THE WHITE HOUSE

WASHINGTON

Date 12-14-00

To: Karen Tramontano

From: The Staff Secretary (Adam Rosman)

Karen -

As we discussed. This is the USTR package. The NEC contact is Rob Westcott.

I will follow-up with you later.

Adam

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'00 DEC 14 PM3:41

ACTION

MEMORANDUM FOR THE PRESIDENT

THROUGH: THE EXECUTIVE CLERK

FROM: SAMUEL BERGER
GENE SPERLING

SUBJECT: Section 337 Orders on Certain Cigarettes and Their Packaging

Purpose

Decide by December 15, 2000 whether to take action in response to two U.S. International Trade Commission (ITC) orders.

Background

Under the authority of Section 337 of the Tariff Act of 1930 (Act), the ITC issued two orders in the investigation Certain Cigarettes and Packaging Thereof.

The Act provides remedies against imports of products that are unfairly traded, including products that infringe U.S. intellectual property rights. In this case, the ITC determined that a general exclusion order and a cease and desist order are appropriate to prohibit the unauthorized re-importation and re-sale of cigarettes and packaging manufactured by the Brown & Williamson Tobacco Corporation exclusively for exportation and sale outside of the United States. The ITC found that these re-imported goods infringe upon trademarks held by Brown & Williamson and that they are materially different from cigarettes manufactured by the firm for sale in the U.S. market.

In making its decision, the ITC applied the relevant statutory criteria and considered appropriate information, including policy concerns such as the need to reduce the availability of low-cost cigarettes to underage smokers; protect domestic consumers from being deceived by cigarettes that may not comply fully with U.S. health and safety standards; stop the circumvention of payments to states under the Master Settlement

cc: Vice President
Chief of Staff

Agreement; and support legislative and regulatory efforts to curb pervasive importation and sale of gray market cigarettes.

You signed a law on November 9, 2000 that prohibits the importation of all so-called "gray market" cigarettes such as these, meaning that the ITC orders, which would block the importation of Brown & Williamson's gray market cigarettes, will have no practical effect unless the law is repealed. The main considerations for your decision, therefore, are what effect it might have on the perceived autonomy of an independent agency like the ITC, the precedent it might set for future gray market import cases, and the optics of a decision affecting the sensitive policy topic of cigarettes.

<u>Options</u>

You have three options:

Option 1: Allow the ITC orders to take effect (either by doing nothing or notifying the ITC that you approve its orders).

You may refrain from taking any action, in which case ITC's orders automatically become final on December 15, 2000, the end of the 60-day review period, or you may formally approve the ITC orders.

- Precedent is on the side of doing nothing in these cases and allowing ITC rulings to become final. During your Administration, 21 ITC cases have come to you for a decision and all 21 times you took no action, allowing the rulings to stand.

- In the one gray market case during your Administration, you took no action in a matter concerning certain agricultural tractors in 1997.

Option 2: Disapprove of the ITC orders for "policy reasons".

You may disapprove the ITC's decision for "policy reasons". The main grounds for such a decision might include:

- Gray market imports of cigarettes will remain prohibited even with a disapproval because of the November 9 law.

- The ITC orders could create a precedent and encourage similar attempts by other companies to restrict the importation of gray market goods. This could limit the important function that gray market goods play in providing consumers -- especially low-income consumers -- with greater choice and lower prices when they shop.

- If these orders stand, the burden and costs to Customs could be high. Indeed, were it not for the November 9 legislation that provides a more sweeping, but easier to administer, barrier to the importation of cigarettes, the orders might require Customs to conduct extensive tests of cigarettes for blend, flavor, moisture, menthol and other characteristics.

- While disapproval could have the appearance of modifying your policy on cigarettes, DPC believes that if the disapproval notice included the explanation attached at Tab A, this would not be seen as a change in your anti-smoking policy.

Option 3: Let the ITC orders stand and issue a statement that this does not set a precedent that re-imports in general should be blocked.

You could allow the ITC orders to become final (either by taking no action or by notifying the ITC that you approve of the orders), and issue a statement that you do not consider this to represent a precedent that re-imports in general should be blocked.

- This option is a modified version Option 1, but is intended to allay the concerns about precedent setting on gray market goods described in Option 2.

- Proposed language for such a statement is included in the attachment at Tab B.

Agency Positions

USTR and the majority of the interagency Trade Policy Staff Committee support Option 1. They encourage you to take no action on the matter and simply allow the ITC orders to become final automatically. USTR has concerns about your overruling an independent agency such as the ITC, especially, as here, where such action would have no practical effect. They note that you have never disapproved an ITC determination and that the last Presidential disapproval was in December 1987. Finally, USTR believes that cigarettes would represent a very unattractive, symbolic case for what would be your only disapproval.

Treasury and CEA recommend Option 2. They believe that allowing the ITC order to take effect, even with a qualifying statement, will set a precedent that will damage the interests of consumers in particular and the national economic interest overall. They argue that precisely because such a disapproval would have no practical effect, this would be a good time to signal that consumer interests should be supported. Finally, these agencies take comfort from DPC's view that the negative optics of your disapproving orders to halt re-importation of cigarettes are manageable.

We favor Option 3. We agree with USTR that the precedent of allowing ITC decisions to stand is important. Also, despite DPC's view, we have some lingering concerns that a disapproval could be seen as counter to your strong anti-smoking policy. However, we also believe that there are important economic merits to the Treasury and CEA position. Therefore, we recommend that you issue a statement that clarifies that the orders should not be interpreted as setting a precedent for the treatment of other gray market imports. This might help to discourage other companies from bringing similar suits and would affirm our view that in general the fewest trade restrictions are best for overall U.S. economic welfare.

RECOMMENDATION

That you select Option 3, thereby allowing the ITC Section 337 orders to take effect automatically after December 15, 2000, and that you also authorize us to issue the statement included at Tab B.

Option 1: ________________ Allow ITC Orders to Take Effect

Option 2: ________________ Disapprove ITC Orders

Option 3: ________________ Allow ITC Orders to Stand and Issue Statement (Recommended)

Attachments

Tab A	Contingency Statement on Disapproving the ITC Orders
Tab B	Contingency Statement on Allowing the ITC Orders to Become Final
Tab C	Memorandum from USTR Ambassador Barshefsky
Tab D	Trade Policy Staff Committee Evaluation
Tab E	Treasury Comments on ITC Exclusion Order on Gray Market Cigarettes

STATEMENT BY THE PRESIDENT
DISAPPROVING THE U.S. INTERNATIONAL TRADE COMMISSION ORDERS
EXCLUDING CERTAIN CIGARETTES

December 15, 2000

Today I am disapproving the U.S. International Trade Commission's exclusion order and cease and desist order on certain Brown & Williamson cigarettes (ITC No. 337-TA-424). This disapproval will prevent a damaging precedent from being set, to the detriment of American consumers, especially those of modest means. If these orders were allowed to take effect, they would encourage the issuance of similar orders in the future, the effect of which would be to progressively prohibit the importation of so-called gray market goods into the United States.

This decision has no effect on this Administration's health or cigarette policies, and will not increase in any way anyone's ability to import gray market cigarettes into the United States. Those imports already are prohibited by a law that I signed just over a month ago. That law is broader and stronger than the order I am disallowing today, and therefore represents a more effective barrier to the importation of gray market cigarettes.

It thus remains this Administration's strong policy to reduce the availability of low-cost cigarettes to underage smokers, to control the importation and distribution of cigarettes and to assure that all cigarettes fully comply with U.S. health and safety standards.

STATEMENT BY THE PRESIDENT
ALLOWING THE U.S. INTERNATIONAL TRADE COMMISSION ORDERS
EXCLUDING CERTAIN CIGARETTES TO BECOME FINAL

December 15, 2000

Today I am allowing the U.S. International Trade Commission's exclusion order and cease and desist order regarding certain Brown & Williamson cigarettes (ITC Case Number 337-TA-424) to stand. Together with the legislation (Public Law 106-476) that I signed on November 9, 2000, these orders will ensure that no gray market cigarettes are imported into the United States -- including not only the two brands covered under the ITC orders but *all* brands of gray market cigarettes as provided in the November legislation. In the same way that the report language for the November legislation made clear that it was in no way intended to alter current policies with respect to other gray market goods, I want to make clear that my allowing these orders to take effect should not be interpreted as setting a precedent for the treatment of other gray market goods.

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EXECUTIVE OFFICE OF THE PRESIDENT
THE UNITED STATES TRADE REPRESENTATIVE
WASHINGTON, D.C. 20508

MEMORANDUM FOR THE PRESIDENT

FROM: Ambassador Charlene Barshefsky Charlene

SUBJECT: Policy Review of Section 337 Orders

Issue:

You must decide by December 15, 2000, what action, if any, you will take regarding a decision by the U.S. International Trade Commission ("USITC") to issue a general exclusion order and a cease and desist order under the authority of section 337 of the Tariff ACT of 1930 in investigation number 337-TA-424, Certain Cigarettes and Packaging Thereof. I recommend that you take no action with respect to these orders, thus allowing them to become final at the end of the 60-day review period. The interagency Trade Policy Staff Committee ("TPSC") supports this recommendation, with the exception of Treasury and the CEA.

Statutory Authority

You may disapprove the USITC orders for policy reasons. The reasons may include the foreign policy implications of the orders, as well as the effect of the orders on U.S. consumers, public health and welfare, competitive conditions in the U.S. economy, and the production of like or directly competitive items in the United States. This Administration has never disapproved a USITC determination; the last Presidential disapproval was in December of 1987.

You may also formally approve the USITC orders or simply take no action with respect to them. If you approve the orders, they will become final upon notification of your approval to the USITC. If you decide to take no action, the orders will become final automatically upon the expiration of the 60-day review period. Almost all section 337 orders have become final through the expiration of the 60-day review period without formal action on the President's part.

Discussion

Section 337 of the Tariff Act of 1930 provides remedies against imports of products that are unfairly traded, including products that infringe U.S. intellectual property rights. In this case, the USITC determined that a general exclusion order and a cease and desist order are appropriate to prohibit unauthorized *re-importation* and *resale* of cigarettes and packaging manufactured by Brown & Williamson in the United States that were originally sold by Brown & Williamson exclusively for exportation and sale outside of the United States. These cigarettes and packaging are "materially different" from the cigarettes manufactured by Brown & Williamson for sale in the U.S. market. In fact, a distinguishing feature of the cigarettes and packaging covered by the general exclusion order and the cease and desist order is that they are imported in packages marked or labeled "TAX EXEMPT. FOR USE OUTSIDE U.S."

In making its decision, the USITC applied the relevant statutory criteria and considered all appropriate information, including policy concerns such as the need to (1) reduce the availability of low-cost cigarettes to underage smokers; (2) reduce the exposure of U.S. smokers to cigarette formulations that may be more dangerous than domestic cigarettes and/or do not contain required labeling; (3) stop the circumvention of payments to the states under the Master Settlement Agreement, which provides funds that states can use for public purposes; (4) support legislative and regulatory efforts to curb pervasive importation and sale of gray market cigarettes; and (5) protect domestic consumers from being deceived by cigarettes that may be materially different in content and quality control, or that may not comply fully with U.S. health and safety standards. TPSC support for the USITC determination rests similarly on these policy reasons.

Treasury and the CEA, however, argue that the orders are unnecessary in light of subsequent Congressional action (P.L. 106-476, section 4001 of which prohibits the importation of all cigarettes with U.S. trademarks unless the importation is authorized by the U.S. trademark holder), and that the orders have the potential to be a very poor precedent for U.S. consumers. With regard to their first point, it is important to recognize that: (1) Section 337 affords a remedy even when other legal remedies are available; (2) to the extent P.L. 106-476 provides the same relief at the border, the exclusion order places no additional administrative burden on Customs (and should the statute be repealed, the exclusion order would still be in place to provide relief); and (3) P.L. 106-476 does not duplicate the remedy afforded in the USITC's cease and desist order. As for Treasury and the CEA's latter point, I would simply note that no new precedent is set by the USITC orders. Indeed, the orders are not intended to set a precedent. If anything, the USITC's determination is based on previously-established precedent, *i.e.*, to the extent there is a conflict between Treasury's policy on gray market goods and the orders in this case, the same was true in 337-TA-380 (*Certain Agricultural Tractors Under 50 Power Take-Off Horsepower*, 1997), on which the President took no action. Moreover, the USITC determination in that case, including the choice of remedy, was later affirmed in <u>Gamut Trading Co. v. USITC</u>, 200 F.3d 775 (Fed. Cir. 1999).

<u>Recommendation</u>

I recommend, with the support of the majority of the TPSC agencies, that you take no action to approve or disapprove the USITC general exclusion order and cease and desist order, thereby letting the orders become final at the end of the 60-day review period. The products at issue are not essential to the public health or welfare. There are no foreign policy or national security implications of the orders, and there are ample non-infringing substitutes on the U.S. market.

<u>Action of the Recommendation</u>

Approve____________________

Disapprove____________________

More Information Required________________

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE
WASHINGTON, D.C. 20508

TRADE POLICY STAFF COMMITTEE PAPER

Section 337: Certain Cigarettes and Packaging Thereof

ISSUE:

Whether the President should approve, disapprove, or take no action with respect to a general exclusion order and a cease and desist order issued by the U.S. International Trade Commission ("USITC") in investigation number 337-TA-424, Certain Cigarettes and Packaging Thereof. The President must act by December 15, 2000.

RECOMMENDATION:

The majority of the TPSC agencies (Agriculture, Commerce, Defense, Energy, EPA, HHS/FDA, Interior, Justice, Labor, OMB, State, and USTR) recommend that the President take no action with respect to the USITC determination, thus allowing the general exclusion order and the cease and desist order to become final at the end of the 60-day review period on December 15, 2000. Treasury and the CEA dissent from this recommendation, and instead recommend that the President disapprove the USITC determination. Treasury has provided a paper supporting this view (Attachment 1). A USTR paper commenting on Treasury's concerns is also attached (Attachment 2).

PRIVATE SECTOR VIEWS:

USTR has received no private sector views on this issue.

BACKGROUND:

On October 16, 2000, the USITC referred to the President for policy review the USITC's decision to issue (1) a general exclusion order prohibiting the entry of certain cigarettes and packaging manufactured by Brown & Williamson Tobacco Corporation ("Brown & Williamson") that infringe upon one or more of eleven federally-registered U.S. trademarks held by Brown & Williamson, that dilute one or more of such trademarks, or that falsely represent Brown & Williamson as the source of these certain cigarettes and packaging; and (2) a cease and desist order directed to one company, PTI, Inc., doing business as Ampac Trading, prohibiting the importation, sale for importation, or sale in the United States after importation of these certain cigarettes and packaging.

The underlying investigation was initiated pursuant to a petition filed by Brown & Williamson alleging unfair acts in violation of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. 1337), in the unauthorized *re-importation* and *resale* of cigarettes and packaging manufactured by Brown & Williamson in the United States that were then sold by Brown & Williamson exclusively for exportation and sale outside of the United States. These cigarettes and packaging are "materially different" from the cigarettes manufactured by Brown & Williamson for sale in the U.S. market.[1] Indeed, a distinguishing feature of the cigarettes and packaging covered by the general exclusion order and the cease and desist order is that they are imported in packages marked or labeled "TAX EXEMPT. FOR USE OUTSIDE U.S."[2]

In its petition, Brown & Williamson named four firms as respondents.[3] All four respondents, however, were terminated from the USITC investigation on the basis of consent orders. Prior to these terminations, PTI, Inc. intervened in the investigation. Subsequently, on June 22, 2000, the presiding Administrative Law Judge ("ALJ") issued her final initial determination, finding a violation of section 337 by PTI, Inc. On October 16, 2000, the USITC determined that the appropriate remedy in this investigation is a general exclusion order and a cease a desist order directed to PTI, Inc., that the public interest factors enumerated in sections 337(d) and 337(f) of the Tariff Act of 1930 do not preclude the issuance of either the general exclusion order or the cease and desist order, and that a bond of seven dollars ($7.00) per carton of the certain cigarettes and packaging at issue is required during the Presidential review period.

With respect to the remedy, the USITC adopted the ALJ's recommendation to issue a general exclusion order and cease and desist order. The USITC determined that a general exclusion order is necessary in light of evidence of a widespread pattern of unauthorized importation of the certain cigarettes and packaging at issue, and of "certain business conditions" from which one might reasonably infer that foreign manufacturers other than the respondents may attempt to enter the U.S. market with the infringing product. For instance, in the order itself, the USITC noted the difficulty in identifying the source of the infringing products.[4] In addition, the order provides that it does not apply to cigarettes and packaging that are imported by, under license from, or with the permission of the trademark owner; accompanying a person arriving into the U.S. for personal use; or otherwise allowed by law.

With respect to the effect of such remedy on public interest, the USITC noted that no evidence was provided suggesting that an adequate supply of cigarettes designed for the domestic market cannot be produced. Instead, the USITC received numerous comments from *inter alia* Members of Congress, the National Association of Attorneys General, and the National Grocers Association, all suggesting that the remedy recommended is in fact in the interest of the public.

PRESIDENTIAL AUTHORITY

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[1] USITC Letter to U.S. Customs on the General Exclusion Order, pp. 2.

[2] Id.

[3] Allstate Cigarette Distributors, Inc. ("Allstate"), Dood Enterprises, Inc. ("Dood"), Prestige Stirage and Distribution, Inc. ("Prestige"), and R.E. Tobacco Sales, Inc. ("R.E. Tobacco").

[4] USITC General Exclusion Order, pp. 1.

Pursuant to section 337(j), the President has 60 days to decide whether to disapprove a USITC determination for policy reasons. In making this decision, the President usually considers the effect of the determination on the public health and welfare, competitive conditions in the U.S. economy, the production of like or directly competitive items in the United States, and U.S. consumers. This Administration has never disapproved a USITC determination; the last Presidential disapproval was in December of 1987.

The President may also approve a USITC determination, or decline to take any action in the 60-day review period. Almost all section 337 orders have become final through the expiration of the 60-day review period without formal action by the President. In these cases, the USITC's determinations become final upon the expiration of the 60-day review period. The statute does not permit presidential modification of a USITC's determination.

CONCLUSION

The majority of the TPSC agencies consider that no equitable or other policy reasons warrant disapproval of the general exclusion order or cease and desist order. The USITC considered all the appropriate information in making its decision and applied all relevant statutory criteria. There are no procedural irregularities or other problems to call the grant of relief into question.

<u>Attachment 1</u>: Treasury's Paper Recommending that the President Disapprove the USITC Orders on Cigarettes

The ITC has issued an exclusion order that would prohibit the importation of certain cigarettes without the permission of the U.S. trademark holder. Treasury believes that this order has the potential to be a very poor precedent for U.S. consumers. Moreover, it is unnecessary in light of subsequent Congressional action that superseded the ITC order. For these reasons, the order should be disallowed.

Congress passed, and on November 9, 2000 the President signed, Public Law 106-476. Section 4001 of that Act prohibits the importation of all cigarettes with U.S. trademarks unless the importation is authorized by the U.S. trademark holder. In addition, this law prohibits the importation and sale for domestic consumption of any U.S. manufactured tobacco products that is labeled for export, unless they have been repackaged and relabeled by the original U.S. manufacturers; Customs would enforce this strictly on the basis of the label. As such, this Act would envelop the above ITC exclusion order, as well as any cease and desist order related thereto. Congress enacted this law in response to the unique circumstances that pertained to the importation of gray market cigarettes. Among the unique circumstances considered by Congress were that such cigarettes: 1) may not comply fully with U.S. health and safety standards, and 2) may displace sales of domestically manufactured cigarettes that are subject to the Master Settlement Agreement (MSA) that certain states reached with U.S. cigarette manufacturers. Under the MSA, the states in the agreement receive payments from the manufacturers based on the quantity of cigarettes that are shipped to cigarette wholesalers. Imports of gray-market cigarettes, which increased sharply after the MSA was reached, cut into payments to the states.

Congress made clear that it did not intend to set a precedent in PL 106-476 for prohibiting importation of other gray market goods. The report stated, *inter alia*, that:

> "requiring the U.S. trademark holder to consent to the importation of [cigarettes bearing their trademark] is necessary to ensure full compliance with the restrictions applicable to the unique circumstances of gray market cigarettes...In this regard, however, it should be noted that the gray market restriction provisions of this bill are crafted for the special circumstances of tobacco. This provision, however, is not intended to alter current policies with regard to other gray-market goods."

Current Administration policies regarding gray market goods (other than cigarettes) recognize that such goods increase competition and benefit consumers through lower prices, while the absence of unnecessary market restrictions promotes open trade. In fact, most gray market goods ultimately are sold through discount retailers, to the benefit of consumers who rely on lower prices to stretch their incomes. Excluding gray market goods would likely lead to price discrimination against U.S. consumers.

In contrast to PL 106-476, the ITC order is crafted as a trademark protection measure. Permitting it to go into effect would set a precedent for excluding other trademarked gray-market goods that do not have "the unique circumstances of gray market cigarettes." It would also conflict with Customs regulations, established a century ago, that do not make authorization by the U.S. trademark holder a requirement for importation of most legally trademarked goods. In fact, there is no similar Congressional prohibition on importation of gray market goods for any product other than gray market cigarettes.

Prior to promulgating this exclusion order, ITC staff, under its usual informal procedures, consulted with Customs regarding Customs' enforcement of the draft order. Customs advised ITC that the order would present serious enforcement problems. If Customs were required to enforce the exclusion order, it would require Customs to examine cigarettes potentially subject to the order to determine material differences in physical characteristics such as tobacco blend, flavor, moisture, menthol level, and packaging, and material differences. Customs does not possess the resources to make such determinations on all relevant shipments. Moreover, this decision is contrary to the 1985 Presidential decision in the Duracell Battery case, where the President disallowed an ITC order against gray market batteries because the ITC "should not exercise jurisdiction in those instances where the resolution of the allegations specifically resides with another federal agency [Customs]." Finally, if this exclusion order is allowed to stand, similar gray market protection will be sought for other products and these future potential uses would further strain Customs' limited budget resources.

<u>Attachment 2</u>: Comments Responding to Treasury's Paper Recommending that the President Disapprove the USITC Orders on Cigarettes

TREASURY ARGUMENT #1: The USITC orders are unnecessary in light of subsequent Congressional action (P.L. 106-476) that superseded the orders.

- <u>Section 337 affords a remedy even when other legal remedies are available</u>: Both P.L. 106-476 and pre-existing temporary ATF regulations may appear to duplicate the relief afforded by the USITC's general exclusion order in this case. However, whether they are actually coextensive with the USITC's exclusion order will depend on how they are interpreted, whether they are challenged in court, etc. Nonetheless, 19 U.S.C. § 1337(a)(1) provides that violations of this section "shall be dealt with, <u>in addition to any other provision of law</u>, as provided in this section." The USITC has consistently interpreted this to mean that if a complainant proves its entitlement to relief under section 337, the USITC should not deny the complainant a remedy even though another remedy (such as a district court injunction) affords substantially the same relief.

- <u>To the extent P.L. 106-476 provides the same relief at the border, the exclusion order places no additional administrative burden on Customs</u>: If the remedies are coextensive, any actions Customs takes to enforce the statute will be sufficient to enforce the exclusion order. No separate action will be needed. The USITC's exclusion order will effectively be dormant as long as the statute is in effect. Should the statute be repealed, the exclusion order would then take effect.

- <u>Even if separate enforcement action were required under the exclusion order, no testing by Customs is necessary</u>: The USITC stated in its opinion and in the letter it sent to Customs IPR Branch that the infringing cigarettes can be easily identified by their labels and packaging; therefore, Customs would not be required to test the tobacco blend, flavor, moisture, menthol level, etc. It would only need to examine the packaging of the product in order to identify cigarettes that fall within the exclusion order.

- <u>P.L. 106-476 does not duplicate relief afforded in the USITC's cease and desist order</u>: The new statute and ATF regulations both act at the border. On the other hand, the cease and desist order prohibits intervener PTI, which claims to be the largest U.S. dealer in re-imported cigarettes, from selling any infringing cigarettes already stockpiled <u>in</u> the United States (or any that may later elude Customs at the border). If the President disapproves the USITC's determination in this case, this disapproval would void the cease and desist order as well as the exclusion order.

TREASURY ARGUMENT #2: The USITC orders have the potential to be a very poor precedent for U.S. Consumers.

- <u>The orders are not intended to set a precedent; if anything, the USITC's determination is based on previously-established precedent</u>: To the extent there is a conflict between Treasury/Customs' policy on gray market goods and the Commission's exclusion order in this case, the same was true in 337-TA-380 (*Certain Agricultural Tractors Under 50 Power Take-Off Horsepower*), on which the President took no action.[1] The USITC determination in that case, including the choice of remedy, was later affirmed in Gamut Trading Co. v. USITC, 200 F.3d 775 (Fed. Cir. 1999).

- There is no conflict between the USITC orders and Customs regulations: In fact, Customs and the USITC act under distinct legal authority. Treasury/Customs has regulations issued under section 526 of the Tariff Act of 1930 (19 U.S.C. § 1526) and section 42 of the Lanham Act (15 U.S.C. § 1124), which allow a trademark owner to register its mark and have gray market goods excluded, but only if the U.S. and foreign trademark owners are unrelated.[2] On the other hand, the USITC's determination is based on section 337 of the Tariff Act of 1930.[3] Thus, while Customs has discretion to interpret (and has interpreted through its regulations) statutes directed to its own enforcement authority, Customs' role under section 337 is limited to the enforcement of orders issued by the USITC pursuant to the USITC's statutory authority. Furthermore, Congress has expressly instructed that, when making determinations of patent, trademark, or copyright infringement under section 337, the USITC should apply the law in the same manner as it is applied by federal district courts. H.R. Rep. No. 100-40, at 158 (1987); S. Rep. No. 100-71, at 130 (1987). As such, the USITC followed federal court precedents, including Gamut Trading Co. v. USITC, in finding a violation of section 337 and imposing a remedy in this case.

- Like P.L. 106-476, the USITC orders take into account "the unique circumstances of gray market cigarettes": In making its determination, the USITC considered comments from various members of Congress, the National Association of Attorneys General, the National Grocers Association, etc., all of whom supported the orders by arguing that among other things they will (1) reduce the availability of low-cost cigarettes to underage smokers; (2) reduce the exposure of U.S. smokers to cigarette formulations that may be more dangerous than domestic cigarettes and/or do not contain required labeling; (3) stop the circumvention of payments to the states under the Master Settlement Agreement, providing funds that states can use for public purposes; (4) support legislative and regulatory efforts to curb pervasive importation and sale of gray market cigarettes; and (5) protect domestic consumers from being deceived by cigarettes that may be materially different in content and quality control, or that may not comply fully with U.S. health and safety standards. Thus, if the President disapproves the USITC determination, the public might perceive this as an indication of the Administration's lack of support for the above policy concerns.

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[1] This 1997 *Tractors* case superseded the *Duracell Battery* case cited by Treasury in its paper.

[2] If they are related, Customs will permit the gray market goods to enter, so long as the importer labels the goods as gray market goods in accordance with the regulations.

[3] The USITC's determination is also based indirectly on (i) a trademark infringement finding under section 32 of the Lanham Act (15 U.S.C. § 1114), and (ii) trademark dilution and unfair competition findings under section 43 of the Lanham Act (15 U.S.C. § 1125).

Treasury Comments on U.S. International Trade Commission Exclusion Order On Gray Market Cigarettes

The ITC has issued an exclusion order that would prohibit the importation of certain cigarettes (Lucky Strike and Kool export blends) without the permission of their U.S. trademark holder (Brown & Williamson). Treasury believes that this order is unnecessary in light of subsequent Congressional action that supersedes the ITC order. Moreover, the order has the potential to be a very poor precedent because its basis could be extended to other gray market products, raising prices and decreasing choice for U.S. consumers. For these reasons, the order should be disallowed.

Congress passed, and on November 9, 2000 the President signed, Public Law 106-476. Title IV of that Act, "The Gray Market Cigarette Compliance Act", prohibits the importation of *all* cigarettes with U.S. registered trademarks unless the importation is authorized by the U.S. trademark holder. In addition, this law prohibits the importation and sale for domestic consumption of any U.S. manufactured tobacco product that is labeled for export unless the product has been repackaged and relabeled by the original U.S. manufacturer. Customs would enforce this strictly on the basis of the label. As such, the Act subsumes the ITC exclusion order, as well as the cease and desist order related thereto.

Congress enacted the Gray Market Cigarette Compliance Act in response to the unique circumstances that pertained to the importation of gray market cigarettes. Among the unique circumstances considered by Congress were that such cigarettes: 1) may not comply fully with U.S. health and safety standards, and 2) may displace sales of domestically manufactured cigarettes that are subject to the Master Settlement Agreement (MSA) that certain states reached with U.S. cigarette manufacturers. Under the MSA, the states in the agreement receive payments from the manufacturers based on the quantity of cigarettes that are shipped to cigarette wholesalers. Imports of gray-market cigarettes, which increased sharply after the MSA was reached, cut into payments to the states.

Congress made clear that it did not intend to set a precedent in the Act for prohibiting importation of other gray market goods. The report stated, *inter alia*, that:

> "requiring the U.S. trademark holder to consent to the importation of [cigarettes bearing their trademark] is necessary to ensure full compliance with the restrictions applicable to the unique circumstances of gray market cigarettes...In this regard, however, it should be noted that the gray market restriction provisions of this bill are crafted for the special circumstances of tobacco. This provision, however, is not intended to alter current policies with regard to other gray-market goods."

Current Administration policies regarding gray market goods (other than cigarettes) recognize that such goods increase competition and benefit consumers through lower prices, while the absence of unnecessary market restrictions promotes open trade. In fact, most gray market goods ultimately are sold through discount retailers, to the benefit of consumers who rely on lower prices to stretch their incomes. Excluding gray market goods would enable larger companies more easily to price discriminate against U.S. consumers.

In contrast to PL 106-476, which relies on cigarette trademarks as a means of maintaining control over *all* cigarette sales and prices to achieve public health and safety objectives, the ITC order is crafted as a trademark protection measure for only two brands of cigarettes manufactured by one company. Permitting the order to go into effect would set a second precedent (in addition to the ITC's 1997 order on imported, used Kubota tractors) for excluding other kinds of trademarked gray-market goods. It would also conflict with Customs regulations, established a century ago, that do not make authorization by the U.S. trademark holder a requirement for importation of most legally trademarked goods. In fact, there is no similar Congressional prohibition on importation of gray market goods for any product other than gray market cigarettes. It also would conflict with Customs regulations that permit the importation of physically different gray market goods if properly labeled to prevent consumer confusion.

Prior to promulgating the exclusion order ITC staff, under usual informal procedures, consulted with Customs regarding Customs' enforcement of the draft order. The ITC staff stated in its opinion and in communications to the Customs Intellectual Property Rights Branch that the infringing cigarettes can be easily identified by their labels and packaging, and that therefore Customs would not be required to test the tobacco blend, flavor, moisture, menthol level, etc.--it would only need to examine the packaging of the product to identify cigarettes that fall within the exclusion order. Customs advised ITC that this view is not legally correct because the Administrative Law Judge's decision on which the order is based, ruled that the trademark infringement was based on a totality of factors, and that the ITC order cannot focus on then label alone.

Happily, after the order was issued, the passage of the Gray Market Cigarette Compliance Act removed the need for Customs to engage in the costly and extensive examination and testing of shipments of B&W cigarettes that would have been required by the order. However, if the order is allowed to stand, it will remain a precedent for other companies to seek orders for other products that would require Customs to examine and test gray market imports for specific physical material differences. Such examination and testing would present serious enforcement problems since Customs does not possess the resources to make such determinations on all relevant shipments.

Moreover, this order is contrary to the 1985 Presidential decision in the Duracell Battery case, where the President disallowed an ITC order against gray market batteries because the ITC "should not exercise jurisdiction in those instances where the resolution of the allegations specifically resides with another federal agency [Customs]."

In conjunction with the exclusion order the ITC also issued a cease and desist order directed to one tobacco importer, PTI, Inc., doing business as Ampac. That importer is not a manufacturer of tobacco products. A section of the Balanced Budget Act of 1997 that became effective January 1, 2000 provided that only tobacco manufacturers are permitted to re-import U.S. manufactured tobacco. Accordingly, the cease and desist order directed to PTI, Inc. was moot and meaningless upon issuance.

THE WHITE HOUSE

WASHINGTON

Date 12·14·00

To: Podesta

From: The Staff Secretary

NSC advises emergency refugee assistance needed ASAP.

Any comment?

43418

7369

THE WHITE HOUSE

WASHINGTON

December 13, 2000

ACTION

MEMORANDUM FOR THE PRESIDENT

'00 DEC 13 PM8:32

THROUGH: THE EXECUTIVE CLERK

FROM: SAMUEL BERGER LR for
CHARLES M. BRAIN CMB

SUBJECT: Presidential Determination on Emergency Refugee and Migration Assistance Fund Drawdown for Guinea, Serbia, Afghanistan, Democratic Republic of the Congo, the North Caucasus, and the Middle East

Purpose

Obtain your authorization to use up to $33 million from the U.S. Emergency Refugee and Migration Assistance (ERMA) Fund.

Background

Under the Migration and Refugee Assistance Act, you may authorize assistance from the ERMA Fund to meet "unexpected urgent refugee and migration" needs whenever you determine it is "important to the national interest" to do so.

The State Department recommends use of the Fund in the amount of up to $33,000,000 to address urgent refugee needs resulting from crises in Guinea, Congo, Serbia, Afghanistan, Chechnya, and the Middle East. In each region, as documented in the Statement of Justification (Tab B), tens of thousands of civilians are refugees affected by ongoing or recent conflict. The need for these funds is urgent and was not foreseen in the appropriation and programming of FY01 Migration and Refugee Assistance funds. The use of these funds will provide contributions to international and non-governmental organizations for assistance to the affected civilians.

cc: Vice President
Chief of Staff

In the coming weeks, the State Department will recommend additional use of the Fund to meet continuing refugee assistance needs in the Balkans.

The current balance of the ERMA Fund is $164,538,208. If this authorization for use of the fund is approved, $131,538,208 will remain. This Presidential Determination should be signed as soon as possible so that funds are available to address these urgent needs.

RECOMMENDATION

That you sign the attached Presidential Determination at Tab A.

Attachments
Tab A Presidential Determination
Tab B Justification for Presidential Determination

THE WHITE HOUSE

WASHINGTON

Presidential Determination
No.______________________

MEMORANDUM FOR THE SECRETARY OF STATE

SUBJECT: Presidential Determination Pursuant to Section 2(c) (1) of the Migration and Refugee Assistance Act of 1962, as Amended

Pursuant to section 2(c) (1) of the Migration and Refugee Assistance Act of 1962, as amended, 22 U.S.C. 2601(c) (1), I hereby determine that it is important to the national interest that up to $33 million be made available from the U.S. Emergency Refugee and Migration Assistance Fund to meet the unexpected urgent refugee and migration needs, including those of refugees, displaced persons, conflict victims, and other persons at risk, due to crises in Guinea, the Democratic Republic of the Congo, Afghanistan, the North Caucasus, Serbia, and the Middle East. These funds may be used, as appropriate, to provide contributions to international, governmental, and non-governmental organizations. I understand that you will be forwarding a separate request to meet requirements for refugee assistance in Bosnia and Croatia.

You are authorized and directed to inform the appropriate committees of the Congress of this determination and the use of funds under this authority, and to arrange for the publication of this determination in the Federal Register.

JUSTIFICATION FOR PRESIDENTIAL DETERMINATION AUTHORIZING THE USE OF UP TO $33,000,000 FROM THE U. S. EMERGENCY REFUGEE AND MIGRATION ASSISTANCE FUND

Under Section 2 (c) (1) of the Migration and Refugee Assistance Act of 1962, as amended, 22 U.S.C. 2601 (c) (1), the President may authorize the furnishing of assistance from the United States Emergency Refugee and Migration Assistance Fund (the Fund) to meet "unexpected urgent refugee and migration" needs whenever he determines it is "important to the national interest" to do so.

Of the $33 million noted above, $5 million will be used to meet unexpected urgent needs associated with the crisis in Guinea, where increasingly brutal cross-border attacks have resulted in the death of one United Nations worker, the abduction of another, and several hundred Guinean and refugee casualties. In order to avert a humanitarian crisis, some 125,000 of the refugees in Guinea must be relocated to new, secure camps away from the border. ERMA funds will contribute to the costs of this movement, as well as provide modest initial funding for food assistance to the refugees.

Of the requested funds, $10 million will be used to meet unexpected urgent needs associated with the Congo crisis. With the peace process stalled, fighting has recently produced an outflow of an estimated 100,000 new refugees into neighboring countries. Security and political limitations on access to the displaced and other conflict victims and inside Congo and resource constraints have produced unparalleled sustained suffering and excess mortality. The United States Government has been in the forefront of an effort to stimulate multiple warring parties to allow the international community to address the humanitarian needs. ERMA funds will provide badly needed assistance to meet the needs of refugees and IDPs from the Congo conflict.

Of the requested funds, $1 million would be used to provide urgently needed support to UNHCR programs for Afghan conflict victims and returnees in Pakistan and Afghanistan. Some 30,000 new refugees have crossed into Pakistan as a result of recent fighting in Northern Afghanistan. Concerned that continued fighting, coupled with the current drought, will lead to further, unmanageable flows, Pakistan has announced it will close the border. In addition, 65,000 to 150,000 displaced Afghans have gathered at the Afghan-Tajik border, prompting fears of large future movements into Tajikistan. With UNHCR's repatriation program for Afghans in Iran continuing to proceed swiftly, these new arrivals have strained UNHCR's resources. ERMA funds will help ensure adequate UNHCR support for its programs in the area.

Of the requested funds, $3.2 million will be used to meet unexpected and urgent needs associated with the North Caucasus crisis. Contrary to earlier expectations, fighting between Russian Federation troops and Chechen separatists has continued, resulting in a continuing lack of security and resources in Chechnya and the displacement of some 300,000 persons. With winter approaching, many IDPs and refugees in the region find themselves without adequate shelter to face colder weather. A rapid needs assessment recently conducted by UN officials found "vast" needs in Groznyy in all sectors. ERMA funds will be used for winterization needs in such areas as food, shelter, health care, water, and sanitation.

Of the requested funds, $8.8 million will be used to meet unexpected and emergency needs of some 217,500 Palestinian refugee families (approximately 1.3 million individuals) in West Bank and Gaza who have been devastated by the recent violence. The UN Relief and Works Agency for Palestine Refugees in the Near East (UNRWA) proposes to use the funds to distribute emergency food baskets, provide cash subsidies to extreme hardship cases, provide temporary shelter, support minor repairs to refugee shelters that have been damaged or destroyed, and to employ some of the refugees receiving cash assistance for refugee camp maintenance and infrastructure repairs. The contribution will allow UNRWA to continue to provide assistance, as per its mandate.

Of these funds, $5 million will be used to meet unexpected and urgent needs associated with Yugoslavia, which hosts more refugees (about 500,00) and Internally Displaced Persons (IDPs) (about 200,000) than anywhere else in the Balkans. Although the removal of sanctions and increased aid to Yugoslavia may ultimately enable the new government to provide greater assistance to refugees and IDPs, key international and non-governmental organizations have recently appealed for new funding to address serious refugee and IDP winterization needs. Previous funding for the Balkans supported humanitarian efforts in Montenegro and Kosovo, but not Serbia.

These funds will be used to provide contributions to the United Nations High Commissioner for Refugees, other UN agencies, the International Committee of the Red Cross, the International Organization for Migration, and other international, governmental, and non-governmental organizations. As necessary, funds will also support administrative expenses of the Bureau of Population, Refugees, and Migration associated with these crises.

A drawdown from the Fund of up to $33 million is required to respond to the unexpected urgent refugee and migration needs related to these crises. The need for these funds is urgent and was not foreseen in the appropriation and programming of FY 2001 Migration and Refugee Assistance funds.

This drawdown furthers the U.S. national interest by providing humanitarian support where it is urgently needed.

Robert S. Willard

4313 Van Buren Street
University Park, MD 20782
301-779-2558 - fax: 301-779-2921
bobwillard@worldnet.att.net

December 14, 2000

12-14-00
To Scheduling

The Honorable William J. Clinton
President of the United States
The White House
Washington, DC 20500

Dear Mr. President:

You have signed into law the Abraham Lincoln Bicentennial Commission Act and have named five members; the other ten members, chosen by the Senate and House leadership, have also been named. (Attached is a membership roster I have prepared.)

You may recall that I had asked you to appoint me to this Commission, but when I talked with Charlie Cole in Presidential Personnel, he pointed out that the law called for appointment of "private citizen[s]." Since I am a government employee, I am ineligible. As a result, I have decided to pursue the position of staff director of the Commission, and I have already had a number of encouraging conversations with members of the Commission.

In the meantime, I am taking steps in a *pro bono* capacity to help the Commission get up and running, and that is the purpose of this letter. In enacting the legislation, Congress introduced a logical flaw. As introduced, the legislation required you to name the chair, but when enacted, the law called for the members of the Commission to designate their chair. But the law also requires the Commission to meet at the call of the chair. So how can the first meeting occur if a chair is not designated to call it?

I think this can be remedied by a very simple—and appropriate—step: you can call the first meeting. The members need to take their oath of office and I can think of no better place for this to occur than the White House (and, specifically, in front of the painting in the State Dining Room). Moreover, given your long-time respect and affection for Mr. Lincoln, it would be most fitting that you be present and provide remarks at the inauguration of this Commission's work.

Therefore, I would respectfully request that you invite the members of the Commission to come to the White House in early January for their swearing in ceremony and initial meeting to select their chair. Of course, I would be quite happy to provide the necessary staff work to make this happen and would work closely with whomever you designate on your staff. Please let me know if this plan is agreeable to you.

Sincerely,

Bob

Robert S. Willard

ROBERT S. WILLARD

December 14, 2000

Dear Ms. Currie,

One more time I am seeking your assistance in getting a letter to the President. Of course, if you feel that, based on the content of the letter it should be seen by someone else first, I certainly defer to your guidance.

Best wishes for a wonderful Christmas and a prosperous and enjoyable new year.

Sincerely,

Bob

Draft - Unofficial

MEMBERSHIP OF THE ABRAHAM LINCOLN BICENTENNIAL COMMISSION
Established by Public Law 106-173
(Approved February 25, 2000)
[As of December 8, 2000]

The Commission shall be composed of 15 members appointed as follows:

(1) Two members, each of whom shall be a qualified citizen*, appointed by the President.		
Mr. Harold Holzer	Vice President for Communications Metropolitan Museum of Art 1000 Fifth Avenue New York, NY 10028-0198 (212) 570-3951 Fax: (212) 472-2764 E-mail: harold.holzer@metmuseum.org Assistant: Mary Jane Crook (maryjane.crook@metmuseum.org)	31 Fulton Avenue Rye, NY 10580 (914) 967-9091 Fax: (914) 967-9092 Spouse: Edith
James O. Horton, Ph.D.	Benjamin Banneker Professor of American Civilization and History The George Washington University American Studies 2108 G Street Building P, Room 201 Washington, DC 20051 (202) 994-7489 E-mail: horton@gwu.edu	11609 Sourwood Lane Reston, VA 20191-3011 (703) 860-8120 Fax: (703) 860-0269
(2) One member, who shall be a qualified citizen, appointed by the President on the recommendation of the Governor of Illinois.		
Hon. James R. Thompson	Chairman Winston & Strawn 35 W. Wacker Dr. Chicago, Illinois 60601-9703 (312) 558-5600 Fax: (312) 558-5700 E-mail: jthompso@winston.com	

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* A qualified citizen is a private citizen of the United States with-- (1) a demonstrated dedication to educating others about the importance of historical figures and events; and (2) substantial knowledge and appreciation of Abraham Lincoln.

Draft - Unofficial

(6) Three members, at least one of whom shall be a Senator, appointed by the majority leader of the Senate.		
Honorable Jim Bunning	Senator United States Senate 502 Hart Senate Office Building Washington, DC 20510 (202) 224-4343 Fax: (202) 228-1373 E-mail: jim_bunning@bunning.senate.gov	
Honorable Frank J. Williams	Associate Justice Providence County Superior Court 250 Benefit Street Providence, RI 02903 (401) 222-6544 Fax: (401) 222-2794 E-mail: alincoln@courts.state.ri.us	300 Switch Road Hope Valley, RI 02832 (401) 364-3642 Fax: (401) 539-7979 Spouse: Virginia
Dr. Gabor S. Boritt	Director, Civil War Institute Gettysburg College 233 N. Washington Street Gettysburg, PA 17325-1486 (717) 337-6590 Fax: (717) 337-6596 E-mail: gboritt@gettysburg.edu Assistant: tgrim@gettysburg.edu	Farm by the Ford 500 Plank Road Gettysburg, PA 17325-7262 (717) 334-6442 Fax: 717-337-6596 Spouse: Liz
(7) Two members, at least one of whom shall be a Member of the House of Representatives, appointed by the minority leader of the House of Representatives.		
Honorable David Phelps	Member of Congress U. S. House of Representatives (IL19) 1523 Longworth House Office Building Washington, DC 20515 (202) 225-5201 Fax: (202) 225-1541	
Ms. Louise Taper	Assistant: Andrea	608 Mountain Drive Beverly Hills, CA 90212 (310) 271-1078 Fax: (310) 271-4712 E-mail: scarlett@netwood.net Spouse: Barry

FROM : FAX NO. : Jun. 01 2000 09:27PM P1

Esther Coopersmith

2230 S Street, Northwest
Washington, DC 20008
Telephone: 202-232-0845 ◆ Facsimile: 202-232-8196

December 9, 2000

12-14-00
To ~~Cohen~~ NSC for Reply
coordinate w/ Sperling

'00 DEC 15 AM10:10

Via Facsimile: 202-456-2461

The President of the United States
The White House
1600 Pennsylvania Avenue, NW
Washington, DC 20500

Dear dear Mr. President:

In follow up to your request last evening for a fax on re-entry into the United Nations Educational, Scientific, and Cultural Organization (UNESCO), I want you to know that it is the considered judgment of the vast majority of the American educational and scientific communities, as well as the twenty or so federal agencies that interact with UNESCO, that the U.S. should re-enter the organization before the end of your Administration. Spokesmen for many of these bodies, including National Education Association President Bob Chase, have written to you of late to urge re-entry. Secretary Riley has spoken particularly forcefully on the subject. Senator Helms said he has no policy problems with re-entry, only budgetary considerations. State's only concern appears to be the $68 million annual dues; we owe nothing from the past.

President Reagan took us out of UNESCO in 1984. In 1995, you wrote to then Director General Mayor stating that the issues that led to withdrawal had been largely resolved and indicating that you favored re-entry and would work with Congress to identify the necessary funds. Mayor turned the organization into a champion of democratic practice and the free press, but management began to unravel during the end of his term in 1999. Former Japanese Deputy Foreign Minister Kolchiro Matsuura is now Director General. He is doing a top-to-bottom management upgrade that includes a major downsizing of senior posts. He needs U.S. membership to push reform farther.

Gene Sperling has met with Director General Matsuura about UNESCO's lead role internationally in providing basic education for all, including girls, and the significant impact this can have on economic development, population control and HIV/AIDS prevention. UNESCO's work in international science, cultural preservation and free flow of ideas is of comparable importance. It is regrettable that the U.S. educational, scientific and cultural communities are deprived of full cooperation with their international partners through UNESCO. It is all the more regrettable that the rest of the world is deprived of U.S. leadership in those fields.

The President
Page Two
December 9, 2000

Re-entry into UNESCO would help regularize our relationship with the UN and give a powerful signal that UN reform will be rewarded. More importantly, it will help us address the new threats to national security that reside in ignorance, over population, environmental degradation, cultural conflict and restrictions on the free press.

It is time, Mr. President, to move the country beyond the "small-mindedness" that you decried in your foreign policy speech yesterday in Nebraska and to make a statement for re-engagement with the international community by rejoining an organization that the U.S. helped to create 50 years ago. We did so then, Mr. President, on the premise that "since wars begin in the minds of men, it is in the minds of men that the defenses of peace must be construed." Re-entry now would be a sterling addition to your distinguished legacy. All it would take is your Executive Order to re-enter UNESCO.

All my best,

Esther

Esther Coopersmith

cc: Gene Sperling