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Regulation of U.S. Oil Imports

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INTRODUCTION

The importation of oil[1] into the United States is regulated by the Department of Energy (DOE) through the Mandatory Oil Import Program (MOIP). The MOIP was created in March 1959 by Presidential Proclamation 3279 and has undergone substantial modifications in the intervening years.[2] The purpose of the MOIP is to reduce the threat to the national security posed by the dependence by the U.S. on foreign sources of oil, which are subject to the threat of interruption, and to foster the development of domestic energy sources and refining capacity.[3]

Proclamation 3279 was issued pursuant to the authority now embodied in section 232 of the Trade Expansion Act of 1962, as amended by the Trade Act of 1974.[4] Section 232(b) provides that, upon an investigation and finding by the Secretary of the Treasury that a commodity is entering the country "in such quantities or under such circumstances as to threaten to impair the national security," the President "shall take such action, and for such time, as he deems necessary to adjust the imports of . . . [the] article and its derivatives so that . . . imports [of the article] will not threaten to impair the national security."[5] Such an investigation and finding with re-

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1. In this article "oil" is defined to include crude oil and partially refined and finished products, whether derived from crude oil, coal, or natural gas. Presidential Proclamation 3279, as amended, encompasses all of these materials under the term "crude oil, unfinished oils and finished products," each of which is further defined in the Proclamation.

2. Pres. Proc. No. 3279, 3 C.F.R. 11 (1959-1963 Compilation), *reprinted in* 19 U.S.C. § 1862, at 542 (1976).

3. *Id.*

4. 19 U.S.C. § 1862 (1976) (corresponds to Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 437, *as amended by* Trade Act of 1974, Pub. L. No. 93-618, § 127(d), 88 Stat. 1993).

5. *Id.* § 1862(b).

spect to "petroleum and petroleum products" was made in 1959 and formed the basis for the quota/allocation system established by Presidential Proclamation 3279.[6] In 1975, another national security investigation was conducted and the findings which resulted therefrom were incorporated with the prior findings in Presidential Proclamation 4341, which imposed the supplemental import fee.[6.1]

SCOPE OF THE SECTION 232 AUTHORITY

Section 232 of the Trade Expansion Act authorizes the President to take "such action . . . as he deems necessary" to adjust imports.[7] The authority was broadly construed by the Supreme Court in *FEA v. Algonquin SNG, Inc.*, which upheld the President's authority to impose license fees.[8] Throughout the decision, the Court cited with approval those portions of the legislative history which would support the widest possible interpretation of the President's authority, such as Senator Millikin's statement that it included the authority "to take whatever action he deems necessary to adjust imports . . . [including use of] tariffs, quotas, import taxes or other methods of import restrictions."[9] Although the Court in *Algonquin* did not explicitly address the question of the legality of the previous quota system, it may be assumed to have been upheld, *sub silentio*, since the question presented was whether the President's authority extended beyond the imposition of quantitative controls.

Although the authority to impose quotas under section 232 of the Trade Expansion Act is not susceptible to serious legal

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6. Pres. Proc. No. 3279, *supra* note 2.

The Executive Branch has consistently taken the position that the continuing validity of a national security investigation and finding provides a basis for subsequent amendments to the original action without the necessity of additional investigations being conducted. In this respect, numerous modifications to the original MOIP have been implemented, including the substitution of a system of license fees for the quota/allocation system in 1973, without conducting additional national security investigations. Pres. Proc. No. 4210, 11 C.F.R. 239 (1971-1975 Compilation). The Attorney General also concluded in a formal opinion issued in 1975 that, although permissible if desired, no additional national security investigation was legally required in order for President Ford to impose supplemental fees on oil imports despite the changes in world oil markets occurring after the OPEC oil embargo. 43 OP. ATT'Y GEN. 3 (1975).

6.1 40 Fed. Reg. 3965 (1975).

7. 19 U.S.C. § 1862(b) (1976).

8. FEA v. Algonquin SNG, Inc., 426 U.S. 548, 561-71 (1975).

9. *Id.* at 564.

question, a possible legal issue exists as to whether an auction of the quota tickets, or some other form of allocation, is within the authority of the President. However, any grant of executive power carries an implicit authority to implement that power, and a quota or other form of quantitative restriction cannot be implemented without a concomitant mechanism for the distribution of the limited quantities which are allowed to be imported.[10] Under the quota system established in 1959, the mechanism chosen was an allocation to refiners and importers based on amounts they historically imported; however, there is nothing in the legislative history which would dictate such a result or which would preclude some other distribution mechanism, such as an auction, from being adopted.[11] Considering that allocations based on historical volumes have several deleterious effects, including their inherent anticompetitive nature and the enforcement difficulties they pose, there are excellent policy reasons for the adoption of a distribution mechanism other than an allocation system. As a consequence, an auction of import rights would most likely be viewed as within the realm of necessary action required to be exercised as part of the authority conferred.

HISTORY OF THE MOIP

As previously noted, the MOIP was created in March 1959 by Proclamation 3279. It replaced a system of voluntary controls that had failed to prevent oil imports from increasing. At that time, such imports were approximately half the price of domestic crude oil.[12] Initially, quota levels were established for different products and regions of the country in accordance with then current levels of imports. Allocations of crude oil import licenses were granted to all refiners, regardless of whether or not they actually imported crude oil.[13] This system ensured that the value of quota licenses was evenly distributed and not received solely by coastal refiners, which would have given them a large competitive advantage. Allocations of petroleum products, such as residual fuel oil, were granted to certain classes of importers.

10. *Id.* at 559.

11. *See generally* 101 CONG. REC. 5298 (1955) (remarks of Sen. Barkley); 101 CONG. REC. 5588 (1955).

12. *See generally* Pres. Proc. No. 3279, *supra* note 2.

13. Inland refiners realized the value of the licenses by arranging exchanges of oil with actual importers.

The effectiveness of the quota in limiting imports ultimately proved to be its downfall. Reduced imports resulted in greater demand for domestic production; however, once excess capacity was utilized, additional demand induced inflationary impacts.[14] As a consequence, political pressure grew to alter the system either to include additional persons seeking to share in the growing monetary value of the import licenses or to increase quota levels and thereby lower the indirect, and increasingly controversial, subsidy to the domestic petroleum industry.

The controversy which quotas engendered led to the decision in April 1973 to issue Presidential Proclamation 4210, which provided for the gradual replacement of quotas by a system of licenses subject to fees which would be available to all importers.[15] The Proclamation established a fee of $0.21 per barrel for crude oil and $0.63 per barrel for petroleum products.[16] The difference between the two fees, $0.42, became the effective per barrel level of protection for domestic refining capacity. Newly constructed refining capacity also was granted a five-year exemption from the fee on 75% of inputs, which meant that such capacity would have a total level of protection equaling $0.57¾ per barrel.[17] Existing quota levels were continued in the form of fee-exempt licenses but were subject to being decreased annually by a specified amount until their complete elimination in 1980.[18] However, the quota levels for certain products (*e.g.*, residual fuel oil imported into the east coast) had previously been set at such high levels that only a relatively small amount of such imports are currently subject to the fee.[19]

In January 1975, President Ford imposed a supplemental fee on all imports based on the failure of Congress to pass legislation in response to the energy crisis in the aftermath which followed the 1973-74 oil embargo. Presidential Proclamation 4341 provided for an initial supplemental fee of $1.00 per barrel, which was to be increased in $1.00 increments to a maximum of $3.00 per barrel.[20] The passage of the Energy Pol-

14. SPECIAL COMMITTEE TO INVESTIGATE CRUDE OIL IMPORTS, REPORT (Mar. 6, 1959).
15. Pres. Proc. No. 4210, 3 C.F.R. 239 (1971-1975 Compilation).
16. *Id.* at 243.
17. *Id.* at 245.
18. *Id.* at 248-49.
19. *See* Pres. Proc. No. 3389, 3 C.F.R. 108 (1959-1963 Compilation).
20. Pres. Proc. No. 4341, 3 C.F.R. 431, 433 (1971-1975 Compilation).

icy and Conservation Act[21] in December of 1975 allowed the President to rescind the supplemental fee in Presidential Proclamation 4412 at a time when it had only reached $2.00 per barrel.[22] Since that time, there have been no substantial modifications to the MOIP.

REGULATORY DEVELOPMENT

Part 213 of Title 10 of the Code of Federal Regulations contains the regulations governing the MOIP. Under the regulations, fee-exempt licenses are annually allocated[23] within the overall levels specified to applicants based on their inputs during a base period.[24] The number of fee-exempt licenses for each product is specified by geographical regions.[25]

The Proclamation and the regulations also preserve certain exemptions for "long term allocations" granted in the 1960's to provide incentives for the construction of petrochemical facilities in Puerto Rico[26] and the Virgin Islands.[27] Persons holding long term allocations are not affected by the sliding scale reducing fee-exempt imports, nor by any other provision that could impair their rights.[28]

Persons not qualifying for a fee-exempt allocation, or who do not receive a sufficient allocation to cover the quantity of oil that they currently import, must apply for licenses subject to the $0.21 or $0.63 per barrel fee, as appropriate.[29]

Procedures for exceptions from Part 213 are contained in Part 205, Subpart D. These provisions implement the authority contained in section 5 of the Proclamation which provides that exceptions may be granted on various grounds, including where payment of the fees would represent an "exceptional hardship."[30] Appendix II of Subpart D contains guidelines given particular consideration in the disposition of exception re-

21. Energy Policy and Conservation Act, 89 Stat. 871 (codified in scattered sections of 15, 42, 50 U.S.C.).

22. 41 Fed. Reg. 1037 (1976).

23. Oil Import Regulations, 10 C.F.R. § 213.3 (1978).

24. *Id.* at 213.9-11.

25. *Id.* at 213.12.

26. Pres. Proc. No. 3693, 3 C.F.R. 153 (1964-1965 Compilation).

27. Pres. Proc. No. 3820, 3 C.F.R. 165 (1967-1970 Compilation).

28. Pres. Proc. No. 3279(9) as amended by Pres. Proc. No. 4210, 3 C.F.R. 11 (1959-1963 Compilation), *reprinted in* 19 U.S.C. § 1862, at 546 (1976).

29. Pres. Proc. No. 3279(3)(a)(1) as currently amended by Pres. Proc. No. 4210, *supra* at 543.

30. 10 C.F.R. § 205.50 (1978).

quests. The guidelines authorize exceptions where, for example, imposition of fees would lead to a result unintended by the Proclamation or would seriously impair the operations of profitability of the applicant's business.[31]

CURRENT EFFECTIVENESS OF THE PROGRAM

Since the adoption of the original program, the world oil market and its relationship to the U.S. oil market have changed fundamentally. The Arab oil embargo, the subsequent several-fold increase in foreign oil prices, and the price controls under the Emergency Petroleum Allocation Act of 1973 (EPAA), as amended,[32] have completely altered the economic positions of persons affected by the MOIP. When the license fee program was initiated in 1973, world crude oil prices were less than domestic prices and were expected to be roughly aligned in the future. Those events resulted in an oil market where a substantial portion of U.S. crude oil has been priced at levels well below world market prices[33] and arguably does not require the additional protection afforded by the MOIP.

Although the protection offered by the MOIP is currently overshadowed by the effects of domestic price controls, the MOIP remains the only long term vehicle for encouraging the construction of domestic refinery capacity and the protection of crude oil production. Therefore, once these controls expire, the MOIP will most likely play an increasingly important role in the regulation of U.S. oil imports.

OTHER STATUTORY AUTHORITIES WHICH COULD BE UTILIZED TO CONTROL OIL IMPORTS

There are several other statutory authorities under which the President could conceivably take action to control oil imports. Section 456 of the Energy Policy and Conservation Act (EPCA) provides that the President may implement a procedure by which "the United States may exercise the exclusive right to import and purchase all or any part of crude oil . . . and refined petroleum products of foreign origin for resale in the United States."[34] Implementation of this authority requires congressional approval as an Energy Action under section 551

31. *Id.* § 205.5, app. II.

32. Energy Petroleum Allocation Act, 15 U.S.C. §§ 751-56 (1976).

33. The value of lower-priced domestic crude oil is allocated to refiners under the Domestic Crude Oil Allocation ("Entitlements") Program. *See* Mandatory Petroleum Allocation Regulations, 10 C.F.R. § 211.67 (1978).

34. Energy Policy and Conservation Act § 456, 15 U.S.C. § 760b(a) (1976).

of EPCA.[35] Section 456 requires that the President buy and sell without profit or loss, except for individual cases which "result in progress toward a lower price for oil sold in international commerce."[36] In addition, the President must find that the use of such authority "is likely to reduce prices for imported oils."[37] The range of action that the President could take to limit imports under this provision is therefore quite narrow and it has never been implemented.

Section 101 of the Defense Production Act, as amended, provides that the President may "allocate materials . . . to such extent as he shall deem necessary or appropriate to promote the national defense."[38] Aside from the fact that civilian allocations must be based on historical supply patterns, there are three major legal and practical obstacles to utilizing this authority to control oil imports. First, "national defense" is defined in the Act to mean military, atomic, or directly related activity.[39] It is a more difficult standard to meet than the broad "national security" objectives which allow use of the Trade Expansion Act authority. Second, the purpose of the Act is to "allocate" supplies needed for national defense resulting from shortages, not to create shortages by restricting imports.[40] Finally, the authority may not be used "to control the general distribution of any material in the civilian market" unless it is a "scarce and critical material essential to the national defense" and defense requirements cannot otherwise be met.[41] Normal market conditions would not appear to meet this standard, although it would most likely be met during an oil embargo.

Under the International Emergency Economic Powers Act (IEEPA), the President may declare a national emergency to deal with any "unusual or extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[42] Upon the declaration of a national emer-

35. Energy Policy and Conservation Act § 551, 42 U.S.C. § 6421 (1976).
36. Energy Policy and Conservation Act § 456, *supra* note 34, at § 760b(c).
37. *Id.* at § 760b(d).
38. Defense Production Act of 1950 § 101, 50 U.S.C. app. § 2071(a)(2) (1970).
39. Defense Production Act of 1950 § 762(d), 50 U.S.C. app. § 2152(d) (1970).
40. *See* Defense Production Act of 1950 § 2, 50 U.S.C. app. § 2662 (1970).
41. Defense Production Act Amendments of 1953 § 3, 50 U.S.C. app. § 2071(b) (1970).
42. International Emergency Economic Powers Act, 50 U.S.C.A. supp. § 1701(a) (1978).

gency, IEEPA permits the President to "investigate, regulate, direct and compel, nullify, void, prevent, or prohibit, any . . . importation . . . of . . . any property in which any foreign country or a national thereof has any interest."[43] The President is required "in every possible instance" to consult with Congress before exercising the authority and to submit a report to Congress explaining his action.[44] Although the emergency action is subject to several additional procedural requirements, the only one that poses a serious constraint on the President's authority is the right of Congress to terminate the emergency by concurrent resolution at any time.[45] In the event of a national emergency, the authority contained in the IEEPA could, therefore, be used in addition to the authority contained in the Trade Expansion Act to control oil imports.

43. *Id.* § 1702(a)(1)(B).
44. *Id.* § 1703(a).
45. *Id.* § 1706(b).