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| 19466 | MEMO | FRED FIELDING TO WILLIAM CLARK, RE INTERAGENCY DISCUSSION PAPER | 4 | 11/10/1982 | B1 |

Freedom of Information Act - [5 U.S.C. 552(b)]

B-1 National security classified information [(b)(1) of the FOIA]
B-2 Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
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B-8 Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
B-9 Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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U.S. Department of Justice
Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

*Washington, D.C. 20530*



MEMORANDUM FOR HONORABLE FRED FIELDING
Counsel to the President

Re: Ferroalloy Investigation and Presidential Authority Under § 232(b) of the Trade Expansion Act of 1962

You have asked this Office to provide you with our views regarding four questions concerning the scope and flexibility of the President's authority to adjust imports under § 232(b) of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862. The questions relate to a range of actions the President might take in response to a "Report" he has received from the Secretary of Commerce which contains a finding by the Secretary that high carbon ferrochromium and high carbon ferromanganese are "being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security . . . ." 19 U.S.C. § 1862(b).

The Report, in connection with this finding, recommends to the President: (i) the upgrading to high carbon ferrochromium and high carbon ferromanganese of chromite and manganese ores currently held in the National Defense Stockpile (NDS), an action to be taken pursuant to the Strategic and Critical Materials Stock Piling Revision Act of 1979, 50 U.S.C. § 98 et. seq. (Stock Piling Act), and (ii) removal of high carbon ferromanganese from the Generalized System of Preferences (GSP) established under Title V of the Trade Act of 1974, 19 U.S.C. § 2461 et. seq. (1974 Trade Act). We conclude that the President may exercise his authority under the Stock Piling Act to upgrade the two ores and his authority under the 1974 Trade Act to withdraw GSP status of high carbon ferrochromium in response to a "national security" finding under 19 U.S.C. § 1862(b). We are also of the view that such actions would satisfy the statutory requirement that the President, unless he rejects the Secretary's finding, "shall take such action, and for such time, as he deems necessary to adjust the imports of such [ferroalloy] . . . so that such imports will not threaten to impair the national security . . . ." 19 U.S.C. § 1862(b).

Our responses to your specific questions are as follows:

1. Whether upgrading ores in the National Defense Stockpile into ferroalloys would be "action to adjust imports" authorized by Section 232 of the Trade Expansion Act of 1962?

We are not aware that any Department has argued that upgrading the ores in the NDS is, in this particular instance, "action to adjust imports" authorized by § 232. To the contrary, the Commerce Department Report recommends that the stockpiling action be taken pursuant to the Stock Piling Act. Although this Department has interpreted the President's authority under § 232 extremely broadly in the past, see 43 Op. A.G. No. 3 (Jan. 14, 1975), and the legislative history mentions stockpiling as an appropriate action 1/, we do not believe that upgrading the stockpile is an action which would be authorized by § 232 standing alone. In light of the cautionary language in Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 571 (1976), which warned that "our conclusion here, fully supported by the relevant legislative history, that the imposition of a license fee is authorized by § 232(b) in no way compels the further conclusion that any action the President might take as long as it has even a remote impact on imports, is also so authorized," we see no reason to reach out unnecessarily to answer question 1 affirmatively since there is clear authority for the stockpiling action under separate statutory authority.

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1/ See 101 Cong. Rec. 5588 (1955)("they will have at their command the entire scope of tariffs, quotas, restrictions, stockpiling, and any other variation of these programs") (remarks of Senator Bennett); 101 Cong. Rec. 5299(1955)("It grants to the President authority to take whatever action he deems necessary to adjust imports . . . . He may use tariffs, quotas, import taxes, or other methods of import restrictions.") (remarks of Senator Milliken); S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955)(President to have the authority to take "whatever action is necessary to adjust imports").

2. If, by action under separate authority, the President were to implement the two remedial actions (stockpiling and GSP removal) recommended in the Section 232 Commerce Report, would the requirement of Section 232 -- that action "to adjust imports" be taken -- be satisfied.

As a preliminary matter, we would note that this question need not be resolved if the President were to refrain at this time from accepting or rejecting the "national security" finding made in the Commerce Report. That is, the President could take the two recommended remedial actions under independent authority established in the Stock Piling Act and the 1974 Trade Act and simply postpone, in light of changed circumstances that would exist at that point, his determination whether the articles are being imported into the United States in such a manner as to threaten to impair the national security.

Should the President, however, determine to affirm the finding of the Secretary, we believe the requirements of § 232 would be satisfied. The only statutory requirement imposed on the President by § 1862(b) is that he "shall take such action, and for such time, as he deems necessary to adjust the imports of such article . . . so that such imports will not threaten to impair the national security . . . ." As we understand the facts, by upgrading the NDS many domestic producers of high carbon ferrochromium and ferromanganese who might otherwise go out of business will remain economically viable for the 10 year period during which the upgrading would occur. Absent such a remedial measure, the failure of these domestic producers would leave the country dependent on imports of strategically critical ferroalloys. Necessarily then, the President's action will have the result of adjusting imports; the nation will rely less on imports of ferroalloys if some domestic production continues. In addition, the effect of removing high carbon ferromanganese from GSP treatment would be analogous to the imposition of tariffs or fees, which are accepted remedies for purposes of § 232. See FEA v. Algonquin SNG, Inc., supra, 426 U.S. at 571. Presumably, raising the price of imports of high carbon ferromanganese would increase the demand for the domestically produced article and thus "adjust imports" within the meaning of § 232.

The language, legislative history and purpose of § 232 indicate that the proposed remedial actions would satisfy the President's obligations under § 232(b). As the Supreme Court noted in FEA v. Algonquin SNG, Inc., supra, 426 at 561:

> In authorizing the President to "take such action and for such time, as he deems necessary to adjust the import of [an] article and its derivatives," the language of § 232(b) seems clearly to grant him a measure of discretion in determining the method to be used to adjust imports. (emphasis added).

Nor has this Department ever questioned that the language in § 232 grants the President "the broadest flexibility" in selecting actions "to adjust imports." 43 Op. A.G. No. 3, supra at 5.

Section 232 of the Trade Expansion Act also instructs the President to

> give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, . . . [as well as to] take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, . . . loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports . . . in determining whether such weakening of our internal economy may impair the national security.

19 U.S.C. § 1862(c). Because the statutory language specifically indicates that maintaining the viability of domestic industries perceived to be critical to the national security was a major purpose of § 232, we believe that the proposed remedial actions -- which would achieve the statutory purpose of preserving domestic production of articles important to the national security -- would "adjust imports" within the meaning of § 232.

The legislative history of § 232(b) and its predecessors 2/ similarly indicates that Congress wanted the President both to address himself to the effects of imports on domestic industries deemed critical to the national security 3/ and to have broad powers to preserve domestic production needed for national defense requirements. Indeed, Representative Cooper, the floor manager of the bill containing § 232(b), illustrated the meaning of that provision with an example analogous to the present situation. He noted that the Conference Report "emphasized that if the President sees fit to stockpile critical materials under any other law, that act may be taken wholly aside from the authority contained in this amendment [final version of § 232(b)]. Conversely, action under the new provision may be taken wholly aside from the authority contained in any other law." 101 Cong. Rec. 8160, citing H.R. Rep. No. 745, 84th Cong., 1st. Sess. 7 (1955).

Representative Cooper further explained: "This means that if the President should institute a stockpile program which would successfully preserve the essential domestic producing facilities in a sound condition and the threat to the national security would thereby be eliminated, there would be no necessity for limiting imports. The President would not only retain flexibility as to the particular

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2/ Section 232(b) was originally enacted by Congress as § 7 of the Trade Agreement Extension Act of 1955, Pub. L. No. 84-86 c. 169, 69 Stat. 166, and amended by § 8 of the Trade Agreement Extension Act of 1958, Pub. L. 85-686, 72 Stat. 678.

3/ In directing the President to consider the domestic effects of imports, § 232 contrasts with other statutes which delegate powers to the President to deal with imports but instruct him to focus primarily on international concerns. See, e.g., 19 U.S.C. § 2132 (correcting balance of payments disequilibria); 50 U.S.C. §§ 1701-06 (IEEPA).

measure which he deems appropriate to take, but, having taken an action, he would retain flexibility with respect to the continuation, modification, or suspension of any decision that had been made." 101 Cong. Rec. 8160-61. 4/

As noted above, Congress made no attempt to restrict the options available to the President to adjust imports in response to a national security finding under § 232. See n.1 supra. (President authorized to take whatever action he deems necessary). See also H.R. Rep. No. 1761, 85th Cong., 2d Sess. 13 (1958)(statute provides "those best able to judge national security needs . . . [with] a way of taking whatever action is needed to avoid a threat to the national security through imports"). We therefore conclude, based on the language and legislative history of § 232, that stockpiling and removing the GSP status of the relevant ferroalloys under independent statutory authorities are sufficient actions "to adjust imports" in response to a national security finding by the Secretary of Commerce.

Finally, we do not believe that either FEA v. Algonquin SNG, Inc., supra, or Independent Gasoline Marketers Council v. Duncan, 492 F. Supp. 614 (D.C.D.C. 1980), establish that these actions would be a legally insufficient response to the finding. In upholding the President's authority to impose a license fee system under § 232(b), the Court's opinion in Algonquin repeatedly cited to expressions from Congress and the Executive Branch reflecting their understanding of the broad scope of authority granted to the President by the language of § 232(b). See 426 U.S. at 564-70. The Court's final caveat that neither its holding nor the legislative history "compels the further conclusion that any action the President might take, as long as it has even a remote impact on imports, is also so authorized," 426 U.S. at 571, is simply not applicable in the present instance because we do not deal here with the coercive regulation of private enterprise that was an underlying concern in the Algonquin case.

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4/ See also Hearings on Trade Agreements Extension (H.R. 1), before the House Comm. On Ways and Means, 84th Cong., 1st Sess. (1955); Hearings on Trade Agreements Extension (H.R. 1), before the Senate Comm. on Finance, 84th Cong., 1st Sess. (1955).

The present actions are also similarly distinguishable from the Petroleum Import Adjustment Program (PIAP) that was created in response to a national security finding concerning oil imports, and was successfully challenged in Independent Gasoline Marketers Council v. Duncan, supra. The PIAP license-fee system was a demand-side disincentive, ultimately designed to fall on consumers of gasoline rather than users of home heating oil. It imposed a gasoline conservation fee on refiners of both domestic and imported crude oil. The court determined that the PIAP system was structured to lower demand for oil generally rather than demand for imports in particular. The court explained the remoteness of the program's effect on imports as follows:

> First, the quantitative impact of the program on import levels will admittedly be slight. Second, the program imposes broad controls on domestic goods to achieve that slight impact. Third, Congress has thus far denied the President authority to reduce gasoline consumption through a gasoline conservation levy. PIAP is an attempt to circumvent that stumbling block in the guise of an import control measure. TEA alone does not sanction this attempt to exercise authority that has been deliberatively withheld from the President by the Congress.

492 F. Supp. at 618. The PIAP system clearly was the type of Presidential action that the Supreme Court had warned was not authorized by § 232 in the Algonquin case.

In contrast to the PIAP system, the proposed remedial actions for ferroalloys in no way penalize domestic industries; rather, the stockpiling action aids them. More importantly, these actions do not constitute coercive regulation taken pursuant to the Act. The removal of GSP status for ferromanganese also discriminates between imports and domestic goods, in conformity with the requirements of § 232. Further, the President would not be relying on § 232 to accomplish indirectly an action that Congress had not authorized him to undertake directly. Accordingly, we conclude that the proposed remedial actions would satisfy the requirements of § 232.

3. If, by independent action and under separate authority, the President implements the two remedial actions (stockpiling and GSP removal) recommended in the Section 232 Commerce Report, can the President then either take no action on the report at this point or return the report to Commerce for further consideration in light of the remedies taken? What effect would such action have on the other eleven ferroalloys for which there were no positive findings?

Section 232(b), as explained above, requires the President either: (1) to take such action, and for such time, as he deems necessary to adjust imports so as to remove the threat to the national security; or (2) to reject the finding of the Secretary of Commerce that imports threaten to impair the national security. 19 U.S.C. § 1862(b). No time frame constrains the President. Moreover, as this Department has previously indicated, the statutory language and relevant legislative history contemplate a continuing course of action, with the possibility of future modifications. 43 Op. A.G. No. 3 at 2-3 (Jan. 14, 1975). 4/ As noted in a Commerce Department memorandum, the constant monitoring contemplated by § 232 encompasses not only a review of factual circumstances

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4/ Representative Cooper, floor manager of the bill which adopted § 232(b), commented:

> "The President would not only retain flexibility as to the particular measure which he deems appropriate to take, but, having taken an action, he would retain flexibility with respect to the continuation, modification, or suspension of any decision that had been made."

101 Cong. Rec. 8160-61 (1955). The Conference Report on the bill also stated with reference to § 232(b) that "it is . . . the understanding of all the conferees that the authority granted to the President under this provision is a continuing authority . . . ." H. Rep. No. 745, 84th Cong. 1st. Sess. 7 (1955).

to determine whether a particular remedy is effective, but also a review to determine whether the initial finding of a threat to the national security remains valid. Memorandum to H.P. Goldfield, Associate Counsel to the President, from Irving P. Margulies, Deputy General Counsel, Re: Ferroalloy Investigation at 2 (Sept. 8, 1982). Thus, we see no reason why the President may not retain the Report for further consideration in light of the actions he will have taken under independent statutory authority. Similarly, we see no reason why he may not return the report to the Commerce Department for further evaluation given the changed circumstances resulting from the actions he will have undertaken.

You have further inquired whether either of these actions would affect the eleven ferroalloys for which no positive national security finding was made. The only potential effect we have been able to identify is whether the President or Secretary of Commerce would be required to publish the Report of the investigation and findings. Section 232(d) requires that:

> A report shall be made and published upon the disposition of each request, application, or motion under subsection (b) of this section. The Secretary shall publish procedural regulations to give effect to the authority conferred on him by subsection (b) of this section.

The Commerce Department regulations promulgated thereunder state that:

> The report, excluding the sections containing national security classified and business confidential information amd material, shall be published in the Federal Register upon the disposition of each request, application, or motion made pursuant to [§ 232]. 15 C.F.R. § 359.10(c).

The President's decision either to retain the Report for further study or to return it to the Commerce Department for further evaluation would not constitute a final disposition of the § 232 application by the Ferroalloys Association. Consequently, no publication requirement would be triggered.

4. Whether GSP eligibility may be withdrawn under Section 232 of the Trade Expansion Act, without the President (i) considering the factors required in Section 504(a) of the Trade Act of 1974, and (ii) issuing an Executive Order overriding the previous Executive order under which GSP status was granted to the product?

We are unaware that any Department presently contends that GSP eligibility should be withdrawn under § 232 of the Trade Expansion Act. The consensus has been that withdrawal of duty-free treatment for high carbon ferromanganese should be implemented under the authority of § 504 of the Trade Act of 1974, 19 U.S.C. § 2464. Two reasons supported this consensus. First, § 503 of the Trade Act of 1974 provides that whenever an article is the subject of any action proclaimed under § 232, that article will not be eligible for GSP status. 19 U.S.C. § 2463(c)(2). We understand that there was a policy disagreement as to whether removal of GSP status was therefore a necessary concomitant of other import-adjusting action under § 232, or whether removal of GSP status alone would suffice to adjust imports under § 232. Second, even if withdrawal of GSP status alone were action authorized by § 232, this determination would not establish that the President had acted solely under the authority of § 232 with respect to high carbon ferrochromium, which has no GSP status. One would still have to rely on the proposition that action to "adjust imports" as contemplated by § 232 could be taken under separate authority were the President to stockpile high carbon ferrochromium under the Stock Piling Act.

Assuming that withdrawal of GSP status can be demonstrated to adjust imports sufficiently directly so as to constitute action under § 232, we do not believe the President is required to consider the factors mentioned in § 504(a) of the Trade Act of 1974. (The factors are set forth in 19 U.S.C. §§ 2461, 2462(c)). Those factors, which focus on economic interactions

between developed and developing countries, are relevant to withdrawal of GSP treatment under the Trade Act of 1974; they have no bearing on actions taken under § 232 of the Trade Expansion Act to address threats to the national security. We are of the view, however, that should the President remove GSP treatment of ferromanganese, he would be required to issue an Executive Order overriding the earlier Executive Order, issued pursuant to 19 U.S.C. § 2463(b), which had designated high carbon ferromanganese to be eligible for GSP treatment.

Larry L. Simms
Deputy Assistant Attorney General
Office Of Legal Counsel

U.S. Department of Justice
Office of Legal Counsel

Office of the
Deputy Assistant Attorney General

*Washington, D.C. 20530*

20 OCT 1982

MEMORANDUM FOR HONORABLE FRED FIELDING
Counsel to the President

Re: Department of Commerce Section 232 Investigation of Ferroalloys

We have reviewed the draft issue/discussion paper concerning the ferroalloy investigation dated October 14, 1982 and circulated by the Staff Secretary of the National Security Council and have comments on two aspects of that draft.

First, we disagree with the determination that "significant import-related action would not be taken under the finding" (Tab A, p. 2) and that "[t]he recommended stockpiling and GSP actions will not significantly adjust imports of ferroalloys" (Tab A, p. 3). This both conflicts with the facts as we understand them and contradicts a recent legal conclusion reached by this Office that the stockpiling and GSP actions would satisfy the Section 232 requirement that the President take action "to adjust imports." See Memorandum for Honorable Fred Fielding, Counsel to the President, Re: Ferroalloy Investigation and Presidential Authority under § 232(b) of the Trade Expansion Act of 1962 at 3-7 (Oct. 5, 1982). Of course, it may be that the word "significant" is used in the draft report in a non-technical sense, but as it presently appears, it could certainly be read as indicating non-compliance by the President with the requirements of § 232 were the President to affirm the national security finding. We would add that the public availability of such a document could be quite nettlesome were litigation to arise subsequent to a Presidential affirmance of the Secretary's finding.

Second, we would observe that a decision to remove ferromanganese from the Generalized System of preferences (GSP) without Trade Policy Committee (TPC) review first need not, necessarily, be a circumvention of Executive Order 11846 or "invite legal action" (Tab C, p. 6). The President has plenary statutory authority to "withdraw, suspend, or limit

the application of the duty-free treatment accorded under section 2461 of this title with respect to any article . . . ;" 19 U.S.C. § 2464(a). To the extent that Presidential withdrawal of ferromanganese from GSP treatment without prior TPC review would conflict with existing regulations implementing Exec. Order 11846, the President may simply issue a new Executive Order modifying existing procedures to accommodate the present situation. If this procedure were followed, we see no reason to suggest that such an action taken by the President would be more vulnerable to a successful challenge in court.

Larry L. Simms
Deputy Assistant Attorney General
Office of Legal Counsel

THE WHITE HOUSE

WASHINGTON

September 22, 1982

MEMORANDUM FOR THEODORE B. OLSON
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGAL COUNSEL
DEPARTMENT OF JUSTICE

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Ferroalloy Investigation

On August 18, 1981 the Ferroalloys Association filed an application with the Department of Commerce ("Commerce") for an investigation under Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. § 1862) to determine whether imports of thirteen types of ferroalloys threaten to impair the national security.

On August 11, 1982 Malcolm Baldridge, Secretary of Commerce, transmitted to the President that Department's investigative findings ("Commerce Report") which concluded, in part, that two products, high carbon ferrochromium and high carbon ferromanganese, were being imported into this country in such quantities or under such circumstances as to threaten to impair the national security. Imports of the remaining eleven ferroalloys were not found to pose such a threat.

The Commerce Report recommends (i) chromite and manganese ore currently in the National Defense Stockpile be upgraded into high carbon ferrochromium pursuant to the Strategic and Critical Materials Stock Piling Act of 1979, and (ii) high carbon ferromanganese be removed from the Generalized System of Preferences ("GSP").

There appears to be some question whether the action recommended by Commerce is in fact sanctioned by Section 232 of the Trade Expansion Act of 1962, or whether such action should, as a matter of law, be taken by the President under separate statutory authority. I would, therefore, appreciate your office opining on the following questions:

1. Whether upgrading ores in the National Defense Stockpile into ferroalloys is "action to adjust imports" authorized by Section 232 of the Trade Expansion Act of 1962?

2. If, by independent action and under separate authority, the President implements the two remedial actions (stockpile and GSP removal) recommended in the Section 232 Commerce Report, would the requirements of Section 232 (i.e., "adjusting imports") be satisfied?

3. If, by independent action and under separate authority, the President implements the two remedial actions (stockpile and GSP removal) recommended in the Section 232 Commerce Report, can the President then either take no action on the report or return the report to Commerce for further consideration in light of the remedies taken? What effect would such action have on the other eleven ferroalloys for which there were no positive findings?

4. Whether GSP eligibility may be withdrawn under Section 232 of the Trade Expansion Act, and without the President (i) considering the factors required in Section 504(a) of the Trade Act of 1974, and (ii) issuing an Executive Order overriding the previous Executive Order under which GSP status was granted to the product?

I have attached for your consideration three memoranda on this subject from the General Counsel's Office at the Department of Commerce.

Given that this matter is likely to be brought before the President for his review shortly, I would appreciate your response to this request as soon as possible.

Thank you.

Attachments

FFF:HPG:aw 9/22/82

cc: FFFielding
HPGoldfield
Subj.
Chron

M E M O R A N D U M DATE: 15 SEP 1982

TO: Debbie Valentine

FROM: Larry D. Simms

SUBJECT: Ferroalloy Investigation

It still seems to me that all of us are on ships passing in the night. Under my analysis, the answer to the question asked under the label "Issue 1" in Unger's September 13 memo to Fielding is "yes," not "no." I say yes because it seems to me that the answer "no" does not follow from all of the discussion which follows that word in the text of Unger's memo. It seems to me there are really only two questions floating around here which continually seem to get jumbled up with one another. First, may the stockpiling action be taken on the basis of the authority of § 232? The answer to that, upon which everyone seems to agree, is "no." The second question is whether an action taken independently of the power conferred on the Executive by § 232 may nevertheless be advanced as an action "adjusting imports" and therefore satisfy the requirement of § 232 that some action to adjust imports be taken if there is a national security finding. Quite frankly, I am not sure

exactly what conclusion Unger's memorandum reaches on this issue, but it seems to me that on the facts as represented to us, a good argument could be made that the stockpiling action will have enough of an effect on imports to satisfy § 232's requirement that imports be adjusted.

It strikes me that either I am way out in left field or Commerce is, and I am not quite sure what to do about it. Look over these comments and lets discuss before one or the other of us calls H.P.

SEP 13 1982

**GENERAL COUNSEL OF THE**
**UNITED STATES DEPARTMENT OF COMMERCE**
Washington, D.C. 20230

SEP 13 1982

MEMORANDUM FOR: FRED F. FIELDING
Counsel to the President

FROM: Sherman E. Unger
General Counsel

SUBJECT: Ferroalloy Investigation

In response to your request of September 10, 1982, this memorandum addresses two issues concerning the ferroalloy investigation conducted under section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862) (the Act).

ISSUE 1

> If the President were to take the recommended actions to upgrade the chromite and manganese ore currently held in the National Defense Stockpile and to remove the GSP for high carbon ferrochromium under the separate and independent authorities of the Strategic and Critical Materials Stock Piling Act of 1979 and the Trade Act of 1974, respectively, would such action constitute action to adjust imports under Section 232 of the Act?

No. However, the legislative history of section 232 indicates that use of authority other than that provided under section 232 can satisfy a finding made under section 232 that the import of an item threatens to impair the national security.

Support for the use of independent authority to remedy a positive section 232 finding comes from the Conference Report in support of the Trade Agreement Extension Act of 1955. In dealing with the power of the President to remedy a positive finding under section 232, the conferees stated that:

> [I]t is the understanding of all the conferees, both House and Senate, that it is not intended to, and does not, diminish or impair any authority the

> President may have under other law. For example, it was emphasized that if the President sees fit to stockpile critical materials under any other law, that action may be taken wholly aside from the authority contained in this amendment. Conversely, action under the new provision may be taken wholly aside from the authority contained in any other law. 1/

In presenting this conference report to the House for its action, Representative Cooper quoted the above-quoted section and then stated:

> This means that if the President should institute a stockpile program which would successfully preserve the essential domestic producing facilities in a sound condition and the threat to the national security from increasing imports would thereby be eliminated, there would be no necessity for limiting imports. The President would not only retain flexibility as to the particular measures which he deems appropriate to take, but, having taken action, he would retain flexibility with respect to the continuation, modification, or suspension of any decision that had been made. 2/

ISSUE 2

> Were there no independent authority for the President to take such actions, would stockpiling and removal from GSP satisfy the requirements of Section 232 of the Act in this case?

If no independent authority existed, the stockpile could not be adjusted under the authority of section 232 because adjustment of the stockpile is not an action that "adjusts imports" within the meaning of section 232. The removal of GSP treatment could be accomplished using section 232 as authority.

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1/ Conference Report No. 745, 84th Cong., 1st Sess. (1955).

2/ 101 Cong. Rec. 8160 (1955).

STOCKPILING

Section 232 provides authority only for those actions that have an "initial and direct" impact on imports and does not authorize those that have a remote impact. 3/ An adjustment of the stockpile would reduce the dependence of the United States on imports of ferroalloys. It would not, however, have an initial and direct impact on imports. Accordingly, section 232 can not provide the legal basis for the stockpile adjusting action recommended in the report.

GSP

If the President indicates that his action of withdrawing GSP status for these ferroalloys was taken for the purpose of adjusting imports to remove a threat to the national security, such action could be considered an action taken "to adjust imports" under the authority of section 232. The existence of independent authority to take such action under the Trade Act does not preclude the use of section 232.

Under section 504(a) of the Trade Act of 1974, the President has the authority to withdraw GSP (i.e. duty-free) treatment from any article. This authority is independent of section 232. As stated in the response to Issue I, section 232 does not impair any authority the President may have under another law. He may exercise that authority wholly aside from the authority contained in section 232. Conversely, action under section 232 may be taken wholly aside from the authority contained in any other law.

The withdrawal of GSP has the effect of increasing or restoring the duty to TSUS Column 1 rates, and is clearly an action that has an "initial and direct" impact on imports.

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3/ FEA v. Algonquin SNG, Inc., 426 U.S. 548 (1976); Independent Gasoline Marketers Counsel v. Duncan, 492 Fed. Supp. 614 (D.C.D.C. 1980).

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September 10, 1982

VIA MESSENGER

MEMORANDUM FOR SHERMAN E. UNGER
GENERAL COUNSEL
DEPARTMENT OF COMMERCE

FROM: FRED F. FIELDING Orig. signed by FFF
COUNSEL TO THE PRESIDENT

SUBJECT: Ferroalloy Investigation

Subsequent to the transmittal of the August, 1982 Department of Commerce Investigative Report (the "Commerce Report") by Secretary Baldridge to the President, on the above-referenced subject, discussions and meetings were held among lawyers from the interested Federal departments and agencies to resolve, from a legal perspective, the options available to the President with respect to the recommendations contained therein.

There would appear to be at least one unresolved legal issue remaining. I would, therefore, appreciate your response to the following questions:

1. If the President accepts the findings of the Commerce Report, the Trade Expansion Act of 1962, as amended, (the "Act") obligates him to "take such action, and for such time as he deems necessary to adjust the import of such article and its derivative so that such imports will not threaten to impair the national security." If the President were to take the recommended actions to upgrade the chromite and manganese ore currently held in the National Defense Stockpile and to remove the GSP for high carbon ferrochromium under the separate and independent authorities of the Strategic and Critical Materials Stock Piling Act of 1979 and the Trade Act of 1974, respectively, would such action constitute action to adjust imports under Section 232 of the Act?

2. Were there no independent authority for the President to take such actions, would stockpiling and removal from GSP satisfy the requirements of Section 232 of the Act in this case?

Inasmuch as this matter is expected to come before the President for consideration in the immediate future, I would appreciate a response from your office by close of business, Monday, September 13, 1982.

Thank you.

GENERAL COUNSEL OF THE
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Washington, D.C. 20230

SEP 8 1982

MEMORANDUM TO H. P. GOLDFIELD
Associate Counsel to the President

FROM: Irving P. Margulies
Deputy General Counsel

SUBJECT: Ferroalloy Investigation

At our meeting of August 27, it was the consensus of the group (Justice, Commerce, the U.S. Trade Representative, and the National Security Council) that the remedies recommended to satisfy the positive findings made in the Ferroalloy Report, submitted to the President pursuant to Section 232 of the Trade Expansion Act of 1962, were authorized by the Act. You have asked us to address the following issue:

> If, by independent action and under separate authority, the President implements the two remedial actions (stockpile and GSP removal) recommended in the section 232 report, can he then either take no action on the report or return the report to Commerce for further consideration in light of the remedies taken?

Our response, below, addresses only this legal issue and does not address any policy implications that might arise from it.

When the President receives a report containing a positive finding, Section 232 directs him either (i) to take action to adjust imports, and for such time, as he deems necessary, or (ii) to reject the positive finding by determining that imports do not threaten to impair the national security. He is not compelled to take any action within a particular time frame. He has broad authority as to the remedy that he may impose, when to impose it, and as to the time that such remedy shall remain in effect.

Moreover, because section 232 is a continuing authority and because actions thereunder are to be continuously monitored, the President may at any time, even before taking action, take into consideration changed circumstances or additional information that is relevant to the findings as well as the proposed remedies. Nothing precludes the President from requesting that the Department perform the monitoring and updating. In fact, as expressed in an opinion of the Attorney General the "statutory scheme presumes that the

President will monitor, through the appropriate agency . . ., the factual situation and the effectiveness of his measures in meeting it." 43 Op. Att'y. Gen. 1 (1975). This constant monitoring assumes not only a review of the factual circumstances to see if the remedy being employed is effective, but also a review whether the initial finding of threat to the national security remains valid.

In summary then, because section 232 of the Trade Expansion Act imposes no time limit on the President, he may delay acting on the report, and the positive finding, for as long as he deems necessary. Theoretically, he could delay action indefinitely. Similarly, the President is not precluded from returning the report to the Secretary of Commerce for such purposes as further investigation in light of changed circumstances or consideration of additional facts or factors. However, until such time as the President rejects the finding that the import of certain ferroalloys threatens to impair the national security, it remains in effect and continues to serve as a valid basis under which he may take import adjusting action under the authority of Section 232.

GENERAL COUNSEL OF THE
UNITED STATES DEPARTMENT OF COMMERCE
Washington, D.C. 20230

JUL 26 1982

MEMORANDUM FOR: Lionel H. Olmer
Under Secretary for
International Trade

FROM: Sherman E. Unger
General Counsel

SUBJECT: Issues Relating to Ferroalloy
Investigation Under Section 232

The draft report of the investigation under Section 232(b) of the Trade Expansion Act of 1962 (19 U.S.C. 1862) (herein referred to as Section 232) regarding imports of ferroalloys concludes that the imports of the following articles are threatening to impair the national security:

- high carbon ferrochromium
- high carbon ferromanganese

The report discusses various import adjustment options but recommends changes in the National Defense Stockpile ("NDS"): convert stockpiled chromite and manganese ore into high carbon ferroalloy products.

In connection with the draft report you have requested our views regarding three issues. The issues and our conclusions based on the attached analysis are as follows:

1. Whether a recommendation to modify the stockpile is an appropriate remedy in response to a positive finding under Section 232.

   The legislative history indicates that a decision to stockpile the ferroalloys in question using the authority of the Strategic and Critical Materials Stock Piling Act would be an appropriate action to satisfy a positive finding under Section 232. It should be noted that the remedy would not be implemented under authority given to the President under Section 232.

2. Whether the implementation of the stockpile option constitutes an "action proclaimed pursuant to . . . Section 232" within the meaning of Section 503(c)(2) of the Trade Act of 1974, thus making the articles in question ineligible for General System of Preferences (GSP) status.

   Because the stockpile option would be implemented under separate authority (i.e., the Strategic and Critical Materials Stockpile Act), and because it is not an import adjustment action, we are of the view that it would not constitute an action proclaimed under Section 232 for purposes of section 503(c)(2). But the issue is a close one and there is clearly a risk of a court challenge.

3. Whether the President can remove GSP status from ferroalloys under the authority of Section 232, notwithstanding his independent authority to remove such articles under Section 504(a) of the Trade Act of 1974.

   In our view, if the President indicates that his action of withdrawing GSP status for these ferroalloys was taken for the purpose of adjusting imports to remove a threat to the national security caused by imports, such action could be considered an action taken "to adjust imports" within the meaning of Section 232.

ATTACHMENT

## ANALYSIS

1. ISSUE: WHETHER A RECOMMENDATION TO ADJUST THE STOCKPILE IS AN APPROPRIATE REMEDY FOR A POSITIVE FINDING UNDER §232.

Section 232 of the Trade Expansion Act of 1962 (19 U.S.C. 1862) provides that following a finding by the Secretary that imports threaten to impair the national security, the President "shall take such action, and for such time as he deems necessary to adjust the import of such article and its derivative so that such imports will not threaten to impair the national security, unless the President determines that the article is not being imported into the United States in such quantities and under such circumstances as to impair the national security." This language suggests that any action taken by the President must be an action to adjust imports.

However, the legislative history of Section 232 indicates that adjustment of materials in the defense stockpile, using the authority of the Strategic and Critical Materials Stock Piling Act, 1/ is an appropriate action to remedy a positive finding under Section 232.

The President is given the broadest flexibility in determining what measures to use to react to a finding that imports threaten to impair the national security. In discussing the meaning of the term "take such action . . . as he deems necessary" the report of the Committee which drafted the provision stated that the President is authorized to take "whatever action is necessary to adjust imports". 2/ In commenting on the section, Senator Milliken, a drafter of the provision, stated that:

> It grants to the President authority to take whatever action he deems necessary to adjust imports . . . . He may use tariffs, quotas, import taxes, or other methods of import restrictions. 3/

Senator Bennett, again a member of the drafting Committee, commented on the powers the President could give to remedy a threat, saying that " . . . they will have at their command the entire scope of tariffs, quotas,

restrictions, stockpiling, and any other variation of these programs." 4/ (emphasis added)

Support for the use of a stockpile action to remedy a positive Section 232 finding comes from the Conference Report in support of the Trade Agremeent Extension Act of 1955. In dealing with the power of the President to remedy a positive finding under Section 232 the conferees stated that:

> [I]t is the understanding of all the conferees, both House and Senate, that it is not intended to, and does not, diminish or impair any authority the President may have under other law. For example, it was emphasized that if the President sees fit to stockpile critical materials under any other law, that action can be taken wholly aside from the authority contained in this amendment. Conversely action taken under the new provision may be taken wholly aside from the authority contained in any other law. 5/

In presenting this conference report to the House for its action, Representative Cooper quoted the above-quoted section and then stated:

> This means that if the President should institute a stockpile program which would successfully preserve the essential domestic producing facilities in a sound condition and the threat to the national security from increasing imports would thereby be eliminated, there would be no necessity for limiting imports. The President would not only retain flexibility as to the particular measures which he deems appropriate to take, but, having taken action, he would retain flexibility with respect to the continuation, modification, or suspension of any decision that had been made. 6/

Thus, the legislative history of Section 232 clearly indicates that the adjustment of materials deemed strategic and critical by use of independent authority other than Section 232, such as the Strategic and Critical Materials-Stock Piling Act, would be an acceptable method of satisfying a positive finding under Section 232.

In addition, the declaration of policy in the Stock Piling Act supports the use of a stockpile remedy as an appropriate method to alleviate a threat by imports to the national security. The purpose of the stockpile is to "provide for the acquisition and retention of stocks of these [strategic and critical] materials and to encourage the conservation and development of sources of these materials within the United States, and thereby decrease and prevent wherever possible a dangerous and costly dependence of the United States upon foreign nations for supplies of these materials in times of national emergency." 7/ Thus, the objectives of both the Stock Piling Act and Section 232 are the same, i.e., decrease dependence on foreign supplies.

An action taken to adjust the stockpile was contemplated by the Congress in the legislative history of Section 232 as an appropriate action for the President to take in fulfilling his broad statutory charge to insure that the national security is not impaired. Such action would be taken using the independent authority of the Strategic and Critical Materials Stock Piling Act.

It should be noted that the President, having implemented the stockpile conversion program is not precluded from invoking 232 authorities to adjust imports directly (e.g. quotas, tariffs, or other appropriate import actions). 8/

2. ISSUE: WHETHER THE IMPLEMENTATION OF THE STOCKPILE OPTION CONSTITUTES AN "ACTION PROCLAIMED PURSUANT TO . . . SECTION 232" WITHIN THE MEANING OF §503(c)(2) OF THE TRADE ACT OF 1974, THUS MAKING THE ARTICLES IN QUESTION INELIGIBLE FOR GENERAL SYSTEM OF PREFERENCES (GSP) STATUS.

Because the stockpile option would be implemented under separate authority (i.e., the Strategic and Critical Materials Stock Piling Act), and because it is not an import adjustment action, we are of the view that it would not

constitute an action proclaimed under section 232 for purposes of section 503(c)(2). But the issue is a close one and there is clearly a risk of a court challenge.

Section 503(c)(2) of the Trade Act of 1974 reads as follows:

> No article shall be an eligible article for purposes of this title [GSP] for any period during which such article is the subject of any action proclaimed pursuant to section 203 of this Act or section 232 or 351 of the Trade Expansion Act of 1962.

The application of this section would appear to be limited by its terms to articles that are the subject of an action implemented (by proclamation) under the authority of section 232. Thus, actions taken under independent authority (such as the Stragetic and Critical Materials Stock Piling Act), albeit as a remedial measure to the national security threat caused by imports, would not be subject to the application of section 503(c)(2). However, the legislative history of the section tends to suggest a broader application.

When passed initially by the House, section 503(c)(2) contained no reference to section 232; it applied only to

503(c)(2), and that, at most, it probably intended the section to apply only to actions that involved import adjustments. This view is supported by the fact that the other type of action included in section 503(c)(2) (i.e., escape clause) is an import relief action. Moreover, as noted above, the plain meaning of section 503(c)(2) suggests that it applies only to action implemented under the authority of Section 232. The stockpile action would be taken under independent authority. We would thus conclude that section 503(c)(2) applies only to actions implemented under the authority of Section 232.

3. ISSUE: WHETHER THE PRESIDENT CAN REMOVE GSP STATUS FROM FERROALLOYS UNDER THE AUTHORITY OF SECTION 232, NOTWITHSTANDING HIS INDPENDENT AUTHORITY TO REMOVE SUCH ARTICLES UNDER SECTION 504(a) OF THE TRADE ACT OF 1974.

In our view, if the President indicates that his action of withdrawing GSP status for these ferroalloys was taken for the purpose of adjusting imports to remove a threat to the national security caused by imports, such action could be

considered an action taken "to adjust imports" within the meaning of Section 232.

Under section 504(a) of the Trade Act of 1974, the President has the authority to withdraw GSP (i.e. duty-free) treatment from any article. This authority is independent of Section 232. Section 232 does not impair any authority the President may have under another law. He may exercise that authority wholly aside from the authority contained in Section 232. Conversely, action under Section 232 may be taken wholly aside from the authority contained in any other law. 10/ Thus, in taking an action to adjust imports, for purposes of Section 232 the President is not limited solely to utilizing his authority under Section 232.

However, to relate an action taken under another statutory authority to Section 232, that action should be one that "adjusts imports." The withdrawal of GSP has the effect of increasing or restoring the duty to TSUS Column 1 rates, and is clearly an action that directly relates to adjusting imports.

One additional step is needed. In order to establish the nexus with Section 232, the President should indicate that the action taken under such other law was for the purpose of adjusting imports threatening the national security.

There is still another basis for supporting the conclusion that removal from GSP status constitutes an action under Section 232. Since the removal of GSP is a direct import adjusting action (i.e., tariff increase), the President has the authority under Section 232 itself to accomplish the removal, irrespective of the existence or non-existence of separate authority. Thus, the President could effect the GSP removal without necessarily relying or acting under the authority of section 504(a).

FOOTNOTES

1/50 U.S.C. 98.

2/S. Rep. No. 232, 84th Cong., 1st Sess. 4 (1955).

3/101 Cong. Rec. 5299 (1955). For a development of the legislative history of 232 including reference to Senator Milliken's statement see Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548 (1976).

4/101 Cong. Rec. 5588 (1955).

5/Conference Report No. 745, 84th Cong., 1st Sess. (1955).

6/101 Cong. Rec. 8160 (1955). 17/50 U.S.C. 98.

7/50 U.S.C. 98.

8/43 Op. Att'y Gen. 1 (1975); See also remarks of Mr. Cooper 101 Cong. Rec. 8161 (1955).

9/S. Rep. No. 93-1298, 93rd Cong., 2nd Sess. (1974).

10/Supra N. 5.