 1973-74 and 1979-80. Such will be the case only if American coal producers refuse to change their marketing attitudes.

The attitude of American coal producers and brokers has been: we don't need government participation in marketing, we don't need export trading companies, and we don't need Webb-Pomerene associations—just show us the demand, give us the customers' names and we'll make the deal—if we can't make the deal, it's because the market isn't there, because of a strong dollar, high domestic costs, slack demand, etc.¹⁰³ This view is dogmatic and oversimplified. It hurts the American coal industry. It reflects a bias against all forms of economic planning and a false assumption that individual entrepreneurship is the best approach to any economic problem. It is a myopic American view offering a blurred vision of European realities.

Western Europe's energy policy is far from being comprehensive, transparent or consistent. This paper's previous sections analyzing the web of EC regulations, directives, resolutions and individual national activities demonstrate that proposition. Nonetheless, many components of an energy policy for Western Europe do exist, and more are being planned. Western Europe's energy market does not and will not resemble a classical free

¹⁰³ Interview with an official of International Trade Administration, United States Department of Commerce, in Charleston, West Virginia (Nov. 1984) (the view described in the text was also expressed by the coal industry personnel with whom the author had communication).

market for soybeans, hogbellies, or bazaar trinkets. Rather, it is highly planned and will continue to be so. It does not make competitive sense to approach such a market as an individual entrepreneur, hoping to strike a profitable coal deal as the opportunity occurs. American coal producers will not be competing against other individual businesses for single transactions. They will be competing against countries, like the Soviet Union, who want to establish a long-term energy relationship with Western Europe involving, for instance, a multi-billion dollar pipeline and gas supply arrangement. Like it or not, Europeans find economic planning highly sensible in certain sectors such as energy. Americans should adjust to the realities that such planning creates if they want to sell more coal to Europe.

The fact that the European Community's energy policy is not fully formulated and that it contains some inconsistencies should not be a reason for American businesses to underestimate its importance. On the contrary, the degree to which such policy is not fully formed leaves room for our own economic interests to have some favorable input in formulation and implementation. For example, European energy policy takes an ambivalent attitude toward imported coal. On the one hand, the Community has explicitly recognized that increasing imports of solid fuels and generally substituting such fuels for oil lessen its dependence on Mideast oil. This independence is the cornerstone of its energy policy. On the other hand, certain aspects of its policy, such as subsidizing its domestic coal industries, promoting nuclear power, fighting air pollution, and contracting for Soviet gas, work against American coal sales to Europe. To the extent that Americans can offer a secure, reasonably clean, long-term source of energy to Europe, the ongoing long term policy choices of European energy planners might be affected in a way favorable to use of American coal.

A number of possible routes are available to the American coal industry for trying to stimulate exports to Europe in a manner responsive to European policy and regulation. These routes generally involve more concerted planning than our coal industry is used to doing.¹⁰⁴

¹⁰⁴ Although the antitrust law implications of such concerted planning is not ana-

A. Research and Development

Much has been said in the media about the technology gap, present and future. The Europeans are worried that they are falling behind the United States and Japan in this area. A second issue concerns synthetic fuels. As described above, the EC has made it part of its energy program to encourage and subsidize research and development of coal liquifaction and gasification. A third issue is the environment. While desiring to promote coal use, the Community is increasingly conscious of the environmental difficulties associated with coal. The threat that acid rain poses to the Black Forest is a highly publicized example of this problem. All three of these areas would be fertile ground for United States-EC cooperation in research and development. Both sides should recognize the benefits of increased technical and capital resources. Large scale cooperation in research and development in areas such as synfuels and environmentally sound use of coal could lead the way to commercial sales between the same partners. These sales could be part of a larger package deal, whereby research and development projects are directly linked with supply arrangements for fuel needs flowing from that research and development. Even in the absence of such explicit linkage, the working relationships developed by United States-EC cooperation in coal research and development could help facilitate similar cooperation regarding coal supply. However, such large scale cooperation is only likely between the United States and the EC if government and industry in the United States are willing to treat the coal sector as something other than an atomized market and to cooperate in export planning and related projects.

B. Long Term Marketing

Whatever gaps and uncertainties may persist in European Community energy policy, one theme is clear: the Community wants to be as independent as possible from Mideast oil. This

lyzed in this paper, the author believes most of the proposed activity to be possible within the bounds of United States law, especially in light of the Export Trading Company Act of 1982, Pub. L. No. 97-920, 96 Stat. 1233 (1982) (codified at 15 U.S.C. §§ 4001-4003 (1982)).

can only be achieved by diminishing demand and securing long-term alternative supplies. Spot sales or short-term contracts for American coal do not significantly contribute to this goal. Long-term supply arrangements would. As mentioned earlier, it is not merely Polish coal and German coal that Americans must compete against, but also French nuclear energy and Soviet gas pipelines.

While it is beyond the scope of this paper to fully analyze the legal, economic and political issues raised by the idea of cooperative long-term export marketing, the identification of a few options is in order. Within the private sector, more cooperation is now legally possible. A pair of American laws, the Webb-Pomerene Act of 1918¹⁰⁵ and the Export Trading Company Act of 1982,¹⁰⁶ allow certain concerted activity for facilitating American exports, although such activity might otherwise run afoul of our antitrust laws. The latter law is broader in the areas it exempts from antitrust prosecution and less burdensome in its procedural requirements.¹⁰⁷ Thus far, coal producers have shown little interest in availing themselves of this law for the purpose of promoting coal sales to Europe.¹⁰⁸ This may be a mistake. Given the Community's emphasis on long-term supply assurances, a cooperative marketing proposal combining the resources of many producers and minimizing the risk of disruption might be very attractive to the Europeans. In a time like the present when American coal is not usually cost-competitive with other sources, such supply assurances might shift the balance more toward American coal. Furthermore, if the monetary and economic circumstances change in a way to make United States products generally more competitive again, such long-term pro-

¹⁰⁵ The Export Trade (Webb-Pomerene) Act of 1918, Pub. L. No. 94-435, 90 Stat. 1397 (1976) (codified at 15 U.S.C. §§ 61-66 (1982)).

¹⁰⁶ Export Trading Company Act of 1982, Pub. L. No. 97-290, 96 Stat. 1233 (1982) (codified at 15 U.S.C. §§ 4001-4003 (1982)) [hereinafter cited as ETCA].

¹⁰⁷ *Id.*

¹⁰⁸ In 1981, a group of Kentucky coal producers did form a marketing cooperative known as the Big Sandy Coal Producers' Association (with administrative and logistic support from the Kentucky Export Resources Authority (KERA)). The cooperative made no attempt to seek an antitrust exemption under either the Webb-Pomerene or Export Trading Company Acts. Absent such exemption, such joint marketing would seem to raise antitrust problems, but apparently no legal challenge was made to the activity.

posals might compete effectively against some of the most attractive energy options that the Europeans are considering.

Beyond the private sector, there is also room for more effective matching of American supply potential with European energy priorities by way of government activity. First of all, states with important coal industries such as Kentucky, Wyoming and West Virginia can develop export marketing strategies and agencies to implement such strategies. Such implementation could include direct marketing activity as has been done by Big Sandy Coal Producers' Association and Kentucky Export Resource Authority in Kentucky.¹⁰⁹ Interstate coordination might be helpful in developing attractive packages for European Community coal users. Such agencies might also help persuade EC, national and industry planners in Europe of the stability of the long-term American coal supply. Such agencies could be formed under the authority of the Export Trading Company Act, which is not limited to private businesses.¹¹⁰ Second, the federal government, perhaps through the Energy and Commerce Departments and the Ex-Im bank,¹¹¹ could play a more direct role in communicating with European decision makers regarding long-term energy security and the role of American coal supplies therein. Again, the imprimatur of government might, for the Europeans, be a significant factor in their energy planning.

¹⁰⁹ *Id.*

¹¹⁰ The term "export trading company" means a person, partnership, association, or similar organization, whether operated for profit or as a nonprofit organization, which does business under the laws of the United States or any State and which is organized and operated principally for purposes of: (a) exporting goods or services produced in the United States; or (b) facilitating the exploration of goods or services produced in the United States by unaffiliated persons by providing one or more export trade services. ETCA, *supra* note 106, § 4002(a)(4).

¹¹¹ The Export-Import Bank (Ex-Im Bank) of the United States is a U.S. agency which provides loans to foreign countries so that they can buy U.S. goods. The Ex-IM Bank was set up in 1934 to provide a variety of credit programs to aid U.S. exports. The Bank can offer loans for as much as 90% of the value of the goods exported. However, it prefers participation by private lending institutions so that its loan share is limited to 45-50% of the value of the goods. Other US agencies, such as the Federal Credit Insurance Association, the overseas Private Investment Corporation, Cooperative Financing Facility, Commodity Credit Corporation, Private Export Funding Corporation, and the Agency for International Development also provide export credit. See J. JACKSON, *LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS* 60 (1982).

C. *State Aids to the Coal Industry*

Obviously, the greater the percentage of European coal consumption satisfied by domestic production, the less coal that will be imported into the community. For this reason, the extent of state aid to the European coal industry is highly significant in assessing the prospect for American coal exports to the EC. This is especially true because much of the Community's coal cannot be produced at competitive prices. Many of Europe's coal mines remain open only through state subsidies. There is a certain irony here, because one of the major provisions of the treaty creating the European Coal and Steel Community prohibits just such state aids.¹¹² The purpose of such prohibition was central to the formation of the common market: to avoid state subsidies which distort true production costs and put the aided firms at a competitive advantage vis-a-vis the unaided firms, allowing favored treatment to a locally produced commodity, and impeding interstate trade and a true common market. Nonetheless, the prohibition against state aids was suspended.¹¹³ This was done for social more than economic reasons. If all the coal mines that could not produce at the market price had been allowed to close, the increase in unemployment would have been severe.¹¹⁴ Additionally, an energy security issue was involved. After the 1973 Arab oil embargo, the EC was anxious to achieve as much energy independence as possible. Keeping its own coal mines open, even at higher than market cost, was consistent with this strategy. However, some European energy experts believe that even considering the social and energy security arguments, some of the subsidized mines should be closed.¹¹⁵ They are so uneconomical that even in another energy crisis, their production costs would exceed a greatly increased market price. Reopening costs for a coal mine are usually prohibitive. However, there is an energy security argument for continuing to operate those mines that

¹¹² THIRTY YEARS OF COMMUNITY LAW, *supra* note 2, at 361-62.

¹¹³ 19 O.J. EUR. COMM. (No. L 63) 1 (1976).

¹¹⁴ Interviews with officials of EC Energy Directorate in Brussels (June 1985) [hereinafter cited as *Interviews*]; see also 19 O.J. EUR. COMM. (No. L 63) 2 (1976) (official recognition of the social impact of mine closings).

¹¹⁵ *Interviews, supra* note 114.

have production costs slightly above market, so that the supply they provide will continue to be available in a crisis.

Determining where to draw the line to cutoff subsidies, if at all, is difficult. This is a very relevant question at the time of this writing because the 1975 Community legislation suspending the state aid prohibition of the ECSC treaty for the coal industry has recently expired.¹¹⁶ Intense debate within EC institutions is now occurring.¹¹⁷ The issue is whether to renew the legislation as written, allowing the individual member states to continue to subsidize their coal industries at whatever level they deem appropriate, or to place some limits on these state aids, thereby forcing the closure of some of the least economical mines. If no legislative action at all were taken, the state aid prohibition would automatically be reinstated upon the expiration of the 1975 law. This is not a realistic possibility, however, given the mammoth consequences of a total withdrawal of state aid.

These consequences can be understood by glancing at the numbers involved. Such an exercise will also show the opportunity that will face American coal producers if even a significant portion of the EC's subsidized capacity is shut down.

The Community produces about 220 million tons of coal per year.¹¹⁸ Approximately 100 million tons of that production is subsidized.¹¹⁹ The EC imports about 70 million tons per year.¹²⁰ Coal use is expected to rise slightly over the next fifteen years to between 300 and 350 million tons yearly.¹²¹ In renewing the state aids legislation discussed above, some EC energy experts feel that a cutback of about 40 million tons of subsidized production per year should be mandated.¹²² Such a combination of

¹¹⁶ 19 O.J. EUR. COMM. (No. L 63) 10 (1976) (the official expiration date was Dec. 31, 1985).

¹¹⁷ *Interviews, supra* note 114.

¹¹⁸ *Id.*; see also ENERGY IN EUROPE, *supra* note 101, at 15, 18.

¹¹⁹ *Interviews, supra* note 114.

¹²⁰ *Id.*; see also ENERGY IN EUROPE, *supra* note 101, at 15, 18.

¹²¹ *Interviews, supra* note 114; see also COMMISSION OF THE EUROPEAN COMMUNITIES, ENERGY 2000 ¶ 68 (Commission working paper Feb. 28, 1985) [hereinafter cited as ENERGY 2000].

¹²² *Interviews, supra* note 114. "[O]f the Community's total production some 50 to 60 million tonnes (20 to 25%) are profitable, some 140-150 million tonnes (60 to 65%) are not profitable under present market conditions and about 40 million tonnes (15%)

diminished production and expanded consumption would require an approximate doubling of coal imports, opening the possibility of tens of millions of tons of new sales for Americans, among others.¹²³ However, even such a partial cutback on subsidies is estimated to cost about 100,000 jobs in Europe.¹²⁴ Thus, such a limitation on state aids is highly controversial and problematic.

D. *Environmental Constraints*

Environmental problems may be the greatest obstacle to a significant expansion in the role of coal in EC energy production. This was the view expressed by EC energy experts in discussions with the author.¹²⁵

The acid rain issue has recently been receiving much attention in Europe, especially in Germany. The famous Black Forest has already suffered severe damage.¹²⁶ Intense debate also raged within the Community this year over exhaust emissions from automobiles.¹²⁷ The Community trails the United States by at least a decade in setting strict standards to fight air pollution. Anyone who has been on a London street recently and breathed the fumes can testify to that. A similarity that the EC does bear to the United States, however, is the regional haggling that

cannot be produced competitively at all". OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, THE EUROPEAN COMMUNITY AND THE ENERGY PROBLEM 40 (Periodical No. 1, 1983) [hereinafter cited as THE ENERGY PROBLEM].

¹²³ Interviews, *supra* note 114; see also ENERGY 2000, *supra* note 122, at ¶¶ 24-26, 68; ENERGY IN EUROPE, *supra* note 101, at 20-21.

¹²⁴ Interviews, *supra* note 114.

¹²⁵ *Id.*

¹²⁶ Acid rain is a phenomenon caused by the combustion of fossil fuels. Sulfur Dioxide (SO₂) and Nitrogen Oxides (NO_x), released into the atmosphere through coal and oil combustion, chemically transform into acids and return to earth by way of precipitation.

Until 1982, West Germany actively opposed any form of acid rain prevention legislation. In that year a government report concluded that over 14 million acres of German forests had suffered severe air pollution damage. West Germany is currently a leading advocate of stringent acid rain prevention.

See Wetstone & Rosencranz, *Transboundary Air Pollution in Europe: A Survey of National Responses*, 9 COLUM. J. ENVTL. L. 1 (1983); Wetstone, *Acid Rain: The International Perspective*, 11 ENVTL. POL'Y & L. 31 (1983) (discussion of the European acid rain problem).

¹²⁷ Dryden, *EC Exhaust Rules Upset Ecologists, Automakers*, International Herald Tribune, July 22, 1985, at 2, col. 1.

characterizes the debate over air pollution. European pollution tends to travel from west to east, as it does in the United States. Just as New York and New England would like regulation that prevents Ohio and West Virginia from sending sulfur dioxide and nitrous oxides their way, Germany advocates EC legislation to limit Britain's production of transboundary pollutants. Britain and Ohio both would like to continue running their power plants with tall stacks reducing the concentration of pollution in the proximity of the plants, but dispersing it eastward in the upper atmosphere. There are also regional conflicts in the EC concerning auto emissions, with states whose auto industries would suffer from new requirements confronting states more concerned about their deteriorating air and water—another similarity to the United States.¹²⁸

Given this conflict, it is difficult to predict the type of mix of environmental controls that will ultimately be legislated by the Community. However, given the growing public debate concerning environmental deterioration in Europe, it seems likely that some collection of more stringent controls will be the result. The EC Commission has recognized the potential effects of such controls on coal consumption.¹²⁹

The Commission's present proposals on tightening-up atmospheric emission controls on large industrial plants could influence the coal and oil markets in the future. However, there is a degree of uncertainty as to the way in which the Member States could apply the proposed standards if they were adopted. Different means could be employed by industrial concerns and electricity undertakings to respond to this need including: (1) replacing the fuel used by another, less polluting one (natural gas could become attractive in this case); (2) turning to coal with low sulphur content, involving a cost increase of from 4 to 8%; and (3) installing desulphurization units, the investment cost of which can vary, depending on the size of installation, from \$90 to \$200/kwe.¹³⁰ A combination of these various means

¹²⁸ *Id.* Auto emissions are a major source of NO_x as well as carbon monoxide, hydrocarbons, and lead. West Germany again is at the forefront for stringent auto emission control, finding support from both the Netherlands and Denmark, but heavy resistance from fellow automakers Italy, France, and Britain.

¹²⁹ ENERGY 2000, *supra* note 121, at ¶ 69.

¹³⁰ *Id.*

would not lead to any appreciable change in gross energy consumption in 2000, but would result in extensive substitutions of one energy product for another.

In the electricity sector, stricter emission controls on conventional power stations will probably lead to increased production costs, varying according to country between 8 and 12%. In this case, overall final electricity demand could drop 3 to 4% by the year 2000, probably being replaced by natural gas. As far as electricity production itself is concerned, there could be some substitutions of nuclear energy for coal at the base of the load curve, while marginal quantities of coal and fuel oil could be replaced by natural gas in the middle of the curve.¹³¹

In the same context, gas would also increase its market share in industry at the expense of coal and oil. The final result of this would be a level of coal consumption in 2000 close to 225 millions of tons of oil equivalent (mtoe) instead of the 265 mtoe arrived at in the reference projection. Oil consumption would also drop by some 10 mtoe in favor of natural gas and nuclear energy, which would each increase their respective market shares to much the same extent.¹³²

In a May, 1985 Commission document entitled "New Community Energy Objectives," the Commission recognized the necessary integration of EC environmental and energy policies.¹³³ It proposed as one of the Community's energy objectives "the balanced pursuit of both energy and environmental aims, particularly through the use of best available and cost-effective control technologies and through improvements in energy efficiency."¹³⁴ In the same section of the report, the Commission mentioned nuclear power and natural gas as environmentally clean alternatives to polluting fuels and encouraged their use.¹³⁵ In this political environment, it is clear that coal's chances of gaining

¹³¹ ENERGY 2000, *supra* note 121, at ¶ 69.

¹³² *Id.*

¹³³ Environment: "The Community's third action program on the environment stresses that the environmental dimension should be integrated in other policy sectors. This integration is especially important in the energy field." COMMISSION OF THE EUROPEAN COMMUNITIES, NEW COMMUNITY ENERGY OBJECTIVES ¶ 44 (May 1985).

¹³⁴ *Id.* at 21.

¹³⁵ "Some energy policy aims are clearly favorable in environmental terms. For instance, energy conservation, the increased use of natural gas and the further development of safe nuclear production will all make a substantial contribution to reducing emissions of pollutants, thus furthering the Community's objectives in both the energy and environmental fields." *Id.*; see also ENERGY 2000, *supra* note 121, at ¶ 46.

an increased share of the energy market in Europe are dependent on developing those "cost-effective control technologies" spoken of by the Commission. The American coal industry might have a potential foot in the door, given the research and development that is presently progressing on this side of the Atlantic.¹³⁶ Combined sales and technology packages are worth considering in this context.

E. Competition from Natural Gas

At first glance it might appear that EC energy policy favors the use of coal over natural gas. Indeed, a council directive, which restricted use of natural gas in power stations, seemed to show a community desire to increase the use of coal at the expense of natural gas. It also seemed to imply that for future purposes, natural gas and coal would not be in competition for the same market. These observations are only partially true.

The directive itself does not prohibit anything effectively. As is the case with all EEC directives, it states purportedly mandatory goals, but leaves to the discretion of each member state the means of enforcing these goals. In this case, even the goal of replacing (or pre-empting) natural gas use in power stations is significantly qualified. If, in the discretion of the individual state, technical, economic, or environmental reasons make the use of natural gas in power stations desirable, such use may be authorized. The climate surrounding the issues relevant to such discretionary decisions has changed sufficiently since the directive's passage in early 1975 to dampen the impact of the directive to the disadvantage of coal.

One reason is that the market has changed significantly. Not only is there a general energy surplus in the world today, but much more natural gas is available to Europe. Rather than the Netherlands being the only major reliable gas supplier to the EC, as was the case in 1975, abundant gas is now offered by the Soviet Union, Norway, Algeria, and the Netherlands.¹³⁷ Even

¹³⁶ Diamond, *Major Advances In Energy: How to Burn Coal — Cleanly*, International Herald Tribune, June 28, 1985, at 1, col. 1.

¹³⁷ The Netherlands, the U.S.S.R., Norway, and Algeria were the four principal sellers of natural gas in Western Europe in 1982, accounting for 95% of the total traded. U. STERN, INTERNATIONAL GAS TRADE IN EUROPE 189 (1984).

more important for the future, natural gas is a clean-burning fuel, with few of the environmental shortcomings associated with coal. This fact could have a negative impact on the market for coal in two ways. First, nations trying to improve their air quality without investment in expensive control technologies might take advantage of the environmental exception within the natural gas directive and continue to burn gas for power generation. This will be an especially attractive option if increasing supplies of gas cause prices to fall. Second, even if gas is phased out of power production, as envisioned by the directive, it will nonetheless compete indirectly with coal to the extent that it, rather than electricity, is used in home heating and cooking.

Thus, to minimize the effects of competition from gas, the coal industry again is faced with the two challenges previously discussed: it must develop commercially attractive pollution control technologies and it must make available the kind of long-term supply assurances offered in the natural gas market.

F. The Electricity Sector and Competition from Nuclear Energy

The Commission's proposed energy objective for electricity 1995 is "Continued priority for the use of solid fuels and nuclear energy in the electricity sector to ensure that not more than 10% of electricity is generated from hydrocarbons [oil and gas] in 1995."¹³⁸ Approximately 40% of electricity output in 1995 is to be generated from nuclear power.¹³⁹ This objective highlights the somewhat ambiguous potential for the growth of coal consumption as a result of conscious EC energy policy. It is Community policy to promote the use of electricity in industry, especially as a substitute for oil or gas.¹⁴⁰ Within the electricity sector, Community policy is to discourage the use of oil and gas

¹³⁸ NEW COMMUNITY ENERGY OBJECTIVES, *supra* note 131, at 34.

¹³⁹ *Id.*

¹⁴⁰ COMMISSION OF THE EUROPEAN COMMUNITIES, REVIEW OF MEMBER STATES' ENERGY POLICIES ¶¶ 45-48 (Feb. 1984) [hereinafter cited as REVIEW].

Tension exists in the debate as to the most environmentally sound alternative to hydrocarbons: coal or nuclear? The impact of coal use is quantifiable in terms of air pollution and its negative effects, and the cost of pollution prevention and clean-up. Nuclear power's adverse consequences are viewed primarily as "risks", and through the risk may be great, actual impact for both present and future is only speculative. See generally THE ENERGY PROBLEM, *supra* note 122, at 43-45.

in power generation.¹⁴¹ Therefore, Community policy also encourages the use of coal and nuclear fuel in such power generation. However, in the choice as to whether coal or nuclear power is the preferable substitute, EC policy is not at all clear. If anything, the language of the objective might imply a slight preference for nuclear power over coal, but that certainly is not explicit.¹⁴²

The historic evidence shows the nuclear industry doing much better than the coal industry in taking advantage of European efforts since the 1973 oil crisis to wean the Community off its thirst for imported oil. Between 1973 and 1983, the EC experienced a 25% increase in electricity demand, although total energy consumption in the Community decreased by over 6% and oil use to generate electricity was approximately cut in half.¹⁴³ Coal did share in this increased electricity consumption, with a 32% increase in solid fuel use for electricity generation.¹⁴⁴ However, nuclear power fared even better with a fourfold increase in production during that period.¹⁴⁵ Despite the growth in solid fuel consumption for power generation, total solid fuel consumption fell slightly between 1973 and 1983,¹⁴⁶ presumably mostly due to reduced metallurgical demand.

Certainly, percentages alone may be misleading. Since the nuclear industry was still getting started commercially in 1973, its percentage growth in the decade following would be expected to exceed that of competing fuels. Even considering that factor, it appears that coal is not competing well against nuclear power. In its predictions for 1995 and 2000, the EC sees nuclear energy

¹⁴¹ NEW COMMUNITY ENERGY OBJECTIVES, *supra* note 131, at 34.

¹⁴² *Id.*

¹⁴³ REVIEW, *supra* note 138, at 8.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ "Consumption of solid fuels in the Community fell slightly between 1973 and 1983. Coal production fell by about 16% and coal imports doubled to account for 20% of coal consumption. The Energy 2000 study shows that there is potential for increasing the consumption of solid fuels in the rest of this century. The wider use of coal, and of lignite and peat in certain countries, would benefit the Community's energy strategy in terms of diversification and restraint of oil imports. In addition to the role of Community production, freedom of access for imported coal will be important in this context. Following an earlier IEA Commitment to promote free trade in coal, member states and other industrialized countries undertook in the May 1983 OECD Ministerial meeting to remove impediments to energy trade." *Id.* ¶ 73.

continuing to take the lion's share of the substitution for oil, with coal retaining its percentage share of the market, but not growing.¹⁴⁷

There may be various factors creating such an expectation. One is certainly the French nuclear program. At the time of the 1973 oil crisis, the French government made a policy decision to use nuclear power as the prime supply side tool to decrease its huge dependence on foreign oil. On the demand side, it instituted what has been a very successful program to increase energy efficiency and conservation. The French nuclear program has been the most successful in the world in terms of producing new energy, and its expansion is expected to continue.¹⁴⁸ In fact, France is expected to become an exporter of nuclear-generated electricity to other European countries. With small and dwindling coal reserves, significant uranium resources under their control, and no domestic oil to speak of, the French decision to put most of their chips on the nuclear option was perhaps understandable. However, how the nuclear versus coal picture is painted in the rest of the EC, (soon to include Spain and Portugal, both of whom take the coal option very seriously, as well as the present ten members), may depend on a second factor which, in addition to the growth of the French nuclear program, is a cause for such modest EC projection of future coal use. That factor is the environment. Until commercially attractive means of using coal in an environmentally acceptable way are developed, its chances of competing successfully with nuclear power are relatively diminished. This assumes that environmental questions about nuclear energy itself do not become impediments to its use. EC policy makers seem to hold this assumption.¹⁴⁹

¹⁴⁷ "Nuclear energy is likely to be the only energy source whose production level will increase significantly in the Community by 2000. According to the reference projection, production of solid fuels should remain static at around the 1983 level. Production of oil and natural gas should decline gradually on the basis of fields being exploited and those likely to come into production." ENERGY 2000, *supra* note 121, at ¶ 24.

¹⁴⁸ In 1984 France accounted for 53% of the total Community nuclear-generated electricity. Its objectives for 1990 include supplying 88% of French domestic demand. REVIEW, *supra* note 138, at 34, 97-98, *see also* ENERGY IN EUROPE, *supra* note 101, at 20 (for a note on nuclear growth in Europe).

¹⁴⁹ THE ENERGY PROBLEM, *supra* note 122, at 42-45.

Conclusion

The European Economic Community has been generally successful in meeting its energy goals for 1985. Its primary objective of reducing dependence on foreign oil, articulated more than a decade ago, has been met. But whether this success is attributable to that policy or only incidental to it is a matter for debate. In fact, the very existence of a true energy policy may be a matter for some debate.

The reason for this seemingly contradictory state of affairs—the success of a policy that some say does not exist—is that the same forces that precipitated formation of community energy objectives also precipitated individual action by European nations. After the 1973 oil boycott, attempts to develop alternative supplies (such as natural gas, coal and nuclear) and attempts to use energy more efficiently would certainly have occurred even if the European community had not articulated energy objectives. The extent to which the Community's general objectives, targets in specific sectors, and a handful of mandatory regulations facilitated this process is a matter for speculation.

Taken as a whole, however, the national and Community energy policies in Europe can be seen in concrete terms, although we are not always able to discern where national policy ends and Community policy begins. There is a clear mandate, being followed successfully, to decrease dependence on Mideast oil. This has included and will continue to include conservation and efficiency measures. On the supply side, there is a policy encouraging long term security. This means increased production of European petroleum, natural gas agreements with the Soviet Union and others, a vastly expanded nuclear program, especially in France, and continued use of solid fuels. Important to the American coal producer is the extent to which the last category will be a significant part of the European energy solution.

There seems to be room for increased American coal exports to Europe within the context of the energy policy followed by community nations. However, there are two major variables. One seems to be the environment. The other is European state subsidies for domestic coal production.

The main limitation on overall expansion of European coal use seems to be problems associated with air pollution and acid rain. Europeans would very much like to switch to greater use

of coal if there were a way to do it cleanly. It is in their interest to do so because of the needs of their own coal industry. To the extent that American producers can participate in technological solutions to this problem and provide Europe with clean burning coal or clean burning coal technology, the American coal industry can share in a tremendous market.

The second major constraint on American coal exports to Europe is the European Community practice of state subsidies, contrary to the original provisions of the ECSC. A large percentage of European mines cannot produce coal economically at world market prices, even taking into consideration the large transportation costs for foreign coal. Even European energy experts are skeptical about the value of a large portion of the subsidies, particularly those to the most uneconomical mines, many of which cannot produce coal for less than \$100 per ton. While it is unrealistic to expect a complete end to such state aid, even partial elimination of such subsidies would open large markets for coal imports to Europe. Americans could obviously share in these markets. This is not simply an internal European issue. It is as much a free trade issue as discussions about Japanese import barriers, European steel dumping, and United States import restrictions proposed against cheap foreign goods. Consciousness should be raised in this country to make the health of our coal export industry as much a public issue as the health of our auto industry, steel industry or agricultural industry. And on this issue, the principle of free trade is on the American side.

Finally, if the potential for coal imports does expand — because of a reduction of state aid, environmental solutions to the pollution problem, and/or economic expansion — American exporters must be prepared to take advantage of such a situation. They will be competing with exporters of coal from Poland, Australia, South Africa, and Columbia. This means American producers must consider ways to offer attractive long-term marketing arrangements, including joint marketing arrangements. It also means that United States inland transportation costs, specifically increasing rail rates, must be brought under control. Otherwise our coal will not be priced competitively with that of other exporters.

Thus, there is a real potential under evolving European energy policy for significant expansion of American coal imports

to that continent. This potential, however, can only be realized if the factors discussed above are consciously and intelligently dealt with by American policy makers in government and in industry.

