Brent - "Unprinted" Dissent.

Dissent of Commissioner West 9/20/90

I. Introduction

The majority has misinterpreted the forward contract exclusion to the extent that a thorough dissent is obligated. It is important that the Commodity Futures Trading Commission issue statutory interpretations to provide guidance as a matter of public policy when it is in the public interest.[1/] Nevertheless, the Commission is not under any compulsion to issue statutory interpretations. Usually guidance to affected parties is provided by staff, in formal no-action letters or informally. At other times, if an issue bears significantly on the public interest, a statutory interpretation by the Commission may be a more appropriate instrument of guidance.

In examining the public policy needs to be fulfilled by issuing this interpretation, we should be asking whether there has been a disruption of the 15-day Brent market resulting from uncertainty about the status of transactions on that market under the Commodity Exchange Act, 7 U.S.C §1, ("Act"). If there has been a disruption of that market, has it adversely affected the public. If there has been a disruption of the market that causes harm to the public interest, will this statutory interpretation provide the necessary relief.

1/ See, Transcript of CFTC open meeting dated June 20, 1990, p. 28-30, comments of Commissioner West.

The statutory interpretation endorsed by the majority was adopted in response to inquiries by some participants in the market for 15-day Brent contracts who were very disturbed by rulings in Transnor (Bermuda) v. BP North America Petroleum, et. al., 86 Civ. 1493 (WCC)(S.D.N.Y.), finding that certain Brent 15-day contracts were United States futures contracts within the meaning and jurisdiction of the Act. As discussed below, under Section 4(a) of the Act, futures contracts traded off-exchange are illegal. Thus, some Brent market participants found the legal status of their contracts in potential jeopardy from private lawsuits. They claimed that the success of the Brent market itself was threatened, or that they would be unable to participate in that market.

Immediately following the issuance of the Transnor opinion, there was a reported decrease in trading volume on the 15-day Brent market. The causes of that decrease have been somewhat uncertain since there were other contemporaneous events that may have affected activity.2/ Yet according to a leading reporting service, "Brent trading in April was higher than in April last year [1989] and not that much lower than April 1988 ... despite the [Transnor] Opinion on April 18 [1990]..."3/ Also, volume of 15-Day Brent cargoes traded daily appears not to be declining. In fact, that reporting service indicated that August 1990 volume

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2/ Id., p. 26, comments of Ms. Medero, General Counsel, CFTC.

3/ Weekly Petroleum Argus, May 21, 1990, p. 4.

was significantly greater than that of July 1990, which in turn was greater than June 1990.4/

Despite these indications that the market has not been severely disrupted, the stability of Brent as a source of crude oil supplies is a vital public interest, particularly during these times of crisis in the Middle East with oil supplies from the Persian Gulf disrupted. Also, during such volatile times, the need of oil producers, refiners, distributors, retailers and consumers for a means of hedging price risks and for reliable pricing cannot be ignored. Thus, the importance of the Brent market itself and the importance and complexity of the forward contract exclusion warrant a thorough examination. It is reasonable to assume that there is a public interest involved which warrants consideration of a statutory interpretation.

II. The Role of the Statutory Interpretation

Even if the Commission desires to grant relief to a party or parties, the Commission is only authorized to do so within the confines of the Act. In interpreting the Act, the Commission looks at the language of the statute itself, its legislative history, court decisions, Commission case law and prior Commission statutory interpretations. Before commenting on the nature of the 15-day Brent market transactions, it is necessary to examine relevant legal authority. Statutory interpretations must rest solidly in the law. The appropriate role of a

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4/ Weekly Petroleum Argus, 24-30 August, 1990, p. 8.

statutory interpretation is to clarify existing law, not to enact new legislation or engage in a rulemaking.

III. Futures Contracts and the Forward Contract Exclusion

Section 2(a) of the Act charges the Commission with jurisdiction over all "accounts, agreements...and transactions involving contracts of sale of a commodity for future delivery..." 7 U.S.C. §2. In Section 3 of the Act, Congress declared that these contracts "known as 'futures' are affected with a national public interest." 7 U.S.C. §5. In fact, Congress found that regulation of futures trading was a necessity due to the importance of the markets for hedging and because, as Section 3 states, "the prices involved in such transactions are generally quoted and disseminated throughout the United States and foreign countries as a basis for determining prices..." In the regulatory scheme devised by Congress, under Section 4(a) of the Act, 7 U.S.C. §6(a), United States futures contracts can only be traded on boards of trade designated by the Commission as contract markets. This exchange trading requirement provides protection to these markets and to the public by assuring that all futures trading takes place in an environment of self-regulation with federal oversight by the Commission.

Congress, the courts, and the Commission have not issued a formal definitive list of the elements of futures contracts. Nevertheless, certain indicia have been recognized generally as characteristics of futures contracts:

(1) A futures contract is an agreement for the purchase or sale of a commodity for delivery in the future at a price that is agreed upon when the contract is

initiated.5/

(2) Futures contracts are entered into primarily for the purpose of assuming or shifting the risk of changes in the value of commodities rather than for transferring ownership of the commodities themselves.6/

(3) Futures contracts generally are not entered into for the purpose of obtaining delivery of the underlying commodity, but are discharged through offsetting transactions or other buy-back arrangements.7/

There are also certain facilitating characteristics of futures contracts including: margin requirements, standardized contract terms, a clearinghouse, competitive trading on a centralized market and price dissemination which may or may not be present.8/ All of these characteristics are useful, but they are not a checklist. Instead, "no bright line definition or list of characterizing elements is determinative."9/ Thus, whether or

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5/ The Regulation of Leverage Transactions and Other Off-Exchange Futures Delivery Type Instruments - Statutory and Regulatory Interpretation by the Office of General Counsel, CFTC, 50 F.R. 57, 11656 (March 25, 1985).

6/ In Re Stoval [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 20,941 (1979).

7/ In the Matter of First National Marketing Corporation [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶ 22,698 (1985) at 30,974-5.

8/ CFTC v. Trinity Metals of Kansas City, Inc. No. 85-1482-CV-W-3, (D.W.D. Mo.) (Jan. 21, 1986).

9/ CFTC v. Co Petro Marketing Group, Inc. 680 F.2d 573, 581 (9th Cir. 1982).

not a given instrument is "a futures contract must be determined on a case-by-case basis with a critical eye toward the transaction's underlying purpose."10/

As the majority discusses, Congress has excluded or carved out deferred delivery or forward contracts from the definition of futures contracts and thus from the Act's exchange trading requirement and the Commission's regulatory jurisdiction. Therefore, Congress decided, beginning in 1921, that the Act's regulatory scheme was not required to govern, as the draft statutory interpretation stated, "... private commercial merchandising transactions in which actual delivery is contemplated but deferred for reasons of commercial convenience or necessity." 11/ Further, as the majority's interpretation discusses, forward contracts have evolved into a variety of transactions. However, important characteristics of forward contracts remain:

(1) The parties to forward contracts are commercials;

10/ *Id.*

11/ CFTC Draft Statutory Interpretation Concerning Forward Transactions, June 29, 1990, ("Draft Views") p. 10. In the final version of the statutory interpretation as endorsed by the majority, this language was revised to read "...private commercial merchandising obligations to deliver but in which delivery is deferred for reasons of commercial convenience or necessity." The requirement for contemplation of delivery was deleted. CFTC, Statutory Interpretation Concerning Forward Transactions, September , 1990 ("Majority Views") p. 11.

(2) The parties use these contracts in connection with their business such as merchandising products or obtaining supplies; and

(3) The parties contemplate delivery, and have the capacity to make or take delivery. In fact, delivery routinely occurs.12/

Because such contracts occur between various commercials to meet their individual business needs, they frequently are not standardized, but may be negotiated by the parties or "tailor made" to meet their specific needs.13/ Historically, the forward contract exclusion has been viewed as covering only contracts for sale which are entered into with the expectation that delivery of the actual commodity will eventually occur through performance on the contracts.14/

12/ Characteristics Distinguishing Cash and Forward Contracts and "Trade" Options, Interpretive Statement of the Office of General Counsel, CFTC, 50 F.R. 189, 39656 (September 30, 1985) and cases and legislative history cited therein. Also, in this interpretive statement, the Office of General Counsel concluded that one type of minimum price guarantee contract came within the forward contract exclusion of Section 2(a)(1) "since legally the contract's predominate feature is its use by producers and merchants to market a commodity through actual delivery. The producer, absent depredation to the crop, must make delivery of the commodity. The merchant or the elevator must accept that delivery. Because both parties are participants in normal commercial channels for these commodities, each is in a position to fulfill all obligations under the contract, and both parties intend that commercial marketing of the commodity by means of delivery will occur." Id. at 39660.

13/ Id.

14/ Id.

Therefore, based on the Act, as well as court and Commission opinions based on the Act, forward contracts are sales of a commodity where <u>delivery</u> is deferred[15/], but it is <u>contemplated</u> and routinely occurs.[16/] The parties to forward contracts are <u>commercials</u> who will be <u>using the commodity</u> in connection with their businesses.[17/]

Because forward contracts are delivery contracts used to move the underlying commodity into the stream of commerce, parties to forward contracts are not viewed as merely speculators in the value of the commodity, rather they seek profit in their businesses from producing, processing, distributing, storing, or consuming the commodity.[18/] Further, the parties to forward contracts are generally not hedging in the same manner as parties to futures contracts. While parties to forward contracts may be seeking to insure a price, they are also using these contracts to

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15/ Section 2(a)(1) of the Act, 7 U.S.C. §2(a)(1).

16/ <u>In Re Stovall</u>, <u>Supra.</u>

17/ <u>Characteristics Distinguishing Cash and Forward Contracts and "Trade" Options.</u>, <u>Supra</u>., and cases cited therein.

18/ <u>Id.</u>

make or take delivery.[19] The crucial point is that forward contracts closely resemble actual cash sales.[20]

IV. Review of Comments on the Draft Statutory Interpretation

In developing this interpretation, the Commission took the unusual, but prudent, route of accepting written comments on a proposed interpretation, a procedure more akin to that found in notice and comment rulemaking.[21] Those comments have proved enlightening and a valuable source of information. Such is the purpose of a comment procedure.

The Chicago Board of Trade ("CBT"), in its comment, provided historical information comparing settlement and clearing methods used at the CBT 70 years ago, before the advent of the Chicago Board of Trade Clearing Corporation, with the methods currently used on the Brent market. The CBT stated that at the time Congress first restricted futures trading to designated

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19/ Hedging transactions normally represent substitutes for transactions to be made later in a physical marketing channel rather than the actual physical or cash transactions themselves. CFTC Regulation 1.3(z)(1). By contrast forward contracts are transactions in the physical or cash marketing channel. See, Johnson and Hazen, Commodities Regulation, Second Edition, Little Brown, Boston, 1989, Vol. I, p. 50, for a discussion about the use of futures contracts to hedge commercial transactions involving cash positions or forward contracts.

20/ "A forward or deferred delivery contract closely resembles a cash transaction, except that delivery is made at a date in the future." Markham, History of Commodity Futures Regulation, Praeger, New York (1987), p. 202.

21/ While the Commission accepted written comments, it did not publish the draft interpretation in the Federal Register for the purpose of inviting public comments from all interested parties.

exchanges, CBT used a "ring" method of clearing and settlement closely resembling today's Brent market. CBT argues that "rather than distinguishing 15-day Brent contracts from futures contracts, the daisy chains, book-outs and cancellation agreements of circles and loops confirm that the 15-day Brent market is composed of the very kind of transactions Congress intended to be regulated as futures contracts."[22/]

CBT also argued that the 15-day Brent contracts are standardized, stating that "Brent contracts are so highly standardized that Brent traders can strike a deal with the magic words 'I will do you a Brent at $X per barrel'."[23/] This view is supported by others. "...[T]he Brent 15-day market does exhibit several characteristics similar to a 'futures' market. In particular both involve highly standardized contracts which can be used for speculation, hedging and arbitrage."[24/] The majority also recognizes that "15-day Brent contracts typically incorporate standard terms and conditions."[25/]

22/ Letter to Ms. Jean A. Webb, Office of the Secretariat, CFTC, from Thomas R. Donovan, President and Chief Executive Officer, CBT, dated July 13, 1990, p. 14.

23/ CBT, p. 20. quoting R. Mabro, et al., The Market for North Sea Crude Oil (1986) p. 173-174.

24/ Blanche Sas, Legal Aspects of the 15 Day Brent Market (Part I), J. of Energy and Nat. Resources L., 109, (1987) ("Sas I"), p. 116.

25/ Majority Views, Supra, p. 5. The majority notes that while the contracts involve standard terms and conditions, they involve individual negotiations which may address a number of terms and conditions particularly credit terms.

The Chicago Mercantile Exchange ("CME") urged the Commission to make an independent examination of the Brent market before issuing a pronouncement based on a few letters from market participants and brokerage houses. The CME also argued that inclusion of the term "traders" as commercial participants in forward contracts goes beyond the traditional scope of the forward contract exclusion.26/ The Draft Views of the Commission included institutional traders as 15-day Brent market participants. The Statutory Interpretation endorsed by the majority has deleted the specific reference.27/ The CME argues that "allowing speculators to qualify as commercial users effectively obliterates the line between the futures and forward contract markets, and does violence to the legislative intent that speculation be controlled by trading in an exchange environment..."28/

The New York Mercantile Exchange expressed concern that the draft statutory interpretation focused on capacity to make or take delivery instead of the traditional standard of intent to deliver. If financial capacity is sufficient, "any well capitalized speculator (trader) may actively participate in

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26/ Letter to Ms. Jean A. Webb, Office of the Secretariat, CFTC, from William J. Brodsky, President and Chief Executive Officer, Chicago Mercantile Exchange, dated July 13, 1990, p. 2.

27/ *See*, Draft Views, *Supra*, p. 5. and Majority Views, *Supra*, p.5.

28/ *Id.*

unregulated off-exchange futures trading under the guise of the forward contract exclusion."29/

Some of the most revealing comment letters came not from futures exchanges, but from Brent market participants themselves. The British Petroleum Company and its subsidiaries ("BP") argued that "the Commission should acknowledge the use of Brent and other forward markets for risk management purposes including hedging and for pricing."30/ Exxon Corporation and its subsidiaries argued that "the Commission needs to explicitly acknowledge that contracts entered into without an intent to deliver (for example, to hedge or price) are nonetheless still 'forward contracts' outside the scope of the CEA."31/ Those commenters seem to want the Commission to exclude from regulation even those hedging and pricing activities which Congress determined the Commission should regulate under the Commodity Exchange Act.32/ In fact, it has been previously noted that these markets are being used for these and other purposes.33/

29/ Letter to Ms. Jean A. Webb, Office of the Secretariat, CFTC, from R. Patrick Thompson, President, New York Mercantile Exchange, dated July 13, 1990, p. 5.

30/ Letter to the CFTC from Stephen R. Pettit, Chief Executive, Oil Trading, BP Oil International Limited, dated July 12, 1990, p. 2.

31/ Letter to Office of the Secretariat, CFTC from Kenneth P. Cohen, Assistant General Counsel, Exxon Company, International, dated July 12, 1990, p.3.

32/ Section 3 of the Act, 7 U.S.C. §5.

33/ Sas, (I), p. 112, in a 1987 article citing R. Bacon, <u>The Brent Market, An Analysis of Recent Developments</u>, WPM8,
(Footnote Continued)

elements to their markets not covered by the interpretation, such as further standardization of contracts, or the installation of a true clearinghouse similar to those associated with regulated futures markets.

The Commission's statutory interpretation refers to U.S. commercial entities participating in other "similar markets" both domestic and foreign.39/ It is said by certain market participants that these similar markets use "delivery processes analogous" to those of the 15-day Brent market.40/ Unfortunately the scope of markets covered is not known. One commenter recognized that an exclusion from the Act's definition of futures contracts, and thus the Commission's jurisdiction, "unless narrowly drafted could have far reaching and objectionable effects."41/

V. 15-Day Brent Market and the Forward Contract Exclusion

After reviewing the characteristics of futures contracts generally relied upon by the Commission and the courts, the similarity of 15-day Brent contracts to futures contracts is apparent. They are both agreements for the purchase or sale of a commodity for delivery in the future at a price that is agreed upon when the contract is initiated. Also, both futures contracts and 15-day Brent contracts have standardization of

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39/ Majority Views, Supra., p. 8.

40/ Id.

41/ Letter to Wendy L. Gramm, Chairman, CFTC, from Wayne Klein, Bureau Chief, Securities Bureau, Department of Finance, State of Idaho, dated June 8, 1990, p. 1.

contract terms and conditions, which "...facilitate the formation of offsetting or liquidating transactions."42/ The ability to offset is important because it allows parties to avoid delivery.43/ The Brent market is marked by a high degree of offset.44/

Like futures contracts, many 15-day Brent contracts are entered into for the purpose of hedging or speculation rather than for the purpose of transferring ownership in crude oil. This is supported by the views of an academic authority45/ and in the comments of Brent market participants themselves.46/ Thus, as in Co Petro, if we look at many 15-day Brent contracts with a "critical eye toward their underlying purpose", they appear to be indistinguishable from futures contracts.47/

Fifteen-day Brent contracts do not sufficiently resemble forward contracts to be excluded from coverage by the Act. The

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42/ Co Petro, Supra., p. 580.

43/ Id.

44/ See, Exxon, Supra. p.2, and footnote 36.

45/ See, Sas I, Supra, p. 112.

46/ See, BP, Supra., p. 2, Exxon, Supra., p. 1, and Goldman, Sachs and Company, Supra., p. 13.

47/ Co Petro, Supra. p. 581. Admittedly, 15-day Brent contracts are not offered to the general public. The absence of public participation is not in and of itself determinative since most recognized futures markets have only limited participation by the general public. The Brent market also does not rely on margin monies to secure transactions, relying instead on credit evaluations or letters of credit. Credit evaluations and letters of credit are utilized by the recognized futures markets as well as margin funds.

market is not limited to commercials in the traditional sense of those who produce, process, use or even handle the underlying commodity. In fact, commercial oil firms may not even be the most active participants in the 15-day Brent market.48/ Since many of these market participants are not commercials, they are obviously not using 15-day Brent contracts to merchandise products or obtain supplies. Even commercial oil firms may not be using the market for these purposes. Finally, it does not appear that the market participants contemplate delivery or that delivery routinely occurs. Instead the statutory interpretation endorsed by the majority focuses on the "book-outs", "circles" and "loops" that characterize the 15-day Brent market.

Since many or even most 15-day Brent contracts do not meet the generally accepted criteria for forward contracts, a statutory interpretation is inappropriate. The statutory interpretation should not be used to expand the definition of commercials to include speculators who do not use the underlying commodity in their trade or business, much less to include those

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48/ During the period 1983-1988, major integrated oil companies, other integrated oil companies, state-owned enterprises, non-integrated oil producers and non-integrated refiners made approximately 33% of the sales and 33% of the purchases in the Brent market. During the same period, trading operations of U.S. investment banks, Japanese trading companies and other trading companies made approximately 57% of the sales and approximately 57% of the purchases in the Brent market. The remainder of the transactions were by companies not classified. Letter to the Office of the Secretariat, CFTC, from Kenneth M. Raisler, Rogers and Wells, dated July 23, 1990. The Draft Views, Supra, p. 5 specifically included institutional traders as 15-day Brent Market participants. The Majority Views, Supra, p. 5 have deleted the specific reference.

who do not contemplate delivery of that commodity. A statutory interpretation cannot be used to change the law.

VI. Alternatives

A. Adjustments by the Brent Market

The Brent market generally does not seem to fall within the forward contract exclusion; however, many 15-day Brent contracts may fall within the exclusion. In these transactions, delivery between commercial oil firms does occur, or delivery is at least intended, and the oil enters the stream of commerce. Brent market participants have the obvious alternative of limiting the nature of their transactions to those within the scope of the forward contract exclusion.

B. The Foreign Market Exclusion

There are policy arguments as to why it may be appropriate for the 15-day Brent market to operate outside the regulatory structure adopted under the Act, such as the foreign nature of the market and regulatory oversight by a foreign government. While the forward contract exclusion does not seem appropriate, there may be another way under the Act in which the 15-day Brent market could operate outside the restrictions of the exchange-trading requirement of Section 4(a).[49] One of the commenters argues that the Brent market could be determined to be ..."a board of trade, exchange or market located outside the United States..."[50], and thus 15-day Brent contracts would not

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49/ *See* Majority Views, *Supra*, p. 9, footnote 5.

50/ CBT, *Supra*, p. 33.

be subject to the requirement that such contracts be made on or subject to the rules of a designated contract market.[51] In such an approach, we would have to examine the market participants' contacts with the United States which were persuasive in determining standing to the judge in Transnor, as well as to recognize current British government regulation of 15-day Brent transactions.

C. New Exemptive Authority

It should be noted, however, that the recognition of the Brent market as a foreign exchange would not necessarily give protection to similar domestic and foreign markets that use analogous delivery processes. Those other markets have not been closely examined or completely identified.

The cleanest way for the Commission to permit such markets to operate without contract market designation would be for it to have the authority to exempt certain transactions by rule, regulation or order from the exchange trading limitation of Section 4(a) of the Act, when in the public interest to do so. The Brent situation may demonstrate the desirability of such authority. Congress could provide the Commission such exemptive authority, and the Commission could then exercise that authority in a manner recognizing historic concerns about fraud and manipulation. Further, Congress could enact such an exemptive provision without creating potential enforcement gaps that could

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51/ 7 U.S.C. § 6(a).

occur from a change to the Commission's exclusive jurisdiction under Section 2(a)(1) of the Act.

V. Conclusion

The forward contract exclusion is a source of needed flexibility for the Commission in determining its jurisdiction under the Act. However, one does not have to be a strict constructionist to conclude there are limits to the Commission's flexibility in using statutory interpretations. Broadening the applicability of the forward contract exclusion to include transactions by traders who are speculators, who are not contemplating delivery, who are using generally standardized contracts, who routinely offset their positions and who do not use the underlying commodity itself is an erroneous interpretation of the Act.

Neither does the Act provide a general "commercial exemption" as one commenter has suggested.52/ While, in some cases, the general public may need more or different protections than commercial entities, clearly the necessity of federal regulation was premised on the use of and dependence by commercials on the hedging and pricing functions of the futures markets. While I have no doubt that the majority has made a good faith effort to interpret existing law in a very difficult area, unfortunately, their effort serves to change the law instead.

The majority has attempted to provide the Brent market participants with the assurance they desire. Unfortunately, it

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52/ See, Goldman, Sachs and Company, Supra. footnote 33.

is doubtful whether the majority's interpretation will survive close scrutiny, leaving the Brent market participants with a false sense of security. Furthermore, the majority's actions may actually have unfortunate consequences for the Brent market itself in preventing its evolution into a full futures market. In trying to help Brent market participants through this interpretation, the Commission may be acting contrary to the public interest. We must ask what are the myriad fraudulent trading practices that can be concocted to escape federal regulation by being declared a "forward contract" under this greatly expanded definition.