Consol. Nos. 2021-2066 & 2252

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PRIMESOURCE BUILDING PRODUCTS, INC.,

Plaintiff-Appellee

v.

UNITED STATES, JOSEPH R. BIDEN, JR., President of the United States, GINA M. RAIMONDO, Secretary of Commerce, CHRISTOPHER MAGNUS, Commissioner of the United States Customs and Border Protection, UNITED STATES CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF COMMERCE,

Defendants-Appellants

OMAN FASTENERS, LLC, HUTTIG BUILDING PRODUCTS, INC., and HUTTIG, INC.,

Plaintiffs-Appellees

v.

UNITED STATES, JOSEPH R. BIDEN, JR., President of the United States, UNITED STATES CUSTOMS AND BORDER PROTECTION, CHRISTOPHER MAGNUS, Commissioner of the United States Customs and Border Protection, DEPARTMENT OF COMMERCE, GINA M. RAIMONDO, Secretary of Commerce,

Defendants-Appellants

Appeals from the United States Court of International Trade in Nos. 20-00032 and -00037, Judges Timothy C. Stanceu, Jennifer Choe-Groves, and M. Miller Baker

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January 3, 2022
(corrected January 10, 2022)

TABLE OF CONTENTS

BRIEF OF DEFENDANTS-APPELLANTS, UNITED STATES, *ET AL.* 1

STATEMENT OF JURISDICTION.....2

STATEMENT OF THE ISSUE.....2

STATEMENT OF THE CASE.....3

I. History Of Section 232, The National Security Provision 3

II. The 1988 Amendments.....5

III. The President Determines That Steel Imports Threaten To Impair National Security And Adjusts Imports 7

IV. The President Determines That Adjusting Imports Of Derivatives Of Steel And Aluminum Articles Is Required 9

V. The Court of International Trade Finds Proclamation 9980 To Be Issued Outside Of Delegated Presidential Authority.....10

VI. The Court of International Trade Stays Its Judgment In *PrimeSource* 14

SUMMARY OF ARGUMENT.....15

ARGUMENT.....17

I. Standard Of Review 17

II. The Trial Court Erred In Its Categorical Narrow Reading Of 19 U.S.C § 1862(c).....17

A. Section 232 Authorizes The President to Take Further Action 18

B. The Trial Court Failed To Account For The President's Inherent Authority.....24

III. The President Acted Within His Authority When He Issued Proclamation 9980 26

CONCLUSION 31

TABLE OF AUTHORITIES

Cases **Page(s)**

Am. Inst. for Int'l Steel v. United States,
376 F. Supp. 3d 1335 (Ct. Int'l Trade 2019) 28

Barnhart v. Peabody Coal Co.,
537 U.S. 139 (2003) 19

Dames & Moore v. Regan,
453 U.S. 654 (1981) 25

Erwin Hymer Grp. N. Am. v. United States,
930 F.3d 1370 (Fed. Cir. 2019) 24

Fed. Energy Admin. v. Algonquin SNG, Inc.,
426 U.S. 548 (1976) 5, 25

Florsheim Shoe Co. v. United States,
744 F.2d 787 (Fed. Cir. 1984) 31

GPX Int'l Tire Corp. v. United States,
780 F.3d 1136 (Fed. Cir. 2015) 17

Gratehouse v. United States,
206 Ct. Cl. 288 (1975) 24

Gundy v. United States,
139 S. Ct. 2116 (2019) 25

Haig v. Agee,
453 U.S. 280 (1981) 25

Maple Leaf Fish Co. v. United States,
762 F.2d 86 (Fed. Cir. 1985) 27

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran,
456 U.S. 353 (1982) 24

Nielsen v. Preap,
139 S. Ct. 954 (2019).....20

PrimeSource Bldg. Prod., Inc. v. United States,
497 F. Supp. 3d 1333 (Ct. Int'l Trade 2021).....passim

PrimeSource Bldg. Prod., Inc. v. United States,
505 F. Supp. 3d 1352 (Ct. Int'l Trade 2021).....12

PrimeSource Bldg. Prod., Inc. v. United States,
No. 20-00032, 2021 WL 3293567 (Ct. Int'l Trade Aug. 2, 2021).....14

Silfab Solar, Inc. v. United States,
892 F.3d 1340 (Fed. Cir. 2018).....17, 27

United States v. Curtiss-Wright Export Corp.,
299 U.S. 304 (1936).....25

United States v. George S. Bush & Co.,
310 U.S. 371 (1940).....31

United States v. O'Brien,
560 U.S. 218 (2010).....24

Statutes

19 U.S.C. § 1862.....6, 12, 18, 28

19 U.S.C. § 1862(b) (1955).....4, 22

19 U.S.C. § 1862(b)(1)(A).....3, 4

19 U.S.C. § 1862(b)(2)(A).....3

19 U.S.C. § 1862(b)(3).....3

19 U.S.C. § 1862(c).....3, 17, 30

19 U.S.C. § 1862(c)(1).....passim

19 U.S.C. § 1862(c)(1)(A) 6

19 U.S.C. § 1862(c)(3) 6, 20

28 U.S.C. § 1295(a)(5) 2

28 U.S.C. § 1581(i) 2

Rules

Federal Rule of Appellate Procedure 4(a)(1)(B) 2

Regulations

Proclamation 9705, Adjusting Imports of Steel Into the United States,
83 Fed. Reg. 5,281 (March 8, 2018) 8, 11, 27, 31

Proclamation 9704 of March 8, 2018, Adjusting Imports of Aluminum Into the United States,
83 Fed. Reg. 11,619 (March 15, 2018) 7

Proclamation 9980 of January 24, 2020, Adjusting Imports of Derivative Aluminum and Derivative Steel Articles into the United States,
85 Fed. Reg 5,281 (January 29, 2020). ..... passim

STATEMENT PURSUANT TO RULE 47.5

Counsel for defendants-appellants is not aware of any other appeal in or from these same civil actions or proceedings that previously were before this Court or any other appellate court under the same or similar title, or of any action that will be directly affected by this Court's decision in this consolidated appeal. Counsel is aware of 12 cases stayed in the United States Court of International Trade, pending the final outcome of this appeal.

Counsel is not aware of any other case pending in this or any other court that may directly affect or be directly affected by this Court's decision in these appeals.

BRIEF OF DEFENDANTS-APPELLLANTS, UNITED STATES, *ET AL*.

Defendants-appellants (collectively, the United States) respectfully request that the Court reverse the judgments of the Court of International Trade and direct that court to enter judgments in their favor. These appeals present the single dispositive question of whether the President acted within his statutory authority by extending the national security tariffs that he had previously proclaimed on steel articles under Section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862, to include derivatives of those articles. *Proclamation 9980 of January 24, 2020, Adjusting Imports of Derivative Aluminum and Derivative Steel Articles into the United States*, 85 Fed. Reg. 5,281 (Jan. 29, 2020), Appx168-180. Plaintiffs-appellees, PrimeSource Building Products, Inc., Oman Fasteners, Huttig Building Products, and Huttig, Inc., who import steel derivatives subject to Proclamation 9980, challenged that proclamation, contending that the President exceeded his authority by issuing Proclamation 9980 outside the time limitations contained in 19 U.S.C. § 1862(c)(1). The trial court agreed and entered judgments in their favor. After these final judgments, however, this Court decided *Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021), in which it reversed a judgment premised on the same alleged statutory violation at issue here. *Transpacific* controls and compels reversal.

STATEMENT OF JURISDICTION

Pursuant to Rule 28(a)(5) of the Rules of this Court, counsel for defendants-appellants states that this Court's jurisdiction rests upon the following bases:

(a) The Court of International Trade possessed jurisdiction to entertain this action pursuant to 28 U.S.C. § 1581(i).

(b) The statutory basis for this Court's jurisdiction to entertain this appeal is 28 U.S.C. § 1295(a)(5).

(c) The United States Court of International Trade entered its final judgment in *PrimeSource* on April 5, 2021 and in *Oman Fasteners* on June 10, 2021. Our appeals were timely filed on June 4 and August 7, 2021, pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B). The Court consolidated these two matters on September 3, 2021.

STATEMENT OF THE ISSUE

Section 232 directs the President to adjust imports of articles that threaten to impair national security. After complying with all procedural preconditions, the President established a 25 percent tariff on certain imports of steel products, a 10 percent tariff on certain imports of aluminum products, and announced that further action might be necessary.

The question presented is whether the President acted within his authority when he issued Proclamation 9980, extending the tariffs to derivatives of steel and

aluminum, after the 90- and 15-day time periods for concurrence and initial action set forth in 19 U.S.C. § 1862(c).

STATEMENT OF THE CASE

I. History Of Section 232, The National Security Provision

For over sixty years, Congress has authorized a procedure by which the President may "adjust the imports" of articles that threaten to impair "national security."

The procedure begins with an investigation by the Secretary of Commerce (Secretary) "to determine the effects on the national security of imports of [an] article." 19 U.S.C. § 1862(b)(1)(A). The Secretary must consult with the Secretary of Defense on any "methodological and policy questions" "and if it is appropriate . . ., hold public hearings or otherwise afford interested parties an opportunity to [comment]." 19 U.S.C. § 1862(b)(2)(A). Within 270 days, the Secretary must submit to the President a report containing his findings "with respect to the effect of the importation of such article . . . upon the national security," as well as "recommendations" for presidential "action or inaction." 19 U.S.C. § 1862(b)(3).

The statute then directs the President, if he concurs, to take the action that, in his judgment, is necessary to address the threat of impairment to national security. Unlike the scope of the Secretary's investigation and report, which is limited to the

"article" under consideration, 19 U.S.C. § 1862(b)(1)(A), if the President concurs with the Secretary's finding, he shall "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of *the article and its derivatives* so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii) (emphasis added).

Congress first enacted this national security provision as part of the Trade Agreement Extension Act of 1955. As originally enacted, upon a finding that an "article is being imported into the United States in such quantities . . . [that] threaten to impair the national security," the President was directed to "take such action as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security." 19 U.S.C. § 1862(b) (1955). Congress understood that "the authority granted to the President under this provision is a *continuing authority*." H.R. Rep. No. 745, 84th Cong. 1st Sess. 7 (1955) (emphasis added).

In 1958, Congress expanded the President's authority to include adjusting imports of derivatives of articles that were the subject of the investigation. The Committee Report explains, in relevant part:

> In order to further strengthen the section, the Finance Committee added language so that adjustments in imports which may threaten the security must be made in the derivatives of raw materials or products as well as the materials or products themselves. The need for such additional language is obvious, for a limitation of the

> materials alone would serve only to spur the importation of the finished or semi-finished products which are, in the final analysis, the very items most essential to the defense of the country.

S. Rep. No. 232, 84th Cong., 2d Sess. at 12 (1958). Congress also affirmed that it intended to provide "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." H.R. Rep. No. 1761, 85th Cong., 2d Sess. 13 (1958). "When the national security provision next came up for re-examination, it was re-enacted without material change as § 232(b) of the Trade Expansion Act of 1962." *Fed. Energy Admin. v. Algonquin SNG, Inc*., 426 U.S. 548, 558 (1976).

Consistent with the understanding that the President's authority to adjust imports is continuing, Presidents have exercised their authority to modify action beyond the initial measures taken. Specifically, "[f]rom 1955 to 1988, Presidents frequently adjusted imports, including by increasing impositions so as to restrict imports, without seeking or obtaining a new formal investigation and report after the initial one." *Transpacific*, 4 F.4th at 1326-27.

II. The 1988 Amendments

In 1988, Congress amended Section 232, as part of the Omnibus Trade and Competitiveness Act of 1988, Public Law No. 100-418 (Aug. 23, 1988).[1] Among

[1] Congress also amended Section 232 in 1975 and 1980. Those revisions are not germane to the question in this appeal.

other changes, Congress shortened the time for the Secretary's investigation, shortened the time for the President's submission of a written report to Congress, and set time frames for presidential concurrence and implementation.

The legislative history reflects Congress's intent to address what it perceived to be presidential inaction in the face of national security threats. "The new provisions have the evident purpose of producing more action, not less—and of counteracting a perceived problem of inaction, including inaction through delay." *Transpacific*, 4 F.4th at 1329. Of relevance to this appeal, Congress revised Section 232 by including timeframes for the President to act after receiving the Secretary's report containing an affirmative finding. Within 90 days of receiving the report, the President shall determine whether he concurs with the Secretary's finding. 19 U.S.C. § 1862(c)(1)(A). If he concurs, he shall identify the "nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." *Id*. § 1862(c)(1)(A)(ii). The President is to implement such action within 15 days of concurrence. *Id*. § 1862(c)(1)(B). Congress also revised the statute to provide that if the President selects negotiations with foreign nations as the appropriate measure, and those negotiations are unsuccessful or ineffective, the President shall take alternative action to address the threat of impairment to national security. *Id*. § 1862(c)(3)(A).

III. The President Determines That Steel Imports Threaten To Impair National Security And Adjusts Imports

Following investigations to determine the effect of imports of steel and aluminum[2] on the national security, the Secretary found that the present quantities and circumstances of steel imports "threaten to impair the national security of the United States." Appx232. The Secretary found that these imports are "weakening our internal economy" and undermining our "ability to meet national security production requirements in a national emergency." *Id*. The Secretary recommended that the President "take immediate action" to address this threat "by adjusting the level of these imports through quotas or tariffs." Appx236. The Secretary explained that "[b]y reducing import penetration rates to approximately 21 percent, U.S. industry would be able to operate at 80 percent of their capacity utilization," *id*., a capacity utilization rate that would "enable U.S. steel mills to increase operations significantly in the short-term and improve the financial viability of the industry over the long-term." Appx235.

[2] The Secretary also found that the present quantities and circumstances of aluminum imports threaten to impair our national security and imposed Section 232 tariffs on aluminum. *Proclamation 9704 of March 8, 2018, Adjusting Imports of Aluminum Into the United States*, 83 Fed. Reg. 11,619 (Mar. 15, 2018). The tariff on aluminum derivative products is "not at issue in this case." *PrimeSource Bldg. Prod., Inc. v. United States*, 497 F. Supp. 3d 1333, 1364 (Ct. Int'l Trade 2021) (*PrimeSource I*), Appx36.

The President concurred in the Secretary's finding that "steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security." *Proclamation 9705, Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 5,281 (March 8, 2018), Appx162-167. To address that threat, the President proclaimed a 25 percent tariff on imports of most steel articles. *Id*.

In recognition of the "important security relationships" and "shared concern about global excess capacity," the President invited countries with a security relationship with the United States to discuss alternative ways to address the threatened impairment of our national security. Appx163.

In light of our national security relationships with Canada and Mexico, the President determined to continue ongoing discussions with those countries and to exempt steel imports from those countries for the time being. *Id*. The President left open the option to "remove or modify" restrictions on imports "[s]hould the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security." *Id.* The President directed the Secretary to monitor steel imports and inform the President of "any circumstances that in the Secretary's opinion might indicate the need for further action" or that "might indicate that the increase in duty rate provided for in this proclamation is no longer necessary." Appx165.

After reaching agreements with South Korea, Australia, Brazil, and Argentina, the President exempted, on a long-term basis, imports from those countries from the tariffs. *See Transpacific*, 4 F.4th at 1314-15 (discussing negotiation history).

IV. The President Determines That Adjusting Imports Of Derivatives Of Steel And Aluminum Articles Is Required

On January 24, 2020, the President extended the tariffs to cover imports of certain derivatives of steel and aluminum, including "steel nails, tacks, drawing pins, corrugated nails, staples, and similar derivative articles" as well as "bumper and body stampings of aluminum and steel for motor vehicles and tractors" in Proclamation 9980. Appx168-180. The President explained that "domestic steel producers' capacity utilization ha[d] not stabilized for an extended period of time at or above the 80 percent capacity utilization level identified in [the Secretary's initial] report as necessary to remove the threatened impairment of the national security." Appx168. In conjunction with this insufficient improvement in capacity utilization, the President noted that a surge in imports of derivative products had "erode[d] the customer base for U.S. producers of aluminum and steel and undermine[d] the purpose of the proclamations adjusting imports of aluminum and steel articles to remove the threatened impairment of the national security." Appx169.

The President further concurred with the "Secretary's assessment" that foreign producers were increasing shipments of derivative products in order to circumvent the tariffs on steel and aluminum articles. *Id*. The President cited a 33 percent increase in import volumes of steel nails, tacks, drawing pins, corrugated nails, staples and similar derivative products between June 2018 and May 2019. *Id*. Given the significant increase in imports of derivatives products and the concurrent lag in improvement to capacity utilization, the President determined that extending the tariffs to derivative products was necessary to address the circumvention that was undermining the effectiveness of the remedies implemented in his original proclamations. Appx170.

V. The Court of International Trade Finds Proclamation 9980 To Be Issued Outside Of Delegated Presidential Authority

Numerous importers of derivative products, including PrimeSource, Oman Fasteners, and Huttig Building Products, Inc. and Huttig Inc. (the latter three, collectively, Oman Fasteners), filed suit challenging Proclamation 9980. PrimeSource and Oman Fasteners alleged a number of procedural and due process errors. Relevant here, they contended that the President lacked authority to issue Proclamation 9980 more than a year after the original proclamations because 19 U.S.C. § 1862(c)(1) limits the President's time to act to 105 days after receipt of the Secretary's report.

Sitting as a three-judge panel, the trial court addressed *PrimeSource* first, and dismissed most of PrimeSource's claims. *See generally PrimeSource I*, 497 F. Supp. 3d 1333, Appx5-60. The majority, however, denied our motion to dismiss the claim that the President acted outside of statutory authority by extending the tariffs to derivative products beyond 19 U.S.C. § 1862(c)(1)'s time periods. The majority found no textual support for our argument that "the President retained authority to adjust imports of articles identified in the Secretary's report and then, after an extended period of time, adjust imports of derivatives of those articles without complying with the detailed procedures of Section 232(b) and (c)." *PrimeSource I*, 497 F. Supp. 3d at 1351, Appx12. Rather, the majority held that "the 90- and 15-day time limitations in Section 232(c)(1) expressly confine the exercise of the President's discretion regardless of whether the President determines to adjust imports only of the 'article' named in the Secretary's report or, instead, to adjust imports of the 'article and its derivatives.'" *Id*. (quoting 19 U.S.C. § 1862(c)(1)).

The majority further reasoned that the "President's characterization of the articles affected by Proclamation 9980 as derivatives of the articles affected by Proclamation 9705 is insufficient, by itself, to support a conclusion that the challenged decision satisfied the time limitations in Section 1862(c)(1), and

Congress did not intend for those time limits to be merely directory." *Id*. at 1359, Appx31.

Because the majority perceived an open question on whether the Secretary's "assessments" regarding the surge in imports of derivative products might qualify as an "investigation," thereby restarting the clock for presidential action, the court declined to grant PrimeSource's cross motion for judgment. *Id*. at 1360-61, Appx32-33. After we stipulated that the Secretary's advice did not meet the statutory requirements for a Section 232 investigation, the court entered judgment in PrimeSource's favor. *PrimeSource Bldg. Prod., Inc. v. United States*, 505 F. Supp. 3d 1352 (Ct. Int'l Trade 2021) (*PrimeSource II*), Appx51-67.

In a dissenting opinion, Judge Baker would have held Proclamation 9980 to be lawful. The dissent explained that: (1) the original 1955 statute, and as later reenacted as Section 232, permitted the President to modify import adjustments; (2) the 1988 amendments to Section 1862 did not withdraw the President's preexisting authority to modify such adjustments; and (3) given that Section 232 import adjustments can last for decades, it would be both incongruous and unworkable to read the statute to preclude later modifications. *PrimeSource I*, 497 F. Supp. 3d at 1373, Appx45.

The dissent reasoned that, when Congress amended the statute in 1988, it did not withdraw the President's existing authority to take subsequent measures to

modify the remedy. The dissent further explained that the majority's reasoning amounted to a holding that the delegation of continuing authority was repealed by implication absent any basis for such a finding. *Id*. at 1380, Appx50. The dissent also explained that the deadlines inserted by the 1988 amendments "require prompt implementation, *i.e.*, putting a plan of action into effect, without which the President has no authority to act at all assuming those deadlines are mandatory, but those deadlines do not apply to modifications of action that was otherwise timely implemented in the first instance." *Id*. at 1379-80, Appx51-53. Because the 1988 amendments could be harmonized with a delegation of continuing authority, the dissent concluded that the "presumption against an implied repeal of the President's preexisting authority to modify Section 232 action is even stronger here because of the three decades of administrative practice and interpretation of Section 232 recognizing that authority prior to the 1988 amendments. If Congress removed the authority, we should expect to find a clear indication that Congress affirmatively sought to make such a radical change." *Id*. at 1380, Appx52. The dissent also reasoned that the majority's reading was contrary to the statute's national security purpose. *Id*.

The judgment declared Proclamation 9980 invalid as contrary to law, directed U.S. Customs & Border Protection (CBP) to liquidate PrimeSource's

entries without assessing Section 232 duties, and to return any such duties that PrimeSource had deposited on entries of derivative articles. Appx66-67.

Having decided *PrimeSource*, the same panel next addressed *Oman Fasteners*. As in *PrimeSource*, we sought dismissal of Oman Fasteners' 15-day and 90-day timing-based claims under 19 U.S.C. § 1862(c)(1). The court found that the statutory issue before it was "indistinguishable" from the issue it had just decided in *PrimeSource*. *Oman Fasteners, LLC v. United States*, slip op. 21-172, 12 (Ct. Int'l Trade June 10, 2021), Appx74-92, Appx85. Oman Fasteners voluntarily dismissed the remaining counts of their complaint and requested that the trial court enter judgment in their favor, consistent with *PrimeSource*. The court granted that request and declared Proclamation 9980 invalid as contrary to law, incorporating by reference its *PrimeSource* decision, including Judge Baker's dissent. Appx74-92. The judgment directed CBP to liquidate the disputed entries without assessing Section 232 duties, and to return such duties that they had deposited on entries of derivative articles. Appx4.

VI. The Court of International Trade Stays Its Judgment In *PrimeSource*

The trial court subsequently stayed the judgment in *PrimeSource* in part pending appeal. *PrimeSource Bldg. Prod., Inc. v. United States*, No. 20-00032, 2021 WL 3293567 (Ct. Int'l Trade Aug. 2, 2021) (*PrimeSource III*), Appx68-73. Among other things, the court reasoned that the intervening decision in

Transpacific had "reject[ed] a claim similar in some respects to a claim [that the trial court] found meritorious." Appx69. The trial court recognized that *Transpacific* involved the same "time limits added by the 1988 amendments to Section 232," Appx70, at issue in this appeal. The trial court further acknowledged this Court's holding that "'[n]one of the new language in the statute, on its own or by comparison to what came before, implies a withdrawal of previously existing presidential power to take a continuing series of affirmative steps deemed necessary by the President to counteract the very threat found by the Secretary.'" *Id*. (quoting *Transpacific*, 4 F.4th at 1329).

The trial court further recognized that this Court had "stated that '[i]n this context, the directive to the President to act by a specified time is not fairly understood as implicitly meaning by then or not at all as to each discrete imposition that might be needed, as judged over time.'" *Id*. (quoting *Transpacific*, 4 F.4th at 1329). Although stating that, "*Transpacific* [] and this case arose from somewhat different facts, [the trial court] nevertheless conclude[d] that the opinion of the Court of Appeals potentially affects the outcome of this litigation" because the "discussion in *Transpacific* [] of the 'continuing' nature of Presidential Section 232 authority is expressed in broad terms." *Id*. The trial court likewise stayed its judgment in *Oman Fasteners*. Appx93-112.

SUMMARY OF ARGUMENT

By categorically rejecting the President's authority to act beyond the time periods set forth in 19 U.S.C. § 1862(c)(1), the Court of International Trade committed reversible error. As this Court held in *Transpacific*, Section 232 authorizes the President to take additional action after the time periods set forth in 19 U.S.C. 1862(c)(1), to ensure the selected measures are effective in achieving that statute's national security objective. *Transpacific* controls and compels reversal of the judgments.

In *Transpacific*, this Court left for another day the question whether later presidential action might run contrary to the national security purpose of the statute, particularly if, for example, the President was acting upon stale information. The President's exercise of judgment and fact-finding are, of course, not subject to judicial review. In any event, the nexus between the President's measure on derivative steel products and the original threat of impairment to national security is clear on the face of Proclamation 9980. The President was advised that increased imports of derivative products were undermining the effectiveness of the original measures. The President adjusted derivative imports to ensure the originally-stated capacity utilization goals would be met and to thwart the possibility that an influx of imports of steel and aluminum derivative products would undermine those goals.

Congress has long intended that the President would monitor and review factual circumstances to determine whether a particular remedy is effective in averting the threat of impairment to national security, without requiring a further report from Commerce to act. The President did so here by extending the tariffs to imports of derivative steel products that were undermining the effectiveness of the existing tariffs implemented on steel articles.

ARGUMENT

I. Standard of Review

This Court reviews matters of statutory interpretation *de novo*. *GPX Int'l Tire Corp. v. United States*, 780 F.3d 1136, 1140 (Fed. Cir. 2015). The Court may set aside Presidential action only upon a showing of "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018) (citation omitted).

II. The Trial Court Erred In Its Categorical Narrow Reading Of 19 U.S.C § 1862(c)

The trial court found that the timeframes in Section 232(c)(1) serve as absolute bar on further adjustment or modification of the remedies the President has selected. In so doing, the court applied the same "categorical narrow reading"

of 19 U.S.C. § 1862 that this Court rejected in *Transpacific*. In light of at least three errors, the judgments must be reversed.[3]

A. Section 232 Authorizes The President to Take Further Action

First, the trial court focused on what it viewed to be the mandatory nature of the timeframes for presidential action under 19 U.S.C. § 1862(c)(1). The court held that the statute's direction that the President "shall" determine and implement action within 90 and 15 days from receipt of the Secretary's report was mandatory as opposed to directory, in contravention of Supreme Court and this Court's binding precedent. *See PrimeSource I*, 497 F. Supp. 3d at 1351 (holding that "the 90- and 15-day time limitations in Section 232(c)(1) expressly confine the exercise of the President's discretion."), Appx23.

This Court, however, held that Section 232(c)(1)'s timeframe for presidential action "does not, without more, entail lack of authority, or of obligation, to take the action after that date has passed, even though the obligation to act by the specified time has been violated." *Transpacific*, 4 F.4th at 1320. This Court rejected contentions that expiration of the 105-day time period in Section 232(c)(1) divested the President of the power to act, holding that "[t]he Trade

[3] This consolidated appeal covers two judgments. The decision in *Oman Fasteners* incorporates by reference the trial court's decision in *PrimeSource*, meaning the rationale underlying both judgments is identical. Accordingly, when we reference the holding or rationale of the trial court, in the singular, we mean to refer to the decisions in both cases.

Court's interpretation of subsection (c)(1)'s time directives does not follow from the ordinary meaning of the provision's language at the time of enactment." *Id*.

In fact, the command that the President "shall" implement action, standing alone, cannot deprive the President of authority to make further adjustments as necessary beyond the initial, specified timeframe. "A statute directing official action needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire when the job is supposed to be done." *Barnhart v. Peabody Coal Co*., 537 U.S. 139, 161 (2003).

As the Court explained, "[a]s a matter of ordinary meaning, a command to 'take this action by time T' is often, in substance, a compound command—one, a directive (with conferral of authority) to take the action, and, two, a directive to do so by the prescribed time." *Transpacific*, 4 F.4th at 1320. "A violation of the temporal obligation imposed by the second directive does not necessarily negate the primary obligation imposed by—let alone the grant of authority implicit in—the first directive. For example: Most people would understand the directive 'return the car by 11 p.m.' to require the return of the car even after 11 p.m." *Id*.

Given this understanding of the statute's command, the Court noted that this "commonsense linguistic point, and its application in the statutory setting, formed the backdrop to Congress's amendments to § [232] in 1988" in which the Legislature enacted the timing provisions at issue in this appeal. *Transpacific*, 4

F.4th at 1320. Indeed, the Supreme Court has "held time and again, an official's crucial duties are better carried out late than never." *Nielsen v. Preap*, 139 S. Ct. 954, 967 (2019). The trial court's holdings cannot be reconciled with the principle that mandatory time limits alone do not foreclose further action beyond them.

Second, the trial court cited 19 U.S.C. § 1862(c)(3) as suggesting that, where Congress intended the President to act beyond the initial 90- and 15-day periods, it said so. *PrimeSource I*, 497 F. Supp. 3d at 1352-53, Appx24-25. It referenced subpart (c)(3) as an example because it provides direction when the President selects negotiation of an agreement with a foreign country as the appropriate remedy. In those circumstances, the President must take further action if, within 180 days, no agreement has been reached or the agreement proves ineffective. 19 U.S.C. § 1862(c)(3)(A)(ii). Yet this Court rejected the trial court's conclusion that the negotiation provision would be superfluous were the statute construed to allow the President to take continuing action. *Transpacific*, 4 F.4th at 1331 ("Those directives are not superfluous of subsection [232](c)(1)'s contemplation of a plan of action with adjustment of implementation choices over time."). As this Court has found, another interpretation, "consistent with the legislative purpose [is] available." *Id.* at 1322. Rather than being duplicative, the specificity of the directions for further action if negotiations have proven ineffective makes sense

because that subpart arose out of grievances associated with President Reagan's negotiation of voluntary restraint agreements in the machine tools case.

This Court in *Transpacific* also found that paragraph (c)(3) "r[a]n counter to the Trade Court's view that Congress forbade presidential imposition of newly specified burdens after § 1862(c)(1)'s 90-day and 15-day periods." *Id*. Reading Section 232(c)(3)(A) as the *only* circumstance in which the President may act beyond the initial time period highlights the error of the trial court's interpretation. Instead, when the President determines that an international agreement to restrain imports is ineffective, subpart (c)(3)(A) directs the President to take further action, without regard to how much time has passed since the investigation. At the same time, if other selected measures prove ineffective, the trial court's reading prohibits the President from making those same remedial adjustments. If the trial court's interpretation were correct, the President could lawfully impose tariffs five years after concurrence in the Secretary's finding if he elected to adjust imports by negotiating an agreement, but could not adjust the rate of tariff on day 106 after concurrence if tariffs were the initial measure implemented. The statute does not demand that incongruity within the President's ability to identify the "nature and duration" of the remedy necessary to protect national security.

In sum, the trial court misread a provision designed to spur presidential action as barring the very action that Congress was attempting to spur. Subpart

(c)(3)(A) would not preclude the President from taking additional action if negotiations had not yet failed, or if the negotiations had produced effective action, but the President nevertheless determined that additional action would further enhance the national security. In other words, both subparts (c)(1)(B) and (c)(3)(A) set a baseline for presidential action, but neither is correctly viewed as prohibiting additional action should it be necessary or appropriate.

Third, the trial court observed that the pre-1988 version of the statute directed the President "to take such action, and for such time, as he deems necessary." 19 U.S.C. § 1862(b) (1982). It viewed the replacement of the phrase "to take such action, and for such time," with the current language as evidence that Congress intended to restrict the time under which the President may act to adjust imports. *PrimeSource I*, 497 F. Supp. 3d at 1350.

As the dissent correctly observed, however, it was erroneous for the trial court "to ascribe significance to this change." *PrimeSource I*, 497 F. Supp. 3d at 1378, Appx50. First, "the President's modification authority under the pre-1988 version of the statute stemmed from the words 'such action,' not 'for such time.'" *Id*. (citing 43 Op. Att'y Gen. No. 20, 2 (1975)). Second, "even if 'for such time' in the pre-1988 statute were the source of the President's modification authority, that clause means the same thing as 'the . . . duration' in the current statute: '[T]he length of time something lasts.'" *Id*. (quoting Duration, Black's Law Dictionary

(11th ed. 2019)). As a result, "the change from 'for such time' to 'the duration' was purely stylistic." *Id*.; *see also Transpacific*, 4 F.4th at 1328 (also holding that this "change was a 'stylistic' one only, not suggesting a change of meaning.").

Indeed, Congress intended that the President modify Section 232 import measures as circumstances warrant. "At the time of the 1988 amendments, then, practice under and executive interpretation of the statute provided a settled meaning of 'action' as including a 'plan' or a 'continuing course of action.'" *Transpacific*, 4 F.4th at 1328. And the 1988 legislative history shows that Congress did not view itself to be withdrawing or narrowing the scope of that delegation. Rather, "[n]one of the new language in the statute, on its own or by comparison to what came before, implies a withdrawal of previously existing presidential power to take a continuing series of affirmative steps deemed necessary by the President to counteract the very threat found by the Secretary." *Id*.

Given the clarity of Congress's intent that the President exercise continuing power (and the decades of congressional acquiescence to the exercise of such power), the trial court erred by assuming that Congress silently withdrew the President's authority to modify his actions. *Cf. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 393-94 (1982) (declining to "assume that Congress silently withdrew" an existing enforcement tool in light of long history of

Congress strengthening the regulations governing commodities futures); *United States v. O'Brien*, 560 U.S. 218, 231-32 (2010) (rejecting argument that Congress altered, *sub silentio*, the meaning of a statutory term).

B. The Trial Court Failed To Account For The President's Inherent Authority

In addition to the reasoning set forth in *Transpacific*, the trial court also erred by failing to account for the President's inherent authority to reconsider his actions.

The power to reconsider or modify is inherent in an official's power to act, "regardless of whether they possess explicit statutory authority to do so." *Erwin Hymer Grp. N. Am. v. United States*, 930 F.3d 1370, 1376 (Fed. Cir. 2019) (citation omitted); *see Gratehouse v. United States*, 206 Ct. Cl. 288, 298 (1975). Thus, even when a statute does not specify how and when an official may reconsider or modify, courts should not assume, as the trial court did here, that an official lacks authority to take further action.

The President's authority to take continuing action is at its apex when the President is exercising powers that are quintessentially executive in nature. "[I]n the areas of foreign policy and national security . . . congressional silence is not to be equated with congressional disapproval." *Haig v. Agee*, 453 U.S. 280, 291 (1981). In those circumstances, the "failure of Congress specifically to delegate authority does not, 'especially . . . in the areas of foreign policy and national

security,' imply 'congressional disapproval' of action taken by the Executive." *Dames & Moore v. Regan*, 453 U.S. 654, 678 (1981) (citation omitted).

The trial court further appeared to conclude that the nondelegation doctrine provided support for its restrictive reading of the statute's timing provisions. *See PrimeSource I*, 497 F. Supp. 3d at 1357-58, Appx29-30. Any such contention is mistaken because the Supreme Court, interpreting the earlier version of Section 232 that lacked timeframe for the President's concurrence and implementation, held that Section 232's delegation was constitutional. *Algonquin*, 426 U.S. at 559-60. Indeed, delegations of authority may be less restrictive where the President exercises independent constitutional authority. *United States v. Curtiss-Wright Export Corp*., 299 U.S. 304, 319–22 (1936); *see also Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting) (observing that "when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power'"). Like *Transpacific*, this appeal presents no "materially distinct issue under the nondelegation doctrine." 4 F.4th at 62.

III. The President Acted Within His Authority When He Issued Proclamation 9980

As we explained above, the trial court erred in its interpretation of Section 232. Subpart (c)'s timeframes for concurrence and implementation do not bar the President from modifying or amending his selected measures as necessary to

further the identified national security objective. While the facts of Proclamation 9980 are different from those presented in *Transpacific*, those facts do not warrant a different result. The importers cannot demonstrate a "'clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority'" by the President in extending national security tariffs on steel articles to cover derivative steel products. *Silfab*, 892 F.3d at 1346 (quoting *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985)).

Comparing the facts of *Transpacific* to this case, the trial court observed that "[t]here can be no question, as a factual matter, that the two, separately published proclamations stemmed from two separate Presidential determinations and were directed at two different sets of products." *Id*. at 33. That pronouncement, however, is inaccurate. Both Proclamation 9772 (at issue in *Transpacific*) and Proclamation 9980 (at issue here) arose out of the same Presidential determination: Proclamation 9705's explanation that imports of steel articles threatened to impair national security.

At the outset, the President anticipated that adjustment of measures might be necessary to address evolving threats of impairment to our national security. The President directed the Secretary of Commerce to continue to "monitor imports of steel articles and shall, from time to time, in consultation with [other Executive Branch officials] review the status of such imports with respect to the national

security." *Proclamation 9705*, 83 Fed. Reg. at 11,628, Appx165. The President then directed the Secretary to "[1] inform the President of any circumstances that in the Secretary's opinion might indicate the need for further action by the President [or to] [2] inform the President of any circumstance that in the Secretary's opinion might indicate that the increase in duty rate provided for in this proclamation is no longer necessary." *Id.* This course of action was within the "judgment of the President," 19 U.S.C. § 1862(c)(1)(A)(ii), to determine "the form of remedial action" necessary to address our national security needs. *Am. Inst. for Int'l Steel v. United States*, 376 F. Supp. 3d 1335, 1343 (Ct. Int'l Trade 2019).

And the President is lawfully authorized to take action against derivative products. As the trial court correctly observed, Section 232 authorizes the President to adjust imports of derivatives of an article, even if derivatives were not the subject of the Secretary's investigation. *PrimeSource I*, 497 F. Supp. 3d at 1348, Appx20. As the statute makes clear, the Secretary is tasked with finding whether "*such article* is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in such report." 19 U.S.C. § 1862(b)(3)(A) (emphasis added). In contrast, the President's responsibility to determine the nature and duration of the action to be taken encompasses adjustment to both "the article *and its derivatives*." 19 U.S.C. § 1862(c)(1)(A)(ii) (emphasis added).

Nor is it persuasive to ascribe any significance to the fact that the President did not initially adjust imports of derivative products. As we explained, adjusting imports of derivative products is consistent with the President's authority to adopt and carry out a plan of action to address the threat of impairment to national security. This distinction between the Secretary's investigation of an "article" and the President's adjustment of imports of "the article and its derivatives" envisions "a plan implemented over time, including options for contingency-dependent choices that are a commonplace feature of plans of action." *Transpacific*, 4 F.4th at 1321.

As a practical matter, the need to adjust imports of derivatives of the article may not arise (or become apparent) until after implementation of the President's initial adjustment of imports of the article, well after day 105. Reading the statute to divest the President of authority to act or requiring the President to anticipate which derivatives of the "article" might be susceptible to evasion, would undermine the protections afforded by Section 232, contrary to this Court's conclusion that Section 232 must be interpreted to ensure its "effectiveness." *Transpacific*, 4 F.4th at 1323 (citations omitted). Because national security considerations necessarily evolve and change, flexibility to modify action is critical if the President is to be effective in averting the threat of impairment to national security. Indeed, when Congress amended the predecessor statute to authorize the

President to take action on derivative products, it did so "out of concern that such imports might allow circumvention of restrictions on that article." *PrimeSource I*, 497 F. Supp. 3d at 1375, Appx47. Precluding the President from taking the very action Congress authorized cannot serve Section 232's statutory purpose.

While this Court cautioned that not all action beyond the 105 days provided in 19 U.S.C. § 1862(c) would be permissible, this case does not come close to the boundaries the Court identified. Here, "there is no genuine concern about staleness." 4 F.4th at 1332. Proclamation 9980 came less than two years after the initial announcement, "which itself provided for just such a possible change in the future, and rested on a determination by the Secretary—about needed domestic-plant capacity utilization—as to which no substantial case of staleness has been made." *Id*.; *see also Proclamation 9980*, 85 Fed. Reg. at 5,281-82 (discussing adverse effects on capacity utilization stemming from surge in imports of derivative products), Appx168-169.

The Secretary reaffirmed to the President the importance of maintaining an 80 percent capacity utilization as "necessary to remove the threatened impairment of the national security." *Id*. at 5,281, Appx168. The President tied the measures on derivative products to his original concurrence that steel imports posed a national security threat, reiterating that "[s]tabilizing at that level is important to provide the industry with a reasonable expectation that market conditions will

prevail long enough to justify the investment necessary to ramp up production to a sustainable and profitable level." *Id*. Because "[t]he President's findings of fact and the motivations for his action are not subject to review," the Court may not look beyond the nexus that the President himself identified. *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984) (citing *United States v. George S. Bush & Co*., 310 U.S. 371, 379–80 (1940)). In sum, the relevance of the conclusions regarding capacity utilization underpinning Proclamation 9705 remained unchanged and in full force at the time of Proclamation 9980.

CONCLUSION

For these reasons, we respectfully request that this Court reverse the trial courts' judgments and direct the United States Court of International Trade, on remand, to enter judgments in favor of the defendants.

Respectfully submitted,

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January 3, 2022

Attorneys for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Federal Rule of Appellate Procedure 32(a)(7), in that it contains 6,620 words.

January 3, 2022

/s/ Meen Geu Oh
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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on the 10th day of January 2022, a copy of the "CORRECTED BRIEF FOR DEFENDANTS-APPELLANTS" was filed electronically. The filing was served electronically to all parties by operation of the Court's electronic filing system.

Dated: January 10, 2022 /s/Meen Geu Oh

ADDENDUM OF REQUIRED DOCUMENTS

UNITED STATES COURT OF INTERNATIONAL TRADE

PRIMESOURCE BUILDING PRODUCTS, INC.,

Plaintiff,

v.

UNITED STATES, et al.,

Defendants.

Before: Timothy C. Stanceu, Chief Judge
Jennifer Choe-Groves, Judge
M. Miller Baker, Judge

Court No. 20-00032

JUDGMENT

Upon the court's consideration of the parties' Joint Status Report (Mar. 5, 2021), ECF No. 108, and all other filings herein, in accordance with the court's Opinion of this date, and upon due deliberation, it is hereby

ORDERED that Proclamation 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Exec. Office of the President Jan. 29, 2020) ("Proclamation 9980") be, and hereby is, declared to be invalid as contrary to law; it is further

ORDERED that the entries affected by this litigation shall be liquidated without the assessment of duties provided for in Proclamation 9980; it is further

ORDERED that any deposits of estimated duties made pursuant to Proclamation 9980 on entries affected by this litigation shall be refunded with interest as provided by law; it is further

ORDERED that any entries affected by this litigation that may have been liquidated with the assessment of duties provided for in Proclamation 9980 shall be reliquidated without the assessment of such duties and with the refund, with interest as provided by law, of any such duties that were paid or collected; and it is further

ORDERED that each party shall bear its own costs.

/s/ Timothy C. Stanceu
Timothy C. Stanceu, Chief Judge

/s/ Jennifer Choe-Groves
Jennifer Choe-Groves, Judge

Dated: April 5, 2021
New York, New York

UNITED STATES COURT OF INTERNATIONAL TRADE

OMAN FASTENERS, LLC, et al., Plaintiffs, v. **UNITED STATES, et al.,** Defendants.	**Before: Jennifer Choe-Groves, Judge** **M. Miller Baker, Judge** **Timothy C. Stanceu, Judge** **Consolidated Court No. 20-00037**

JUDGMENT

Upon the court's consideration of the parties' Joint Status Report (Apr. 30, 2021), ECF No. 105, plaintiffs' unopposed motion for entry of judgment (Apr. 30, 2021), ECF No. 106, and all other filings herein, in accordance with the court's Opinion of this date, and upon due deliberation, it is hereby

ORDERED that defendants' Motion to Dismiss Count I of Plaintiffs' Complaints (Mar. 20, 2020), ECF No. 57, be, and hereby is, denied; it is further

ORDERED that plaintiffs' Motion for Summary Judgment with Respect to Count I of Plaintiffs' Complaint[s] (Apr. 14, 2020), ECF No. 65, be, and hereby is, granted, and plaintiffs are entitled to summary judgment on Count I of their respective complaints, (Feb. 7, 2020), ECF No. 2 (Ct. No. 20-00037); (Feb. 18, 2020), ECF No. 5 (Ct. No. 20-00045); it is further

ORDERED that the stays of Counts II and III of the Complaints, *see* Order (Mar. 9, 2020), ECF No. 46, Order (Mar. 16, 2020) ECF No. 54, are lifted and those Counts are dismissed without prejudice; it is further

ORDERED that plaintiff's Unopposed Motion for Dismissal Without Prejudice of Counts II and III & Entry of Summary Judgment on Count I (Apr. 30, 2021), ECF No. 106, be, and hereby is, granted; it is further

ORDERED that plaintiff's Unopposed Motion for Oral Argument (June 18, 2020), ECF No. 87, be, and hereby is, deemed withdrawn; it is further

ORDERED that Proclamation 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Exec. Office of the President Jan. 29, 2020) ("Proclamation 9980") be, and hereby is, declared to be invalid as contrary to law; it is further

ORDERED that the entries affected by this litigation shall be liquidated without the assessment of duties provided for in Proclamation 9980; it is further

ORDERED that plaintiffs are no longer obligated to post a continuous bond to cover duties enacted pursuant to Proclamation 9980; it is further

ORDERED that any deposits of estimated duties made pursuant to Proclamation 9980 on entries affected by this litigation shall be refunded with interest as provided by law; it is further

ORDERED that any entries affected by this litigation that may have been liquidated with the assessment of duties provided for in Proclamation 9980 shall be reliquidated without the assessment of such duties and with the refund, with interest as provided by law, of any such duties that were paid or collected; and it is further

ORDERED that each party shall bear its own costs.

/s/ *Jennifer Choe-Groves*
/s/ *Timothy C. Stanceu*
Jennifer Choe-Groves, Judge
Timothy C. Stanceu, Judge

Dated: June 10, 2021
New York, New York

Curling, 491 F.Supp.3d at 1326. So nothing is gained by issuing another injunction requiring the same thing. (*See* Dkt. 159 at 113 ("[T]he backup emergency paper ballots and the paper pollbooks have been addressed in the *Curling* decision.").) As for the remaining items, "an injunction is to be narrowly tailored to remedy the specific action which gives rise to it." *Valley v. Rapides Par. Sch. Bd.*, 646 F.2d 925, 942 (5th Cir. 1981); *see Califano v. Yamasaki*, 442 U.S. 682, 702, 99 S.Ct. 2545, 61 L.Ed.2d 176 (1979) ("[T]he scope of injunctive relief is dictated by the extent of the violation established."). Plaintiffs have not shown Defendants will cause long lines by failing to do the remaining three things they seek to compel. On the contrary, Georgia law already says poll workers may use emergency paper supplies if lines exceed 30 minutes. Ga. State Election Board Rule 183-1-12-.11(2). And the state is "increasing the number of Election Day technicians available, aiming to have a contracted technician available *for each polling place*." (Dkt. 110-5 ¶ 5 (emphasis added).) The counties also have secured additional technicians of their own. Plaintiffs have not shown more is required. *See Califano*, 442 U.S. at 702, 99 S.Ct. 2545 ("[I]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs.").[32]

The bottom line is that Plaintiffs lack standing because they have not shown long lines are certainly impending in November. And, even if Plaintiffs had standing, the Court cannot issue the injunction they seek because it requests relief that is either inappropriate or unnecessary. For these reasons, Defendants' motions to dismiss are granted, Plaintiffs' motion for a preliminary injunction is denied, and this case is dismissed for lack of subject matter jurisdiction.

IV. Conclusion

The Court **GRANTS** County Defendants' Motion to Dismiss (Dkt. 105), **GRANTS** State Defendants' Motion to Dismiss (Dkt. 106), and **DENIES** Plaintiffs' Motion for Preliminary Injunction (Dkt. 92). The Court **DISMISSES** this action for lack of subject matter jurisdiction.

SO ORDERED this 13th day of October, 2020.

PRIMESOURCE BUILDING PRODUCTS, INC., Plaintiff,

v.

UNITED STATES, et al., Defendants.

Slip Op. No. 21-8
Court No. 20-00032

United States Court of International Trade.

January 27, 2021

Background: Importer of steel nails filed suit challenging proclamation issued by

32. It is unclear whether the Court even *could* order State Defendants to "enact a policy" requiring the actions Plaintiffs seek. *See Jacobson,* 974 F.3d at 1257 ("it is doubtful that a federal court would have authority to" issue "an injunction ordering the Secretary to promulgate a rule" because "such relief would . . . raise[ ] serious federalism concerns"); *id.* ("[T]he *Ex parte Young* exception to sovereign immunity is limited to the precise situation in which a federal court commands a state official to do nothing more than refrain from violating federal law.").

President that imposed 25% tariffs on imported products made of steel, including steel nails, as allegedly authorized by Trade Expansion Act and previous proclamations, and based on assessments provided by Secretary of Commerce. Government moved to dismiss for failure to state claim, and importer moved for summary judgment.

Holdings: The Court of International Trade, Timothy C. Stanceu, Chief Judge, held that:

(1) Secretary of Commerce's assessments were not reviewable final actions;

(2) Secretary of Commerce's assessments were not product of rulemaking;

(3) proclamation did not deny importer procedural due process;

(4) Trade Expansion Act was not overdelegation of Congress' legislative powers;

(5) claim that proclamation was untimely was sufficiently alleged; and

(6) fact dispute precluded summary judgment as to proclamation's timeliness.

Motions granted in part and denied in part.

M. Miller Baker, J., filed opinion concurring in part and dissenting in part.

1. Customs Duties ⇐84(6)
United States ⇐254

In reviewing a challenge to Presidential action taken pursuant to authority delegated by statute, Court of International Trade does so according to a standard of review that is highly deferential to the President.

2. Customs Duties ⇐84(6)
United States ⇐254

For the Court of International Trade to interpose in a challenge to Presidential action taken pursuant to authority delegated by statute, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.

3. Customs Duties ⇐84(1)
United States ⇐254

Review of a Presidential proclamation, according to the Administrative Procedure Act (APA), is not available to the Court of International Trade, because the President is not an "agency" for purposes of the APA. 5 U.S.C.A. § 706.

See publication Words and Phrases for other judicial constructions and definitions.

4. Customs Duties ⇐84(1)
United States ⇐254

In an action where a statute commits a determination to the President's discretion, Court of International Trade lacks authority to review the President's factual determinations.

5. Customs Duties ⇐84(2)

Court of International Trade will grant a motion to dismiss if the complaint fails to allege enough facts to state a claim to relief that is plausible on its face. USCIT, Rule 12(b)(6).

6. Customs Duties ⇐84(2)

Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice to defeat a motion to dismiss for failure to state a claim. USCIT, Rule 12(b)(6).

7. Customs Duties ⇐84(1)
United States ⇐254

Secretary of Commerce's assessments, on which President based proclamation imposing 25% tariffs on steel and aluminum derivatives and that allegedly violated Commerce's regulations and Administrative Procedure Act (APA), were not "final actions," as required for judicial

review under APA, where assessments merely provided facts and recommendations for potential action by President rather than imposing duties under authority of Trade Expansion Act, and assessments had no direct or independent effect on importer of steel nails that were subject to 25% tariffs as result of President's broad discretion, not from Secretary's actions. 5 U.S.C.A. § 704; 19 U.S.C.A. § 1862; 15 C.F.R. § 705; Pres. Proc. No. 9980.

See publication Words and Phrases for other judicial constructions and definitions.

8. Customs Duties ⚿53

Secretary of Commerce's assessments, on which President based proclamation imposing 25% tariffs on steel and aluminum derivatives, did not "implement, interpret, or prescribe law or policy," within meaning of Administrative Procedure Act (APA), and thus, assessments were not product of rulemaking that would require Secretary to provide public notice and opportunity for comment, since Secretary's assessments did not themselves impose tariffs or implement any other measure. 5 U.S.C.A. §§ 551(4), 553(b), 553(c); Pres. Proc. No. 9980.

See publication Words and Phrases for other judicial constructions and definitions.

9. Constitutional Law ⚿4150
Customs Duties ⚿5
United States ⚿252

President's proclamation imposing 25% tariffs on steel and aluminum derivatives did not violate Due Process Clause by failing to provide importer of steel nails with notice and opportunity to comment prior to issuing proclamation; importer lacked protected property interest in maintaining tariff treatment applicable to its imported merchandise that existed prior to proclamation, and neither Due Process Clause nor Trade Expansion Act required President, in order to avoid deprivation of due process, to provide notice or opportunity to comment before imposing duties on imported merchandise under delegated legislative authority. U.S. Const. Amend. 5; 19 U.S.C.A. § 1862; Pres. Proc. No. 9980.

10. Constitutional Law ⚿2428
Customs Duties ⚿2

Trade Expansion Act is not impermissibly broad delegation of legislative authority from Congress to the Executive Branch. 19 U.S.C.A. § 1862.

11. Customs Duties ⚿84(1)

Trade Expansion Act does not provide for judicial review of any action taken thereunder. 19 U.S.C.A. § 1862.

12. Customs Duties ⚿84(1)

Secretary of Commerce's assessments, on which President based proclamation imposing 25% tariffs on steel and aluminum derivatives and that allegedly violated Trade Expansion Act, were not "final actions," as required for judicial review under Administrative Procedure Act (APA), where assessments merely provided facts and recommendations for potential action by President rather than imposing duties under Trade Expansion Act, and assessments had no direct or independent effect on importer of steel nails that were subject to 25% tariffs as result of President's broad discretion, not from Secretary's actions. 5 U.S.C.A. § 704; 19 U.S.C.A. § 1862; Pres. Proc. No. 9980.

See publication Words and Phrases for other judicial constructions and definitions.

13. Customs Duties ⚿5
United States ⚿252

Steel nails importer's allegations that President's proclamation imposing 25% tariffs on steel and aluminum derivatives

was invalid in that President's authority to adjust imports of new set of steel products had expired, under Trade Expansion Act, were sufficient to state claim that proclamation was untimely, as not implemented during Act's 105-day time period, if time period commenced upon President's receipt of steel report from Secretary of Commerce; President's characterization of articles affected by proclamation as "derivatives" of steel products affected by prior proclamation was insufficient to support conclusion that proclamation was timely modification of prior proclamation, and Congress did not intend for time limit to be merely directory rather than mandatory. 19 U.S.C.A. §§ 1862(b)(3)(A), 1862(c)(1)(A), 1862(c)(1)(B); Pres. Proc. No. 9705, 9980.

14. Customs Duties ⇐84(7)

In lawsuit by importer of steel nails, challenging Presidential proclamation imposing 25% tariffs on steel and aluminum derivatives based on report of Secretary of Commerce, judicial notice would be taken of Secretary's report, published in Federal Register, regarding effect of imports of steel on national security after investigation conducted under Trade Expansion Act. 19 U.S.C.A. § 1862(b)(3)(A); Pres. Proc. No. 9980.

15. Customs Duties ⇐12

Court of International Trade disfavors an interpretation that ascribes different meanings to the same term as used in different provisions of the same statute.

16. Customs Duties ⇐12

Where a statute creates an exception to a general rule, such exception is to be read narrowly by the Court of International Trade and not interpreted to apply where Congress did not expressly provide for it.

17. Customs Duties ⇐12

When interpreting a statute, Court of International Trade is to give effect to every word and every provision.

18. Customs Duties ⇐84(8.1)

The burden is on the party moving for summary judgment to show that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. USCIT, Rule 56(a).

19. Customs Duties ⇐84(8.1)

Genuine dispute of material fact remained as to whether 105-day time period imposed by Trade Expansion Act, for President to issue proclamation imposing 25% tariffs on steel and aluminum derivatives, began to run on date that President received steel report from Secretary of Commerce, thus precluding summary judgment on claim by importer of steel nails that proclamation was null and void as untimely. 19 U.S.C.A. § 1862(c)(1).

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Before: TIMOTHY C. STANCEU, Chief Judge, JENNIFER CHOE-GROVES and M. MILLER BAKER, Judges.

OPINION AND ORDER

STANCEU, Chief Judge:

Plaintiff PrimeSource Building Products, Inc. ("PrimeSource"), a U.S. importer of steel nails, challenges on various grounds a proclamation issued by the President of the United States ("Proclamation 9980") that imposed 25% tariffs on, *inter alia*, various imported products made of steel (identified in the proclamation as "derivatives" of steel products), including steel nails. Arguing that plaintiff's complaint does not state a claim on which relief can be granted, defendants move to dismiss this action according to USCIT Rule 12(b)(6). Plaintiff opposes defendants' motion to dismiss and moves for summary judgment, urging us to declare Proclamation 9980 invalid and order the refund of any duties that previously may have been collected on its affected entries. In moving to dismiss and in their response to PrimeSource's summary judgment motion, defendants argue that the President's action was within the authority delegated by Congress and must be upheld.

We grant defendants' motion to dismiss as to four of plaintiff's claims, which are set forth as Counts 1, 3, 4, and 5 of the Amended Complaint, and deny it as to Count 2, in which plaintiff claims that Proclamation 9980 is invalid because it was issued after the authority delegated to the President by the governing statute had expired. Because plaintiff has not shown "that there is no genuine dispute as to any material fact," USCIT R. 56(a), we deny plaintiff's summary judgment motion as to the remaining claim.

1. All citations to the United States Code are to the 2012 edition.

2. The products affected by Proclamation 9705 are certain iron and steel products classified within chapters 72 and 73 of the Harmonized Tariff Schedule of the United States ("HTSUS"), as follows:

(1) *Flat-rolled products* provided for in HTSUS headings 7208 (of iron or nonalloy steel, 600 mm or more in width, hot-rolled, not clad, plated or coated),

I. Background

A. The Challenged Presidential Proclamation

On January 24, 2020, President Trump issued Proclamation 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Exec. Office of the President Jan. 29, 2020) ("*Proclamation 9980*"). Proclamation 9980 imposed a duty of 25% *ad valorem* on various imported products made of aluminum and of steel, including steel nails and other steel fasteners as well as "bumper stampings of steel" for motor vehicles and "body stampings of steel" for agricultural tractors. *Id.* at 5,291, 5,293.

The 25% duties imposed by Proclamation 9980 went into effect on February 8, 2020. *Id.* at 5,290. As authority for the President's action, Proclamation 9980 cited Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 ("Section 232"),[1] and certain previous proclamations of the President that also invoked Section 232, including Proclamations 9704, *Adjusting Imports of Aluminum Into the United States*, 83 Fed. Reg. 11,619 (Exec. Office of the President Mar. 15, 2018) ("*Proclamation 9704*"), and 9705, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Exec. Office of the President Mar. 15, 2018) ("*Proclamation 9705*"). *Proclamation 9980* ¶¶ 9–10, 85 Fed. Reg. at 5,283.

Proclamation 9705 imposed 25% duties on various steel products in basic and semi-finished form but did not impose duties on the products that were the subject of Proclamation 9980,[2] which Procla-

mation 9980 described as "Derivatives of Steel Products."[3]

7209 (of iron or nonalloy steel, 600 mm or more in width, cold-rolled, not clad, plated or coated), 7210 (of iron or nonalloy steel, 600 mm or more in width, clad, plated or coated), 7211 (of iron or non-alloy steel, less than 600 mm in width, not clad, plated or coated), 7212 (of iron or non-alloy steel, less than 600 mm in width, clad, plated or coated), 7225 (of alloy steel other than stainless, 600 mm or more in width) or 7226 (of alloy steel other than stainless, less than 600 mm in width);

(2) *Bars and rods* provided for in HTSUS headings 7213 (hot-rolled, in irregularly wound coils, of iron or nonalloy steel), 7214 (other, of iron or nonalloy steel, not further worked than forged, hot-rolled, hot-drawn or hot-extruded, but including those twisted after rolling), 7215 (other, of iron or nonalloy steel), 7227 (hot-rolled, in irregularly wound coils, of alloy steel other than stainless), or 7228 (other bars and rods of alloy steel other than stainless; angles, shapes and sections, of alloy steel other than stainless; hollow drill bars and rods, of alloy or nonalloy steel); *angles, shapes and sections* of HTSUS heading 7216 (angles, shapes and sections of iron or nonalloy steel) except products not further worked than cold-formed or cold-finished, of subheadings 7216.61.00, 7216.69.00, or 7216.91.00; *wire* provided for in HTSUS headings 7217 (wire of iron or nonalloy steel) or 7229 (wire of alloy steel other than stainless); *sheet piling* provided for in HTSUS subheading 7301.10.00; *rails* provided for in HTSUS subheading 7302.10 (rail and tramway track construction material of iron or steel: rails); *fish-plates and sole plates* provided for in HTSUS subheading 7302.40.00 (rail and tramway track construction material of iron or steel: fish plates and sole plates); and other products of iron or steel provided for in HTSUS subheading 7302.90.00 (other railway or tramway track construction material of iron or steel, other than switch blades, crossing frogs, point rods and other crossing pieces, fish plates and sole plates);

(3) *Tubes, pipes, and hollow profiles* provided for in HTSUS headings 7304 (seamless, of iron (other than cast iron) or steel), or 7306 (other (for example, open seamed or welded, riveted or similarly closed), of iron or steel); *tubes and pipes* provided for in HTSUS heading 7305 (other tubes and pipes (for example, welded, riveted or similarly closed), having circular cross sections, the external diameter of which exceeds 406.4 mm, of iron or steel);

(4) *Ingots, other primary forms and semi-finished products* provided for in HTSUS heading 7206 (iron and nonalloy steel in ingots or other primary forms (excluding certain iron in lumps, pellets or similar forms, of heading 7203)), 7207 (semi-finished products of iron or nonalloy steel) or 7224 (alloy steel other than stainless in ingots or other primary forms; semi-finished products of alloy steel other than stainless); and

(5) *Products of stainless steel* provided for in HTSUS heading 7218 (stainless steel in ingots or other primary forms; semi-finished products of stainless steel), 7219 (flat-rolled products of stainless steel, 600 mm or more in width), 7220 (flat-rolled products of stainless steel, less than 600 mm in width), 7221 (bars and rods, hot-rolled, in irregularly wound coils, of stainless steel), 7222 (other bars and rods of stainless steel; angles, shapes and sections of stainless steel), or 7223 (wire of stainless steel).

Proclamation 9705, *Adjusting Imports of Steel Into the United States*, Annex (''To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States''), 83 Fed. Reg. 11,625, 11,629 (Exec. Office of the President Mar. 15, 2018).

3. Proclamation 9980 imposed 25% tariffs on four categories of products that it described as ''Derivatives of Steel Articles.'' The four categories of products are as follows:

(1) *Threaded steel fasteners suitable for use in powder-actuated handtools*, classified in subheading 7317.00.30, HTSUS (nails, tacks (other than thumb tacks), drawing pins, corrugated nails, staples (other than staples in strips of HTSUS heading 8305) and similar articles, of iron or steel, whether or not with

B. Proceedings Before the Court of International Trade

Plaintiff commenced this action on February 4, 2020, naming as defendants the United States, the U.S. Department of Commerce, U.S. Customs and Border Protection, and various officers of the United States in their official capacities (the President of the United States, the Secretary of Commerce, and the Acting Commissioner of Customs and Border Protection). Summons, ECF No. 1; Compl., ECF Nos. 8 (conf.), 9 (public).

Plaintiff amended its complaint on February 11, 2020. First Am. Compl., ECF Nos. 21 (conf.), 22 (public) ("Am. Compl."). Defendants filed their Rule 12(b)(6) motion to dismiss the amended complaint on March 20, 2020. Defs.' Mot. to Dismiss for Failure to State a Claim, ECF No. 60 ("Defs.' Mot."). On April 14, 2020, plaintiff opposed defendants' motion to dismiss and moved for summary judgment. Rule 56 Mot. for Summ. J., Pl. PrimeSource Bldg. Prods. Inc.'s Mem. of Points and Authorities in Supp. of Mot. for Summ. J. and Resp. to Defs.' Mot. to Dismiss for Failure to State a Claim, ECF No. 73-1 ("Pl.'s Br."). Defendants replied in support of their motion to dismiss and responded to plaintiff's summary judgment motion on May 12, 2020. Defs.' Reply in Supp. of their Mot. to Dismiss and Resp. to Pl.'s Mot. for Summ. J., ECF No. 78 ("Defs.' Reply"). Plaintiff replied in support of its summary judgment motion on June 9, 2020. Pl. PrimeSource Bldg. Prods. Inc.'s Reply Br. in Supp. of its Mot. for Summ. J., ECF No. 91 ("Pl.'s Reply").

II. Discussion

A. Subject Matter Jurisdiction

We exercise subject matter jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(2), (i)(4). Paragraph (i)(2) of § 1581 grants this Court jurisdiction of a civil action "that arises out of any law of the United States providing for ... tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." *Id.* § 1581(i)(2). Paragraph (i)(4) grants this Court jurisdiction of a civil action arising "out of any law of the United

heads of other material, but excluding such articles with heads of copper;

(2) *Certain other steel fasteners: nails, tacks* (other than thumb tacks), *drawing pins, corrugated nails, staples* (other than staples in strips of HTSUS heading 8305) *and similar articles*, of iron or steel, of one piece construction, made of round wire (other than certain collated roofing nails), classified in HTSUS statistical subheadings 7317.00.5503 (collated, assembled in a wire coil, not galvanized), -5505 (collated, assembled in a plastic strip, galvanized), -5507 (collated, assembled in a plastic strip, not galvanized), -5560 (not collated, coated, plated, or painted), -5580 (vinyl, resin or cement coated), and other steel fasteners of one-piece construction (other than thumb tacks), not made of round wire, and other than cut, classified in HTSUS statistical subheading 7317.00.6560;

(3) *Bumper stampings of steel for motor vehicles* (classified in HTSUS subheading 8708.10.30 (parts and accessories of the motor vehicles of HTSUS headings 8701 to 8705: bumpers); and

(4) *Body stampings of steel for tractors suitable for agricultural use*, classified in HTSUS subheading 8708.29.21 (parts and accessories of the motor vehicles of headings 8701 to 8705: other parts and accessories of bodies (including cabs): other: body stampings: for tractors suitable for agricultural use).

Proclamation 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States*, Annex II (''Derivatives of Steel Articles''), 85 Fed. Reg. 5,281, 5,290 (Exec. Office of the President Jan. 29, 2020).

States providing for ... administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection." *Id.* § 1581(i)(4).

B. Standards of Review

[1–4] A court reviewing a challenge to Presidential action taken pursuant to authority delegated by statute does so according to a standard of review that is highly deferential to the President. "For a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985). Review of Proclamation 9980 according to the Administrative Procedure Act, 5 U.S.C. § 706 ("APA"), is not available because the President is not an agency for purposes of the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992). In an action such as this one, where a statute commits a determination to the President's discretion, a reviewing court lacks authority to review the President's factual determinations. *United States v. George S. Bush & Co.*, 310 U.S. 371, 379–80, 60 S.Ct. 944, 84 L.Ed. 1259 (1940); *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1349 (Fed. Cir. 2018) ("In particular, courts have repeatedly confirmed that, where the statute authorizes a Presidential 'determination,' the courts have no authority to look behind that determination to see if it is supported by the record." (citing *George S. Bush & Co.*, 310 U.S. at 379, 60 S.Ct. 944)); *Maple Leaf Fish Co.*, 762 F.2d at 89 ("The President's findings of fact and the motivations for his action are not subject to review." (citing *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984))).

[5, 6] To avoid dismissal for failure to state a claim on which relief can be granted, a complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." USCIT R. 8(a)(2). A court will grant a motion to dismiss if the complaint fails to allege "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009).

The court will grant a motion for summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a).

C. Defendants' Motion to Dismiss

Plaintiff raises five claims in its complaint. Am. Compl. In its first claim ("Count 1"), *id.* ¶¶ 62–69, PrimeSource alleges that the Secretary of Commerce violated the Commerce Department's regulations, 15 C.F.R. § 705, and the Administrative Procedure Act in various ways when providing the "assessments" on which the President based Proclamation 9980. PrimeSource alleges, *inter alia*, that the Secretary failed to initiate an investigation, failed to notify the Secretary of Defense of an initiation of an investigation, failed to publish an Executive Summary in the Federal Register, and failed to provide for public hearings, as required by its regulation, *id.* ¶¶ 66–67, and violated the APA when he "failed to provide interested parties with sufficient notice and an opportunity to comment" on the imposition of the duties on derivatives, *id.* ¶ 68, and when he failed to provide a reasoned explanation for its assessments, *id.* ¶ 69.

PrimeSource's second claim ("Count 2") is that Proclamation 9980 was issued in violation of the time limits specified in

Section 232. *Id.* ¶¶ 70–73. Specifically, plaintiff alleges: (1) noncompliance with Section 232(c)(1)(A), 19 U.S.C. § 1862(c)(1)(A), which directs the President to make a determination on a report submitted by the Commerce Secretary under 19 U.S.C. § 1862(b)(3)(A) within 90 days of receiving such report, and (2) noncompliance with 19 U.S.C. § 1862(c)(1)(B), which directs the President to implement any determination the President makes to adjust tariffs on an article and its derivatives within 15 days after the President makes such a determination. *Id.* Maintaining that the relevant report issued under § 1862(b)(3)(A) was the report the President received on January 11, 2018, which resulted in Proclamation 9705, a Presidential action that imposed 25% duties on steel products other than the derivatives affected by Proclamation 9980, PrimeSource alleges that "[i]n issuing Proclamation 9980 a full 653 days since the 90-day window closed for the President to determine what action must be taken and 638 days after the 15-day window to implement such action, the President failed to follow the mandated procedures set forth in Section 232." *Id.* ¶ 73.

In Count 3, *id.* ¶¶ 74–78, plaintiff asserts that it has a property interest in its imports of steel derivative products, *id.* ¶ 76, and that "[b]y failing to provide parties with notice and an opportunity to comment before issuing Proclamation 9980 imposing Section 232 tariffs on steel and aluminum derivative products, the President violated PrimeSource's due process rights protected under the Fifth Amendment," *id.* ¶ 78.

Count 4, *id.* ¶¶ 79–80, alleges that "Section 232 is unconstitutional and not in accordance with the law because it represents an over-delegation by Congress to the President of its legislative powers by failing to set forth an intelligible principle for the President to follow when implementing Section 232," *id.* ¶ 80.

Finally, Count 5, *id.* ¶¶ 81–82, asserts that "[t]he Secretary of Commerce violated Section 232 by making 'assessments', 'determinations' and providing other 'information' to the President without following any of the statutory procedures for new action and by doing so outside the statutory time periods applicable to the 2017-18 investigation conducted by the Secretary of Commerce that resulted in Proclamation 9705," *id.* ¶ 82.

1. Plaintiff's First, Third, Fourth, and Fifth Claims Must Be Dismissed

[7] Plaintiff's first claim (Count 1), in challenging the "assessments" of the Secretary of Commerce addressing steel and aluminum derivatives, alleges various violations of the Commerce Department's regulations, 15 C.F.R. § 705, and the APA. The assessments by the Commerce Secretary merely provided facts and recommendations for potential action by the President rather than impose duties under the authority of Section 232. These actions had no direct or independent effect on PrimeSource. They were, therefore, not final actions PrimeSource could challenge in a cause of action brought under the APA. *See* 5 U.S.C. § 704 ("final agency action for which there is no other adequate remedy in a court are subject to judicial review"); *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1362 (Fed. Cir. 2006) (*en banc*) (citing *Franklin*, 505 U.S. at 798, 112 S.Ct. 2767); *DRG Funding Corp. v. Sec'y of HUD*, 76 F.3d 1212, 1214 (D.C. Cir. 1996) (citing 5 U.S.C. § 704).

PrimeSource argues that the Commerce Secretary's actions should be deemed "final," and therefore judicially reviewable, because the Secretary's actions "represent the consummation of the Secretary's deci-

sion-making process that have direct legal consequences on importers of derivative steel products like PrimeSource, and, therefore, are reviewable under the APA." Pl.'s Br. 26 (citing *Bennett v. Spear*, 520 U.S. 154, 177–78, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997) (agency action held final where it marks consummation of agency's decision-making process and is one that either determines rights or obligations or is one from which legal consequences flow)). Here, however, the legal consequence, which is the imposition of tariffs on imported steel "derivatives," resulted from an exercise of the President's broad discretion, not from the actions of the Commerce Secretary.

For its "finality" argument, PrimeSource relies, erroneously, on *Corus Group PLC v. U.S. Int'l Trade Comm'n*, 352 F.3d 1351 (Fed. Cir. 2003). Pl.'s Br. 28–32. *Corus Group* considered whether a "serious injury" determination of the U.S. International Trade Commission ("ITC") in an "escape clause" investigation involving the U.S. steel industry under Section 201 of the Trade Act of 1974 could be challenged in this Court as a final agency action. 352 F.3d at 1358. Under the statutory scheme, an affirmative determination of serious injury to a U.S. domestic industry is a statutory prerequisite to the exercise of the President's discretion to impose temporary tariff protection. *Id.* at 1359. If the ITC commissioners were equally divided on the question of serious injury (as occurred in that case, in which the vote on injury was a three-to-three tie), the President could consider the decision agreed upon by either group of commissioners as the determination of the ITC. The President considered the decision of the three commissioners voting affirmatively to be the ITC determination and, on that basis, imposed safeguard duties on certain steel imports. In the situation presented, and under the unique statutory scheme, the ITC vote, which itself was challenged in the litigation, had legal consequence and therefore could be contested in the Court of International Trade. *Id.* The Court of Appeals for the Federal Circuit (the "Court of Appeals") distinguished *Corus Group* in *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335 (Fed. Cir. 2010), a case more closely analogous to this case. In *Michael Simon*, the Court of Appeals held that ITC recommendations to the President for modifications to the Harmonized Tariff Schedule of the United States could not be subjected to judicial challenge because, lacking any binding legal effect, they did not constitute "final agency action" within the meaning of 5 U.S.C. § 704. 609 F.3d at 1339–40.

[8] In further support of the claim in Count 1, PrimeSource argues that the Commerce Secretary's assessments regarding steel and aluminum derivatives are the product of "rulemaking" that, under the APA, 5 U.S.C. § 553(b)–(c), required the Secretary to provide the public notice and an opportunity for comment. Pl.'s Br. 34–38. This argument lacks merit. The Secretary's assessments did not themselves impose the tariffs on derivatives or implement any other measure. They did not "implement, interpret, or prescribe law or policy" within the meaning of the APA, 5 U.S.C. § 551(4).

Because the claim stated as Count 1 does not assert a valid cause of action, it must be dismissed.

[9] Plaintiff's third claim, alleging a due process violation stemming from the President's failure to provide parties with notice and the opportunity to comment before issuing Proclamation 9980, also must be dismissed. The Due Process Clause of the Fifth Amendment did not require the President, in order to avoid a deprivation of due process, to provide no-

tice or the opportunity to comment before imposing duties on imported merchandise under delegated legislative authority, and neither Section 232 nor any other statute required such a procedure. Moreover, PrimeSource fails to identify any authority for its theory that, on the facts it has pled, it had a protected property interest in maintaining the tariff treatment applicable to its imported merchandise that existed prior to Proclamation 9980. Plaintiff relies on *NEC Corp. v. United States*, 151 F.3d 1361 (Fed. Cir. 1998) in support of that theory, Pl.'s Br. 41, but *NEC Corp.* is not on point, having arisen from an action brought (unsuccessfully) to enjoin the conducting of an antidumping duty investigation based on alleged "prejudgment" on the part of the Commerce Department. PrimeSource also relies upon *Schaeffler Grp. USA, Inc. v. United States*, 786 F.3d 1354 (Fed. Cir. 2015), Pl.'s Br. 41, but that case also is inapposite. Rejecting a claim that the petition support requirement of the Continued Dumping and Subsidy Offset Act of 2000 (the "CDSOA") was impermissibly retroactive according to the Due Process Clause, the Court of Appeals "assume[d] without deciding, for purposes of our analysis, that Schaeffler had a protected property interest implicating the Due Process Clause." 786 F.3d at 1361. The property interest claimed by plaintiff Schaeffler Group USA, Inc. was not pre-existing tariff treatment but a claimed right that arose "because, when it checked the box to oppose a petition, it believed that it would not be subjecting itself to competitive harm through the aggrandizement of its competitors." *Id.* Reasoning that the CDSOA was not impermissibly retroactive, the appellate court chose not to reach the question of whether there was a vested property right "because we find that Congress had a rational basis for the retroactive effect of the petition support requirement." *Id.*

[10] PrimeSource's fourth claim, that Section 232 is impermissible under the U.S. Constitution as an impermissibly broad delegation of legislative authority from Congress to the Executive Branch, is foreclosed by the decision of the U.S. Supreme Court in *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 96 S.Ct. 2295, 49 L.Ed.2d 49 (1976). Therefore, it too must be dismissed.

[11, 12] The fifth count in PrimeSource's complaint contains only one substantive paragraph, as follows:

> The Secretary of Commerce violated Section 232 by making "assessments", "determinations" and providing other "information" to the President without following any of the statutory procedures for new action and by doing so outside the statutory time periods applicable to the 2017-18 investigation conducted by the Secretary of Commerce that resulted in Proclamation 9705.

Am. Compl. ¶ 82. This claim, which is similar to the claim in Count 1 but grounded in alleged violations of Section 232 instead of alleged violations of the Commerce Department regulations or the APA, also must be dismissed. Section 232 does not provide for judicial review of any action taken thereunder. Accordingly, for PrimeSource's fifth count to be cognizable, judicial review must exist under the APA. But as with Count 1, this claim cannot be brought under the APA, which "limits nonstatutory judicial review to 'final' agency actions." *DRG Funding Corp.*, 76 F.3d at 1214 (citing 5 U.S.C. § 704); *see Motion Sys. Corp.*, 437 F.3d at 1362.

We address below plaintiff's remaining claim, which is set forth as Count 2.

2. Defendants' Motion to Dismiss the Claim in Count 2 Must Be Denied

Section 232, 19 U.S.C. § 1862, grants the President broad authority to "adjust the

imports of the article and its derivatives" that threaten to impair the national security, *id.* § 1862(c)(1)(A). Congress conditioned the delegation of this authority upon the President's receipt of a report by the Secretary of Commerce on the findings of an investigation "to determine the effects on the national security of imports" of an article that is the subject of a request for such an investigation by "the head of any department or agency" or that is the subject of an investigation initiated upon the Commerce Secretary's "own motion." *Id.* § 1862(b)(1)(A). In conducting the investigation, the Commerce Secretary must consult with the Secretary of Defense "regarding the methodological and policy questions raised" in the investigation and seek "information and advice from, and consult with, appropriate officers of the United States." *Id.* § 1862(b)(2)(A)(i), (ii). The statute further provides that "if it is appropriate and after reasonable notice," the Commerce Secretary shall "hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." *Id.* § 1862(b)(2)(A)(iii). The Secretary of Commerce is directed to submit the report of the investigation to the President within 270 days after the investigation is initiated. *Id.* § 1862(b)(3)(A). The statute lists numerous non-exclusive factors the Commerce Secretary and the President are to consider in making their determinations. *Id.* § 1862(d).

[13] Plaintiff's claim in Count 2 is that Proclamation 9980 is invalid as untimely because the President's authority to adjust imports of a new set of products made of steel (i.e., the "derivatives") had expired.[4] PrimeSource argues that Section 232 expressly limited, according to the time periods set forth in 19 U.S.C. § 1862(c)(1), any action the President could take to adjust imports of such products, including steel nails. Under PrimeSource's interpretation of Section 232, the action effected by Proclamation 9980 could have been valid only had it been implemented within 105 days (i.e., the 90 days allowed by § 1862(c)(1)(A)[5] plus the 15 days allowed by § 1862(c)(1)(B)[6]) of the receipt of a report of the Commerce Secretary submitted under § 1862(b)(3)(A). *See* Am. Compl. ¶¶ 70–73. According to PrimeSource, Proclamation 9980 was issued 638 days after the transmittal of that report to the Presi-

4. Although plaintiff has named the President (among other officers of the United States) in his official capacity as a defendant in this action, we do not construe the claim in Count 2 as a claim against the President. The claim is directed against Proclamation 9980 itself, not the President, against whom no remedy is sought.

5. The provision setting forth the 90-day time period reads as follows:

> Within 90 days after receiving a report submitted under subsection (b)(3)(A) of this section [19 U.S.C. § 1862(b)(3)(A)] in which the Secretary [of Commerce] finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President shall—(i) determine whether the President concurs with the finding of the Secretary, and (ii) if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.

19 U.S.C. § 1862(c)(1)(A).

6. The provision setting forth the 15-day time period reads as follows:

> If the President determines under subparagraph (A) [19 U.S.C. § 1862(c)(1)(A)] to take action to adjust imports of an article and its derivatives, the President shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A).

19 U.S.C. § 1862(c)(1)(B).

dent and is, therefore, null and void. *Id.* ¶ 73.

Plaintiff's Count 2 claim rests upon a "plain meaning" interpretation of Section 232(c)(1), 19 U.S.C. § 1862(c)(1). This provision, in subparagraph (A), requires the President to make certain determinations within 90 days of receiving the Commerce Secretary's report under Section 232(b)(3)(A). In subparagraph (B), it directs the President, if determining to take action "to adjust imports of an article and its derivatives," to implement that action within 15 days of making that determination.

[14] The Secretary of Commerce, following an investigation initiated under Section 232, submitted a report to the President under 19 U.S.C. § 1862(b)(3)(A) (the "Steel Report")[7] on January 11, 2018. Defs.' Mot. 5–6; Pl.'s Br. 3–4; *see Proclamation 9980* ¶ 1, 85 Fed. Reg. at 5,281. That report was the basis for Proclamation 9705. Proclamation 9980 states that the President, based on certain "assessments" of the Secretary of Commerce, concluded that it was "necessary and appropriate in light of our national security interests to adjust the tariffs imposed by previous proclamations to apply to the derivatives of aluminum articles and steel articles described in Annex I and Annex II to this proclamation." *Proclamation 9980* ¶ 9, 85 Fed. Reg. at 5,283. While mentioning these "assessments" of the Commerce Secretary, Proclamation 9980 does not state that the President was taking action pursuant to any report the Commerce Secretary issued under Section 232(b)(3)(A), 19 U.S.C. § 1862(b)(3)(A), subsequent to the January 2018 Steel Report.

Defendants do not dispute that the 2018 Steel Report is, for purposes of Section 232(c), 19 U.S.C. § 1862(c), the report issued according to Section 232(b)(3)(A), 19 U.S.C. § 1862(b)(3)(A), upon which the President based his adjustment to imports of steel derivatives, including steel nails. *See* Defs.' Mot. 24–29. Instead, they offer a different interpretation of Section 232(c)(1) (19 U.S.C. § 1862(c)(1)) than does plaintiff, arguing that in issuing Proclamation 9980, the President remained free to adjust imports of articles not addressed in Proclamation 9705 that the President designates as "derivatives" of those articles, despite the time limitation of Section 232(c)(1), including, specifically, the 15-day window of § 1862(c)(1)(B). *See id.*

Defendants advance two arguments in support of their statutory interpretation. Their first argument holds that the President complied with the time limits in Section 232(c)(1) when, in 2018, he issued Proclamation 9705 within 105 days of the President's receipt of the Steel Report. Their theory is that Proclamation 9980, rather than being an "action," or an implementation, separate from Proclamation 9705, was permissible under Section 232(c)(1) as a "modification" of that earlier action. Def.'s Mot. 25–34. Their second argument is in the alternative. The gist of this second argument is that even if the issuance of Proclamation 9980 was not in compliance with the time limitations of Section 232(c)(1), the court still should sustain Proclamation 9980 because the time limitations are merely "directory" and therefore did not preclude the President from adjusting imports of the products named therein. *Id.* at 34–36.

7. The Secretary's Report was published in the Federal Register earlier this year. *Publication of a Report on the Effect of Imports of Steel on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended,* 85 Fed. Reg. 40,202 (Dep't of Commerce July 6, 2020). We take judicial notice of this published document.

Defendants' first argument is, essentially, that Proclamation 9980 was timely according to Section 232(c)(1) because Proclamation 9705, of which Proclamation 9980 was a permissible modification, was timely. Further to this argument, defendants maintain that "section 232 delegates broad authority to the President to make adjustments to actions taken pursuant to the statute." *Id.* at 25. They direct our attention, specifically, to the words "nature and duration" in Section 232(c)(1)(A)(ii), 19 U.S.C. § 1862(c)(1)(A)(ii), arguing that "[i]f the Secretary's report recommends that action be taken to protect the national security, and if the President concurs, the President 'must determine the *nature and duration of the action* that, *in the judgment of the President*, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.' " *Id.* at 25 (quoting 19 U.S.C. § 1862(c)(1)(A)(ii)) (emphasis in original). Defendants characterize the terms "nature and duration" as "necessarily flexible and broad." *Id.* They also argue that the word "implement" appearing in Section 232(c)(1)(B), 19 U.S.C § 1862(c)(1)(B), "should not be read with the finality that PrimeSource appears to ascribe to it." *Id.* at 26. They urge that we interpret Section 232(c)(1) to mean that "[t]he statute contemplates continued monitoring and adjustments to section 232(c) actions, as circumstances change." *Id.* While acknowledging that amendments made to Section 232 by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, Title I, 102 Stat. 1107, Title I, §§ 1501(a), (b)(1) (the "1988 amendments") imposed the time limits in current Section 232(c)(1), they argue that the President's authority to modify actions previously taken predated those amendments, which they view as having preserved, rather than having curtailed, that modification authority. *Id.* at 29–32.

Although defendants would define the issue before us in broad and general terms, we conclude that the precise question is not whether, or to what extent, Section 232 provides general authority for "monitoring and adjustments" of an action previously taken. We conclude, instead, that the question before us is a narrower one: whether the President's having characterized the articles affected by Proclamation 9980 as "derivatives" of the steel products affected by Proclamation 9705 is, by itself, sufficient for us to conclude that Proclamation 9980 was timely according to Section 232(c)(1).[8] In considering this question, we conclude that Section 232(c)(1) would have empowered the President, upon a timely issuance of Proclamation 9705 in 2018, to include an adjustment to imports of, in addition to the specific articles identified by the Commerce Secretary in the Steel Report, "derivatives" of those articles. Section 232(c) allows the President the discretion to do so regardless of whether derivative products were identified and recommended to him in a report the Secretary submits under Section 232(b)(3)(A). Further, we presume that had the President done so, he would have acted within his discretion in characterizing the products affected by Proclamation 9980 as derivatives of the articles affected by Proclamation 9705. We note that Section 232 does not confine the President's

8. Because Proclamation 9980 imposed tariffs on a new set of articles (''derivatives'' of previously affected articles) rather than raise the tariff on an article already the subject of a Presidential action taken under Section 232, this case presents a different factual circumstance than the one this Court addressed in *Transpacific LLC v. United States, et al.,* 43 CIT ——, 415 F. Supp. 3d 1267 (2019) and *Transpacific Steel LLC v. United States, et al.,* 44 CIT ——, 466 F. Supp. 3d 1246 (2020).

discretion by defining the term "derivatives," and, in any event, we do not construe plaintiff's claim as contesting this characterization.

Two provisions in Section 232—the only provisions in the statute that mention "derivatives"—bear on the question before us. Section 232(c)(1)(A) directs the President to make two determinations "[w]ithin 90 days after receiving a report submitted under subsection (b)(3)(A) of this section [19 U.S.C. § 1862(b)(3)(A)] in which the Secretary [of Commerce] finds that *an article* is 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(c)(1)(A) (emphasis added). Subparagraph (i) of Section 232(c)(1)(A) provides that the President must determine whether he concurs with the affirmative finding of the Commerce Secretary in the report submitted under Section 232(b)(3)(A). Subparagraph (ii), the first of the two statutory provisions addressing derivatives, provides that the President, if concurring, "shall . . . determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article *and its derivatives* so that such imports will not threaten to impair the national security." *Id.* § 1862(c)(1)(A)(ii) (emphasis added). Section 232(c)(1)(B), the second of the two statutory provisions mentioning derivatives, directs that, if determining "under subparagraph (A) [19 U.S.C. § 1862(c)(1)(A)] to take action to adjust imports of an article *and its derivatives*, the President shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A)." *Id.* § 1862(c)(1)(B) (emphasis added).

A predecessor to the current Section 232, Section 7 of the Trade Agreements Extension Act of 1955,[9] did not contain the current reference to "derivatives." In pertinent part, Section 7 provided as follows:

> In order to further the policy and purpose of this section, whenever the Director of the Office of Defense Mobilization has reason to believe that any article is being imported into the United States in such quantities as to threaten to impair the national security, he shall so advise the President, and if the President agrees that there is reason for such belief, the President shall cause an immediate investigation to be made to determine the facts. If, on the basis of such investigation, and the report to him of the findings and recommendations made in connection therewith, the President finds that the article is being imported into the United States in such quantities as to threaten to impair the national security, he shall take such action as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security.

Trade Agreements Extension Act of 1955, Pub. L. No. 86–169, § 7, 69 Stat. 162, 166. As defendants point out, Defs.' Mot. 27, the conference report on this legislation stated that "[i]t is the understanding of all the conferees that the authority granted to the President under this provision is a

9. The immediate predecessor of this provision, enacted as Section 2 of the Trade Agreements Extension Act of 1954, contained a very brief national security provision: "No action shall be taken pursuant to such section 350 [negotiating authority] to decrease the duty on any article if the President finds that such reduction would threaten domestic production needed for projected national defense requirements." Pub. L. No. 83–464, 68 Stat. 360 (1954). This provision remains in current law as Section 232(a), 19 U.S.C. § 1862(a).

continuing authority." H.R. Rep. No. 84–745 at 7 (1955).

In renewing trade agreement authority in the Trade Agreements Extension Act of 1958, Congress made numerous changes to the national security provisions. Among the changes was a lengthy new subsection describing the factors to be considered when determining the effects of imports on national security; this provision is continued in current law as current Section 232(d), 19 U.S.C. § 1862(d). The Trade Agreements Extension Act of 1958, in § 8(a), streamlined the existing national security investigative procedure by eliminating the requirement that the President initiate an investigation and placing that responsibility instead upon the Director of the Office of Defense and Civilian Mobilization. Most pertinent to this case is that Congress also granted the President, if advised by the Director that imports of an "article" threaten to impair the national security, the authority to adjust the imports of "such article and its derivatives":

> Upon request of the head of any Department or Agency, upon application of an interested party, or upon his own motion, the Director of the Office of Defense and Civilian Mobilization (hereinafter in this section referred to as the "Director") shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from other appropriate Departments and Agencies, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. If, as a result of such investigation, the Director is of the opinion that the *said article* is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall promptly so advise the President, and, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security as set forth in this section, he shall take such action, and for such time, as he deems necessary to adjust the imports of such article *and its derivatives* so that such imports will not so threaten to impair the national security.

Pub. L. No. 85–686, § 8(a), 72 Stat. 673, 678 (1958) (emphasis added). This provision authorized the President, on his own authority, to adjust the imports of derivatives of the article that was investigated and reported to him.

The language on derivatives was added to the legislation (H.R. 12591, the "Trade Agreements Extension Bill of 1958") by an amendment (Amendment No. 20) in the Senate, to which the House receded. Trade Agreements Extension Bill of 1958, Conference Report [to accompany H.R. 12591], Rep. No. 2502, 85th Cong., 2d Sess., at 7 (1958). The debate in the House on the Conference Report on H.R. 12591 indicates that the purpose of Amendment No. 20 in the Senate was to ensure that the President could address the possibility that derivatives of the investigated article would circumvent the measures taken to adjust imports of the article itself. 104 Cong. Rec. 16,537, 16,542 (1958). There was a specific concern involving derivatives of imports of crude oil and other natural resources, but Amendment 20 effected a change that was without limitation as to the type of product involved.[10] *See id.* Significantly, Proclama-

10. The floor statement of House Ways and Means Chairman Mills, 104 Cong. Rec. 16,537, 16,542 (1958), included the following:

> The Senate further authorized the President that if he should take such action as he deems necessary to adjust the imports of

tion 9980 identified "circumvention" of the tariffs on the steel products affected by Proclamation 9705 as a justification for the President's decision. *Proclamation 9980*, ¶ 8, 85 Fed. Reg. at 5,282.

In enacting Section 232 of the Trade Expansion Act of 1962, Congress essentially carried over the language of § 8(a) of the 1958 statute, reassigning the investigative responsibility from the Director of the Office of Defense and Civilian Mobilization to the Director of the Office of Emergency Planning.[11] Neither the 1958 version nor the 1962 version of the statute placed any time limits on the President's authority to adjust imports of the investigated article or derivatives of that article, and in that respect the authority delegated to the President by the 1962 statute could be described as "continuing."

Congress again amended Section 232 in 1975. The investigative responsibility was transferred from the Director of the Office of Emergency Planning to the Secretary of the Treasury,[12] the current language on

> the particular article, he may also adjust the imports of its derivatives. The effect of the addition of the language with respect to derivatives in the statute serves the same purpose as the expression of intent on the part of the Committee on Ways and Means which was elaborated in a colloquy between the gentleman from Texas [Mr. IKARD] and myself on the floor of the House when the legislation was under consideration by the House. At that time, in response to an inquiry from the gentleman from Texas, I observed that prudent administration of this provision of the law would require that, if action in the interest of national security is indicated with respect to the imports of a particular article, it would follow that appropriate action with respect to the derivatives of such article would also be in order if it has been found that the imports of such derivatives would have the effect of threatening to impair the national security.
>
> The colloquy to which Chairman Mills referred included the following:
>
> Mr. IKARD. Is it intended that when the imports of a natural resource are controlled under the provisions of the national security section of the committee bill, and with particular reference to petroleum, that such control should take into consideration the importation of products, derivatives, or residues of petroleum so that these products and derivatives could not be imported in a way that would circumvent the control of the imports of the basic natural resource?
>
> Mr. MILLS. Yes. Clearly, when a decision is taken to restrict imports in the interest of national security, it is our intention that the decision be effective and not rendered ineffective by circumvention.
>
> House debate on H.R. 12591, 104 Cong. Rec. 10,672, 10,750 (1958).

11. The new provision read as follows:

> Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Director of the Office of Emergency Planning (hereinafter in this section referred to as the ''Director'') shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from other appropriate departments and agencies, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. If, as a result of such investigation, the Director is of the opinion that the said article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall promptly so advise the President, and, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security as set forth in this section, he shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security.
>
> Trade Expansion Act of 1962, Pub. L. No. 87–794, § 232(b), 76 Stat. 872, 877.

12. Along with certain other responsibilities pertaining to international trade, this responsibility was transferred to the Secretary of Commerce by *Reorganization Plan No. 3 of*

public participation was added, and, for the first time, Congress placed a time limit on the investigation:

> The Secretary [of the Treasury] shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation. The Secretary shall report the findings of his investigation under this subsection with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, his recommendation for action or inaction under this section to the President within one year after receiving an application from an interested party or otherwise beginning an investigation under this subsection.

Pub. L. No. 93–618, 88 Stat. 1978, 1993–94 (1975). Congress placed no time limit on the exercise of discretion by the President.

Congress next made major changes to Section 232 in the 1988 amendments, which resulted in the current Section 232.[13] Among a number of new procedural requirements, including requirements for reporting to the Congress on actions taken or declined to be taken, the 1988 amendments imposed, for the first time, time limits on the exercise of discretion by the President. These were the aforementioned 90-day time period in which the President is to "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives . . .," 19 U.S.C. § 1862(c)(1)(A)(ii), and the 15-day time period in which the President, if determining "to take action to adjust imports of an article and its derivatives," is directed to "implement that action," *id.* § 1862(c)(1)(B).

Defendants maintain that "[n]othing in the 1988 amendments' text or legislative history . . . suggests that Congress intended to alter, let alone withdraw, its longstanding delegation of authority to take continuing action" and that "[t]he circumstances leading to passage of the 1988 amendments make clear Congress' desire to prevent *inaction*, not to curtail further action." Defs.' Mot. 29–30. Turning first to the text of the 1988 amendments, we are unconvinced by defendants' argument that these amendments maintained, unchanged, the "continuing" authority of the President.

As amended, the statute expressly requires the President, "[w]ithin *90 days* after receiving a report submitted under subsection (b)(3)(A)," (i.e., the report the Commerce Secretary is to issue within 270 days of the initiation of an investigation under 19 U.S.C. § 1862(b)) to "determine the nature and duration of *the action* that, in the judgment of the President, must be taken to adjust the imports of the article *and its derivatives* . . . ." *Id.* § 1862(c)(1)(A)(ii) (emphasis added). Section 232(c)(1)(B) provides that "[i]f the President determines . . . to take *action* to adjust imports of an article *and its derivatives*, the President *shall implement that action* by *no later* than the date that is *15 days* after the day on which the President determines to take action . . . ." *Id.* § 1862(c)(1)(B) (emphasis added). Contrary to defendants' urging that we read Section

1979, § 5(a)(1)(B), eff. Jan. 2, 1980, 44 Fed. Reg. 69,273, 69,274, 93 Stat. 1381, 1383.

13. An intervening amendment in 1980 added current Section 232(f), which provided that Congress could invalidate Presidential action to adjust imports of petroleum or petroleum products upon a "disapproval resolution." Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96–223, Title IV, § 402, 94 Stat. 229.

232(c)(1) broadly and flexibly, we find no ambiguity in the time limitations it imposes. Nor do we find the provision ambiguous in its application of those time limits to an action taken to adjust imports of "derivatives." In short, there is no "flexible" reading of this provision under which the express time limitations on a Presidential "action," and implementation thereof, do not apply. And we find no indication anywhere in the text of the statute as amended by the Omnibus Trade and Competitiveness Act that the President retained authority to adjust imports of articles identified in the Secretary's report and then, after an extended period of time, adjust imports of derivatives of those articles without complying with the detailed procedures of Section 232(b) and (c). To the contrary, the 90- and 15-day time limitations in Section 232(c)(1) expressly confine the exercise of the President's discretion *regardless* of whether the President determines to adjust imports only of the "article" named in the Secretary's report or, instead, to adjust imports of the "article and its derivatives." *See* 19 U.S.C. § 1862(c)(1). No other provision in Section 232 provides to the contrary or, for that matter, addresses in any way the authority to adjust imports of derivatives. Had Congress intended, in the 1988 amendments, to preserve Presidential authority to adjust imports of derivatives after the close of the 105-day period, presumably it would have created an exception to the general time limitation it imposed in Section 232(c)(1). But we see no indication of such an intent in the plain meaning of the statute and find indications to the contrary.

Defendants' "flexible" reading of Section 232(c)(1) would require us to interpret the "action" taken by Proclamation 9980 and that taken by Proclamation 9705 as parts of the same "action." This presents several interpretive problems. For one, it is contrary to the plain and ordinary meaning of the words "action" and "implement" as used in Section 232(c)(1). There can be no question, as a factual matter, that the two, separately-published proclamations stemmed from two separate Presidential determinations and were directed at two different sets of products. Each necessarily required its own implementation. *See* 19 U.S.C. § 1862(c)(1)(B) ("[T]he President *shall implement that action* by no later than the date that is 15 days after the day on which the President determines to take *action* under subparagraph A"). The President "implemented" the "action" he determined to take following his receipt of the Steel Report when he issued Proclamation 9705 in 2018. In enacting Section 232(c)(1) as part of the 1988 amendments, Congress placed time limits on the exercise of the President's discretion for the first time in the history of the statute. The straightforward language by which Congress did so did not leave room for an interpretation that the President retained, indefinitely, discretion to adjust imports of derivatives of an article affected by an earlier action and implementation. Despite the express time limitation Congress imposed, defendants insist that the President may resume his "implementation" indefinitely—presumably even repeatedly through subsequent measures, and even many years later—and thereby sidestep the express time limitations Congress imposed.

[15] Additionally, defendants' interpretation of Section 232 would require us to ascribe a different meaning to the word "action" as used in Section 232(c)(1) than that indicated by the use of that term in another provision added to the statute by the 1988 amendments, Section 232(c)(3) (19 U.S.C. § 1862(c)(3)). In Section 232(c)(3), Congress created an exception to the time limitations in Section 232(c)(1), and an alternate procedure, to apply when the "action" the President

chooses to take under Section 232(c)(1) is to pursue a trade agreement "which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security." 19 U.S.C. § 1862(c)(3)(A)(i). Under this alternate procedure, if, after 180 days, no agreement is reached or if an agreement "is ineffective in eliminating the threat to the national security posed by imports of such article," the President may "take such other *actions* as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security." *Id.* § 1862(c)(3)(A)(ii) (emphasis added). Section 232(c)(1) uses the singular term "action"—which Section 232(c)(3) also uses to refer to the determination taken under Section 232(c)(1)—and then distinguishes that term by using the term "*other* actions" (also identified as "*additional* actions"), 19 U.S.C. § 1862(c)(3)(B)(ii) (emphasis added), that the President is authorized to take under Section 232(c)(3) in the event the Section 232(c)(1) "action," i.e., any trade agreement, or attempt to obtain one, is deemed by the President to be insufficient to eliminate the threat from imports of the article. Thus, defendants' reading of the word "action" as used in Section 232(c)(1) to encompass, broadly, a series of continuing measures to adjust imports, as opposed to a discrete action that may be implemented, cannot be reconciled with the use of that term in Section 232(c)(3). We disfavor an interpretation that ascribes different meanings to the same term as used in different provisions of the same statute. *See Brown v. Gardner*, 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 (1995) ("[T]here is a presumption that a given term is used to mean the same thing throughout a statute.").

Although placing no express time limits on the "other actions" in Section 232(c)(3), as it did in Section 232(c)(1), Congress limited these "additional actions" to those that adjust imports of the article that was, or would have been, affected by the trade agreement. *Id.* § 1862(c)(3)(A) (confining the additional actions to actions "to adjust the imports of *such article*" (emphasis added)). In substance, Proclamation 9980 concludes that the previously-imposed tariffs on steel articles were (in the words of 19 U.S.C. § 1862(c)(3)) "ineffective in eliminating the threat to the national security." But Proclamation 9980 differs from an "additional action" taken under Section 232(c)(3) in two critical respects: it did not follow a determination to enter into a trade agreement (a determination of which the President must give timely notification to Congress under Section 232(c)(2)), and even if it had, it would not have conformed to the procedure thereunder because the "additional action" was not directed to the same article as was the original action.

[16] Where a statute creates an exception to a general rule (as Section 232(c)(3) does in creating an exception to the time limitations of Section 232(c)(1)), such exception is to be read narrowly and not interpreted to apply where Congress did not expressly provide for it. *Comm'r v. Clark*, 489 U.S. 726, 739, 109 S.Ct. 1455, 103 L.Ed.2d 753 (1989) ("In construing provisions ... in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.") (citing *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493, 65 S.Ct. 807, 89 L.Ed. 1095 (1945) ("To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people."). When we read the statute as a whole, we see the detailed, specialized procedure Congress set forth as Section

232(c)(3) as another indication that Proclamation 9980 must be viewed as untimely under Section 232(c)(1) if considered to be an action that was taken based solely on the Steel Report.

Defendants' argument referring to the words "nature and duration" in Section 232(c)(1)(A)(ii) also fails to convince us that the President retains authority, indefinitely, to take additional steps to adjust imports of articles not addressed in his original action. Because different products were affected, the "nature" of the action the President took in 2020 differed from the nature of the action he took in 2018.

Defendants argue that specific factors set forth in Section 232(d), 19 U.S.C. § 1862(d), that the President is to consider in exercising his authority under Section 232 signify that "[t]he statute contemplates continued monitoring and adjustments to section 232(c) actions, as circumstances change." Defs.' Mot. 26. According to defendants, "[m]any of these factors, including the 'domestic production needed for projected national defense requirements,' the 'capacity of domestic industries to meet such requirements,' and 'the impact of foreign competition on the economic welfare of individual domestic industries,' are dynamic by nature and invite ongoing evaluation and, as necessary, course correction." *Id.* (quoting 19 U.S.C. § 1862(d)). This argument, too, is unpersuasive, confusing the non-exclusive list of factors the President is to consider in his determination of what action is needed with the time periods in which he must make and implement that determination. As we discussed above, the list of non-exclusive factors set forth in current Section 232(d) were added by Trade Agreements Extension Act of 1958. We find nothing in the text of Section 232(d) that creates an exception to the time limits Congress imposed, as Section 232(c)(1), thirty years later.

In support of their motion to dismiss, defendants argue, additionally, that "[i]t is no defect that the Secretary's investigation covered steel articles and not derivatives of steel articles, such as nails." Defs.' Mot. 37 (citing Compl. ¶¶ 41–42); Defs.' Reply 2 (arguing that "Commerce plays no statutory role with respect to derivative articles."). According to defendants, "the President is authorized to adjust imports of derivatives of articles, even when the Secretary's investigation and report addressed only the article itself." Defs.' Mot. 37 (quoting 19 U.S.C. § 1862(c)(1)(A)(ii) ("if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article *and its derivatives* . . . ."). As we discussed above, the President is empowered to adjust imports of derivatives of the investigated article regardless of whether the investigation, and the Commerce Secretary's Section 232(b)(3)(A) report, included them. Defendants' argument does not confront the question of timeliness: PrimeSource challenges the timeliness of the President's action on the ground that the time limitations of Section 232(c)(1) apply regardless of whether or not the President's action is directed to derivatives of an article affected by an earlier action.

In support of their argument that nothing in the legislative history of the 1988 amendments evinces congressional intent to limit the Presidents' discretion as to modifications of earlier actions, defendants cite congressional testimony showing, they argue, that the 1988 amendments were motivated by frustration on the part of certain members of Congress with President Reagan's delay in taking actions under Section 232, in particular with respect to machine tools. *Id.* at 30–31 (citing Hearings Before the Comm. on Ways & Means on H.R. 3 Trade and International Eco-

nomic Policy Other Proposals Reform Act, 100th Cong. (1987); Hearings Before the Subcomm. on Trade of H. Comm. On Ways & Means, 99th Cong., 2d Sess. 1282 (1986)).

A Senate report on the legislation, while noting that then-current law imposed a one-year requirement for the investigation (shortened to 270 days by the 1988 amendments), also noted that under current law "[t]here is no time limit for the President's decision." Report of the Committee on Finance on S. 490, S. Rep. 100-71, at 135 (1987). "The basic need for the amendment arises from the lengthy period provided by present law—one year for investigations and no time limit for decisions by the President—before actions to remove a threat posed by imports of particular products to the national security are taken. For example, in the machine tools case, the President waited over 2½ years before taking any action to assist the domestic industry." *Id.* "The Committee [on Finance] believes that if the national security is being affected or threatened, this should be determined and acted upon as quickly as possible." *Id.*

At least arguably, the legislative history defendants cite, and the quoted Senate report, are consistent with a view that Congress could have intended that the President retain "modification" authority such as defendants posit, so long as he imposes an initial measure within the time limits. But Section 232(c)(1) as effected by the 1988 amendments unambiguously placed time limits on the President's authority to adjust imports of derivatives as well as the imports of the investigated article. Were there intent to retain the authority to impose subsequent measures to adjust imports of derivatives after the expiration of the 105-day period, we would expect to see at least some indication of that intent in the legislative history. However, we find nothing in the legislative history to indicate that Congress intended to do so. Such indications as we are able to find are to the contrary. The conference agreement on the Omnibus Trade and Competitiveness Act of 1988 summarizes the amendment to Section 232 as follows:

A. Amends section 232 of the Trade Expansion Act of 1962 to require the Secretary of Commerce to report to the President within 270 days of initiating an investigation.

B. Requires the Secretary of Commerce to consult with the Secretary of Defense regarding the methodological and policy questions raised by the investigation; and requires the Secretary of Defense, upon request of the Commerce Secretary, to provide defense requirements with respect to the article under investigation.

C. Requires the President to decide, within 90 days of receiving the Commerce Secretary's report, on whether to take action and if so to proclaim such action within 15 days.

D. Requires the President to report to Congress within 30 days on the action taken and reasons for such action.

E. Authorizes the enforcement of the quantitative restrictions negotiated with respect to machine tool imports.

Summary of the Conference Agreement on H.R. 3, The Omnibus Trade and Competitiveness Act of 1988 at 15–16 (Comm. Print 1988). The use of the words "proclaim such action" in paragraph C, above, casts further doubt on defendants' expansive and flexible interpretation of the word "implement" as used in 19 U.S.C. § 1862(c)(1)(B). "Proclaim" is the verb form of the noun "proclamation," and "proclaim *such action*" is inconsistent with

an interpretation under which Congress intended the President to have authority to proclaim additional "actions" indefinitely (through subsequent proclamations), after the time period had passed.

In summary, we view defendants' argument on legislative history as confusing an apparent motivation with the specific statutory means Congress chose to achieve its objective, which is reflected in the plain meaning of the language of the amendments. The solution Congress adopted was to require, generally, that the President implement an import adjustment (whether on the investigated article or on that article and its derivatives) within the 105-day time period following receipt of the report the Secretary submits under Section 232(b)(3)(A) (with the limited "trade agreement" exception discussed previously). The statute did not provide general authority for the President to take, or implement, another "action" (or actions) on derivatives after that time period elapsed.

According to defendants, "[t]hat the statute also involves foreign affairs and national security cautions against an inflexible reading" of the provisions governing the exercise of the President's Section 232 authority. Defs.' Mot. 33. In support of this argument, they cite *B-West Imports, Inc. v. United States*, 75 F.3d 633, 636 (Fed. Cir. 1996), *Florsheim*, 744 F.2d at 793, and *American Ass'n of Exporters & Importers-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1248 (Fed. Cir. 1985). While the statutory interpretation principle defendants identify is a valid one, it does not serve the arguments they make in favor of their particular interpretation of Section 232. As we have explained, there is no "flexible" reading of Section 232(c)(1) that suffices to allow the President to adjust, through new tariffs, imports of derivatives of previously-affected articles outside of the time limits Congress imposed, and the appellate decisions on which defendants rely do not lend support to any such reading.

In *B-West Imports* and in *Florsheim Shoe Co.*, the Court of Appeals addressed interpretations of statutes conferring Presidential authority in matters involving import regulation. Each of these cases rejected an appellant's statutory interpretation that was plainly unreasonable. *B-West Imports* held that a provision in the Arms Export Control Act, 22 U.S.C. § 2778, which granted the President authority to "control" arms imports, encompassed the authority to revoke previously-issued permits for importations of munitions from the People's Republic of China. The Court of Appeals rejected the interpretation of § 2778 advanced by appellants, who conceded that the term " 'control' is broad enough to allow the President to ban imports by denying licenses or permits for future imports." 75 F.3d at 635. The opinion states that "if the term 'control' includes the power to prohibit, as appellants concede that it does, we are unable to discern any basis for construing the statute to convey the power to deny permits and licenses in advance, but to withhold the power to revoke them once they have been issued." *Id.* at 636. The case did not involve an attempt to invoke *delegated* authority to adjust imports that was claimed to have expired. *Florsheim Shoe Co.* rejected an importer's challenge to an action by the President that withdrew duty-free treatment provided under the Generalized System of Preferences ("GSP") program for certain leather articles from India. The Court of Appeals, upon interpreting statutory language providing that "[t]he President may withdraw, suspend, or limit the application of the duty-free treatment accorded under section 2461 of this title with respect to any article or with respect to any country . . .," 19 U.S.C. § 2464 (1982) (amended to 19 U.S.C. § 2463(c)(1) (1996)),

rejected appellant's argument that "the President may only limit duty-free treatment for a particular article from all countries or for all articles from a particular country" and therefore lacked authority to withdraw duty-free treatment from a specific article from a particular beneficiary country. 744 F.2d at 794. The Court of Appeals viewed appellant's argument as based on an "over-emphasis on the word 'or' " in § 2464 that was at odds with the overall provision. In the instant case, plaintiff advocates a "plain meaning" construction of Section 232(c)(1), rather than one such as that advocated in *Florsheim Shoe Co.*, which was a strained interpretation of a provision delegating tariff authority to the President that failed to recognize that the greater power the provision granted must be read to include the lesser.

The third decision defendants cite, *American Ass'n of Exporters & Importers-Textile & Apparel Grp.*, adjudicated, and rejected, claims that an administrative agency, the Committee on the Implementation of Textile Agreements, "failed to abide by its statutory authority," "acted arbitrarily," and violated "the statutory and constitutional rights" of members of plaintiff's organization "to have notice of the proposed actions and an opportunity to be heard." 751 F.2d at 1246. In disposing of appellant's "statutory authority" claim, the Court of Appeals disagreed with a narrow construction of section 204 of the Agricultural Act of 1956, under which the President negotiated agreements on importations of textiles and textile products. The Court of Appeals rejected the argument that Congress, in authorizing the President "to issue regulations governing the entry or withdrawal from warehouse of any such commodity, product, textiles, or textile products to carry out such agreements," 7 U.S.C. § 1854 (1982), "intended to incorporate the terms of any agreements concluded pursuant to section 204 into that statute itself." 751 F.2d at 1241, 1247 (footnote omitted). The Court reasoned that the statutory phrase "to carry out" as used in § 1854 "does not imply that Congress restricted the President's discretion in this regard by requiring him to implement the agreements in the particular manner seen by appellant" but rather "is a broad grant of authority to the President in the international field in which congressional delegations are normally given a broad construction." *Id.* This case, in contrast, does not involve delegated authority to promulgate implementing regulations, and there is no "broad construction" of the express time limitations in Section 232(c)(1) that plausibly supports defendants' argument.

In summary, the action taken by Proclamation 9980 to adjust imports of derivatives was not implemented during the 105-day time period set forth in § 1862(c)(1), if that time period is considered to have commenced upon the President's receipt of the Steel Report. The President's having characterized the articles affected by Proclamation 9980 as "derivatives" of the steel products affected by Proclamation 9705 is, therefore, insufficient by itself to support a conclusion that Proclamation 9980 was timely according to Section 232(c)(1).

We turn next to defendants' second argument, which is that the statutory deadlines in Section 232(c)(1) are directory, not mandatory, an argument apparently in the alternative to their argument that the President complied with all procedural requirements. Defs.' Mot. 35. They maintain that where Congress did not expressly state the consequences of failures to meet deadlines, the deadlines ordinarily should not be construed as mandatory, and the court should so construe them here. But as we pointed out above, accepting this logic would require us to conclude that Congress established the time limitations,

which were central to the 1988 amendments and related to other procedural requirements imposed by those amendments, while at the same time intending that these limitations would have no binding effect on the exercise of the President's discretion. It also would require us to conclude that the President could take virtually any action he chose, even one adjusting imports of products that are not derivatives of those affected by an earlier action, despite the express time limitations in Section 232(c)(1). Such an interpretation essentially renders Section 232(c)(1), as added by the 1988 amendments, a nullity. As the court has explained, the plain meaning and structure of Section 232 are to the contrary.

[17] The aforementioned Section 232(c)(3), another provision added by the 1988 amendments, also is inconsistent with an interpretation that the Section 232(c)(1) time limitations are merely directory. As the court has discussed, this alternate procedure applies when the President determines that the appropriate "action" is to seek a trade agreement limiting or restricting the importation into, or exportation to, the United States of "the article that threatens to impair national security." 19 U.S.C. § 1862(c)(3)(A)(i). But it is axiomatic that when interpreting a statute, a court is to give effect to every word and every provision. *See Duncan v. Walker*, 533 U.S. 167, 174, 121 S.Ct. 2120, 150 L.Ed.2d 251 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.' ") (citing *United States v. Menasche*, 348 U.S. 528, 538–39, 75 S.Ct. 513, 99 L.Ed. 615 (1955)); *see also Williams v. Taylor*, 529 U.S. 362, 404, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (describing the above rule as the "cardinal principle of statutory construction"). The procedure Congress spelled out in detail in Section 232(c)(3) would appear to be rendered superfluous if the time limitations in Section 232(c)(1) were interpreted to have no binding effect. In summary, defendants' conception of a "flexible" statutory scheme under which the Section 232(c)(1) time limits are merely directory is inconsistent with the elaborate procedural mechanisms Congress included to ensure oversight generally, and to provide, specifically, for the special situation arising from the President's negotiation of a trade agreement.

In support of their argument that the time limitations in Section 232(c)(1) are merely directory, defendants cite *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159, 123 S.Ct. 748, 154 L.Ed.2d 653 (2003) (citing *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63, 114 S.Ct. 492, 126 L.Ed.2d 490 (1993)), *Hitachi Home Elecs., Inc. v. United States*, 661 F.3d 1343, 1345–46 (Fed. Cir. 2011), *Gilda Industries, Inc. v. United States*, 622 F.3d 1358, 1365 (Fed. Cir. 2010), and *Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563, 566 (Fed. Cir. 1989). Defs.' Mot. 35. These cases are inapposite. They did not involve an express limitation Congress imposed on the delegation to the Executive Branch of a legislative power the Constitution vested in the Congress. See U.S. CONST. art. I, § 8, cl. 1 (conferring the power to lay and collect Duties) & cl. 3 (conferring the power to regulate commerce with foreign nations). In each, the Supreme Court or the Court of Appeals, using established methods of statutory interpretation, concluded that Congress intended for the time limitation at issue to be merely directory. We approach the issue in this case not by applying a blanket presumption as to whether a deadline is directory or mandatory, as defendants would have us do, but by examining the statute as a whole, giving effect to "every clause and word," *Duncan*, 533 U.S. at 174, 121 S.Ct. 2120, to discern congressional intent as to the statutory time limits in

question. Here, the nature of the delegation (a delegation of a legislative power reserved by the Constitution to the Congress), the plain meaning of Section 232(c)(1), and the indicia of congressional intent appearing elsewhere in Section 232 preclude us from concluding that the time limits are merely directory.

Barnhart v. Peabody Coal Co. arose from a statutory requirement in the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9706(a) ("Coal Act"), that the Secretary of Labor assign, before October 1, 1993, retired coal miners whose former employers were no longer in business to extant "signatory operators," who would assume the annual premium obligations for those retirees' benefits. After the Department of Labor was unable to complete the lengthy assignment process by the statutory due date, it proceeded to assign some 10,000 previously-unassigned beneficiaries to signatory operators. 537 U.S. at 155–56, 123 S.Ct. 748. The issue in the case was whether those assignments were valid regardless of the untimeliness of the Department's actions. From a comprehensive examination of the Coal Act, including the legislative purpose of requiring the assignments and the consequence of holding assignments made after the deadline to be invalid, which the Court considered to be contrary to the overall intent of the statute, the Court held that the statutory date for the assignments did not invalidate the subsequent assignments. *Id.* at 172, 123 S.Ct. 748 ("The way to reach the congressional objective, however, is to read the statutory date as a spur to prompt action, not as a bar to tardy completion of the business of ensuring that benefits are funded, as much as possible, by those identified by Congress as principally responsible."). The case at bar does not present an analogous situation. Rather than spur agency action to complete a complex administrative task such as that required by the Coal Act, Congress endeavored in the 1988 amendments to Section 232 to impose new controls, through time limitations and reporting requirements, on the exercise of Presidential discretion.

Hitachi Home Elecs., Inc. involved the requirement in Section 515(a) of the Tariff Act that Customs and Border Protection act on a protest within two years. Rejecting the plaintiff's argument that a protest not acted upon within the two-year period is "deemed allowed," the Court of Appeals noted that a protestant desiring to obtain expeditious allowance or denial, or alternatively judicial review, may seek accelerated disposition under Section 515(b). 661 F.3d at 1348–49. Nothing in the Tariff Act even suggested congressional intent that a protest not acted upon during the two-year period should be deemed to have been allowed, and the provision for accelerated disposition is contrary to such an intent.

Gilda Industries, Inc. held that a failure of the U.S. Trade Representative to make a notification required by 19 U.S.C. § 2417(c)(2) to be made to domestic parties of the impending termination of a retaliatory trade action occurring by operation of § 2417(c)(1) four years after its imposition, in the absence of a written request from a domestic party for continuation, did not nullify the statutorily-required termination. Under the reasoning of the Court of Appeals, the termination of the retaliatory trade action on the four-year anniversary date, absent a continuation request by a party already on notice of the termination, was unaffected by the absence of the notification required by § 2417(c)(2). 622 F.3d at 1365.

Canadian Fur Trappers Corp. involved a previous version of Section 504(d) of the Tariff Act, which directed the Customs Service to liquidate an entry within 90

days of removal of a suspension of liquidation but did not provide a consequence for a failure by the Customs Service to do so. The Court of Appeals rejected the importers' argument that such failure resulted in a deemed liquidation at the entered duty rate, a highly consequential result for which the statute did not then provide. 884 F.2d at 566.

In summary, we are not convinced by either of the two arguments defendants put forth to support their motion to dismiss plaintiff's Count 2 claim. The President's characterization of the articles affected by Proclamation 9980 as derivatives of the articles affected by Proclamation 9705 is insufficient, by itself, to support a conclusion that the challenged decision satisfied the time limitations in Section 232(c)(1), and Congress did not intend for those time limits to be merely directory. Count 2 of plaintiff's complaint states "a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570, 127 S.Ct. 1955, and we decline to dismiss it at this stage of the proceedings.

D. Plaintiff's Motion for Summary Judgment

PrimeSource characterizes its motion as a USCIT Rule 56 motion for summary judgment, Pl.'s Br. 1 (moving pursuant to USCIT Rule 56 "because there is no genuine dispute as to any material fact and PrimeSource is entitled to judgment as a matter of law"). Nevertheless, it appears that plaintiff also is moving for relief under USCIT Rule 56.1 ("Judgment on an Agency Record for an Action Other Than That Described in 28 U.S.C. § 1581(c)(1)"). Plaintiff refers to its motion as a "Motion for Judgment on the Agency Record," Pl.'s Br. 50, and in this way identifies its motion as one brought under USCIT Rule 56.1. To date, neither plaintiff nor defendants have raised the question of whether an administrative agency record will be relevant to this litigation.

Rule 56.1 applies when "a party believes that the determination of the court is to be made solely on the basis of the record made before an agency." USCIT R. 56.1(a). Certain of the claims we have dismissed in this litigation were APA claims, which we dismissed for the reason discussed above, which is that there is no final agency action that may be contested under the APA. The remaining claim, that of Count 2, is not an APA claim as it contests an action of the President, not an agency action. Therefore, we consider plaintiff's motion as a Rule 56 motion for summary judgment, not a motion under Rule 56.1. But it does not necessarily follow that an agency record will be irrelevant to this proceeding or that individualized procedures similar to those specified under Rule 56.1 will not be useful as this litigation proceeds.

[18, 19] Under USCIT Rule 56(a), the burden is on the moving party to show "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." At this pleading stage of the litigation, we cannot conclude that plaintiff has met this burden. To declare Proclamation 9980 invalid, and on that basis enter summary judgment in plaintiff's favor, we must find "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Maple Leaf Fish Co.*, 762 F.2d at 89. As we discussed previously, defendants conceded that Proclamation 9980 was not based on a report, other than the Steel Report, that was designated as a report issued pursuant to Section 232(b)(3)(A). This concession was relevant to our conclusion that Proclamation 9980 was not issued within the time period imposed by Section 232(c)(1), if that time period is deemed to have begun with

the President's receipt of the Steel Report. But at this stage of the litigation, we cannot conclude that the time period imposed by Section 232(c)(1) necessarily began on January 11, 2018, the date the Steel Report was received by the President. Therefore, we are not now able to determine whether or not the claim in Count 2 is validly based on a "significant procedural violation," *Maple Leaf Fish Co.*, 762 F.2d at 89.

Although Proclamation 9980 was issued long after the 105-day period beginning with the receipt of the Steel Report, it also was issued pursuant to what Proclamation 9980 describes as an "assessment" (or "assessments") of the Commerce Secretary. Proclamation 9980 states that "[i]t is the Secretary's *assessment* that foreign producers of these derivative articles have increased shipments of such articles to the United States to circumvent the duties on aluminum articles and steel articles imposed in Proclamation 9704 and Proclamation 9705, and that imports of these derivative articles threaten to undermine the actions taken to address the risk to the national security . . . ." *Proclamation 9980* ¶ 8, 85 Fed. Reg. at 5,282 (emphasis added). It further states that "[t]he Secretary has *assessed* that reducing imports of the derivative articles . . . would reduce circumvention" and identifies the reduction of those imports as a measure to address the threatened impairment of the national security. *Id.* (emphasis added). The Proclamation states that the adjustment of the tariffs on the derivative articles is being taken "[b]ased on the Secretary's assessments." *Id.* ¶ 9, 85 Fed. Reg. at 5,283 ("Based on the Secretary's *assessments*, I have concluded that it is necessary and appropriate in light of our national security interests to adjust the tariffs imposed by previous proclamations to apply to the derivatives of aluminum articles and steel articles described in Annex I and Annex II to this proclamation.") (emphasis added).

The Secretary of Commerce is the official Section 232 identifies as having the responsibility of conducting a Section 232(b) investigation and preparing a Section 232(b)(3)(A) report. Proclamation 9980 did not characterize as a "report" submitted under Section 232(b)(3)(A) the communication or communications by which the Secretary of Commerce transmitted his recommendation to the President to adjust tariffs on the aluminum and steel products Proclamation 9980 identified. Nevertheless, it is clear from the text of Proclamation 9980 that the Secretary of Commerce undertook certain preparations prior to the President's action and also that the Secretary made a recommendation relating to the subject matter of Section 232(b)(3)(A) ("If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in such report.").

Even though the Secretary's communications to the President on derivative articles were not designated in Proclamation 9980 as having been made pursuant to Section 232(b)(3)(A), we are not in a position to ascertain the extent to which these communications nevertheless met the fundamental requirements of Section 232(b)(3)(A), for the straightforward reason that those communications, and any related records, are not before us. Although concluding that Proclamation 9980 was untimely under Section 232(c)(1) when viewed solely as an action taken in response to the Steel Report, we also conclude that there are genuine issues of material fact that bear on the extent to which the subsequent "assessment" or "assessments" of the Commerce Secretary identi-

fied in Proclamation 9980 validly could be held to have served a function analogous to that of a Section 232(b)(3)(A) report. Nor do we know what form of inquiry or investigation, if any, the Commerce Secretary conducted prior to his submission of these communications to the President and whether, or to what extent, any such inquiry or investigation satisfied the essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(b)(2)(A).

We do not imply that the Secretary's actions are judicially reviewable in this case. We conclude instead that factual information pertaining to the Secretary's communicating to the President on the derivative articles would be required in order for us to examine whether, and to what extent, there was or was not compliance by the President with the procedural requirements of Section 232 and whether any noncompliance that occurred was a "significant procedural violation," *Maple Leaf Fish Co.*, 762 F.2d at 89. Moreover, at this early stage of the litigation, we lack a basis to presume that these unresolved factual issues are unrelated to the issue of whether the President clearly misconstrued the statute or the issue of whether the President took action outside of his delegated authority.

In summary, there remain genuine issues of material fact precluding us from granting plaintiff's motion for summary judgment, and as a result plaintiff has not met the burden required to obtain a judgment in its favor on its Count 2 claim. It would appear that the filing of a complete administrative record could be a means of resolving, or helping to resolve, these factual issues, but rather than directing a specific procedure, we believe it advisable that the parties first consult on these matters and report to the court on a scheduling order that will govern the remainder of this litigation.

III. Conclusion and Order

We grant the government's motion to dismiss as to Counts 1, 3, 4, and 5 of the amended complaint and deny it as to Count 2. We deny plaintiff's motion for summary judgment as to Count 2 because plaintiff has not met the burden of showing "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). Therefore, upon consideration of all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that the claims stated as Counts 1, 3, 4, and 5 of the amended complaint be, and hereby are, dismissed for failure to state a claim on which relief can be granted; it is further

ORDERED that plaintiff's motion for summary judgment be, and hereby is, denied with respect to the claim stated in Count 2 of the amended complaint; it is further

ORDERED that the parties shall consult and submit to the court, by February 26, 2021, a joint schedule to govern the remainder of this litigation; and it is further

ORDERED that if the parties are unable to agree upon a schedule, each shall submit a proposed schedule by February 26, 2021 that includes a justification for its position.

/s/ TIMOTHY C. STANCEU
TIMOTHY C. STANCEU, Chief Judge

/s/ JENNIFER CHOE-GROVES
JENNIFER CHOE-GROVES, Judge

BAKER, Judge, concurring in part and dissenting in part:

I respectfully dissent from my colleagues' parrying the question of whether we have subject-matter jurisdiction over claims against the President. In my view, both Federal Circuit precedent and the separation of powers compel that we *sua*

sponte raise the question and then dismiss him from the case.

On the merits, I concur in my colleagues' decision to grant the government's motion to dismiss (and deny PrimeSource's cross-motion for summary judgment as to) Counts 1, 3, and 4 of the amended complaint and therefore join the majority opinion's discussion of those claims. I also concur in dismissing (and denying PrimeSource's cross-motion as to) Count 5 but write separately to explain my views on why that claim fails.

Finally, although I concur in my colleagues' denial of PrimeSource's cross-motion for summary judgment as to Count 2 of the amended complaint, my reasons differ, and I respectfully dissent from their denial of the government's motion to dismiss that claim, which alleges that the President violated Section 232 by imposing tariffs on steel derivative products after the statutory implementation deadline.

In my view, if the President timely implements Section 232 action to restrict imports—and there is no dispute that the President did so in the original Proclamation 9705 restricting steel *articles*—the statute also permits him to later modify such restrictions, and that modification power is coextensive with the original power to act in the first instance. Because the President could have also acted as to steel *derivatives* when he initially restricted steel article imports in Proclamation 9705, Section 232 permitted him to later extend those restrictions to derivatives. I would therefore grant the government's motion to dismiss Count 2 for failure to state a claim.

Statutory and Factual Background

A. Section 232

As its title indicates, Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to impose import restrictions to "[s]afeguard[ ] national security." 19 U.S.C. § 1862. In short, the statute directs that in various circumstances, the Secretary of Commerce is to investigate the national security effects of specified imports. *Id.* § 1862(b)(1)(A).

Once the Secretary initiates an investigation, the statute prescribes the following steps:

- The Secretary is to give the Secretary of Defense immediate notice of the investigation, *id.* § 1862(b)(1)(B), and is then to consult with him about "the methodological and policy questions raised in any investigation," *id.* § 1862(b)(2)(A)(i).
- The Secretary is to "seek information and advice from, and consult with, appropriate officers of the United States." *Id.* § 1862(b)(2)(A)(ii).
- "[I]f it is appropriate and after reasonable notice," the Secretary is to "hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." *Id.* § 1862(b)(2)(A)(iii). In other words, hearings or other opportunity for comment are not mandatory.
- The Secretary may also ask the Secretary of Defense to assess "the defense requirements of any article that is the subject of an investigation." *Id.* § 1862(b)(2)(B).

Section 232 requires the Secretary to submit a report to the President by no later than the date that is 270 days after the date on which the investigation commenced. *Id.* § 1862(b)(3)(A).[1] The report is

1. The statute directs that in executing their duties, the Secretary and the President are to

to discuss "the effect of the importation of such article in such quantities or under such circumstances upon the national security" and to set forth the Secretary's recommendations for action or inaction; in addition, if the Secretary believes the importation threatens "to impair the national security," the report must so state. *Id.*

If the Secretary finds a threat to national security, the President then has 90 days to determine whether he "concurs" with the Secretary's finding. *Id.* § 1862(c)(1)(A)(i). If he so concurs, the President must

> determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.

Id. § 1862(c)(1)(A)(ii).[2]

The statute further directs that if the President determines to take action to restrict imports to protect national security, he must "implement" that action within 15 days of determining to do so. *Id.* § 1862(c)(1)(B). Taken together, the two deadlines (to "determine" and then to "implement") give the President 105 days to act after receiving the Secretary's report.

If the President's action is to attempt to negotiate an agreement restricting the imports in question, the statute provides that if such an agreement is not reached within 180 days of his decision, *id.* § 1862(c)(3)(A)(ii)(I), *or* if such an agreement, having been reached, is "not being carried out or is ineffective," § 1862(c)(3)(A)(ii)(II), the President may "take such other actions as [he] deems necessary to adjust imports of such article so that they do not threaten national security. *Id.* § 1862(c)(3)(A)(ii).[3]

B. Proclamation 9705's steel tariffs

Following a Section 232 investigation, the Secretary here issued a report finding that steel imports threatened national security.[4] Based on this report, in 2018 the President issued Proclamation 9705, which imposed 25 percent duties on imported raw steel. *See* Proclamation No. 9705 of March 8, 2018, *Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 11,625 (Mar. 15, 2018). The proclamation further directed the Secretary to monitor steel imports and their effect on national security and, after appropriate consultations with other Executive Branch officials, inform the President of "any circumstances that . . . might indicate" the need for further Section 232 duties or that "the increase in duty rate provided for in this proclamation is no longer necessary." *Id.* at 11,628.

keep in mind, among other things, various enumerated considerations bearing on national security. *See* 19 U.S.C. § 1862(d).

2. The statute also requires the President to submit a written statement to Congress within 30 days of his determination explaining his reasons for acting or declining to act on the Secretary's report. 19 U.S.C. § 1862(c)(2).

3. The statute further requires that when there has been such a failure to conclude an agreement restricting imports or that such an agreement, if reached, was ineffective, the President must publish in the Federal Register notice of either (1) any such ''additional actions'' taken, *see* 19 U.S.C. § 1862(c)(3)(A)(ii), or (2) his determination not to take any such additional actions. *See id.* § 1862(c)(3)(A)(B).

4. *See generally* U.S. Dep't of Commerce, Bureau of Industry & Security, The Effect of Imports of Steel on the National Security (Jan. 11, 2018), https://www.bis.doc.gov/index.php/documents/steel/2224-the-effect-of-imports-of-steel-on-the-national-security-with-redactions-20180111/file, 85 Fed. Reg. 40,202 (Dep't Commerce July 6, 2020).

C. Proclamation 9980's extension of tariffs to steel derivative products

On January 24, 2020, the President issued Proclamation 9980, which stated that the Secretary had informed him as follows:

> [I]mports of certain derivatives of steel articles have significantly increased since the imposition of the tariffs and quotas [in Proclamation 9705]. The net effect of the increase of imports of these derivatives has been to erode the customer base for U.S. producers of ... steel and undermine the purpose of the proclamations adjusting imports of ... steel articles to remove the threatened impairment of the national security.

Proclamation No. 9980 of January 24, 2020, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States*, 85 Fed. Reg. 5281, 5282 (Jan. 29, 2020). The President further explained that the Secretary had advised him that foreign producers of steel derivative products had "increased shipments of such articles to the United States to circumvent ... Proclamation 9705." *Id.*

Based on that information and recommendation from the Secretary, the President extended Proclamation 9705's 25-percent duties to certain steel *derivative* products (e.g., steel nails) not previously addressed by the Secretary's report on steel article imports or by Proclamation 9705. *Id.* at 5283.[5] The government implicitly concedes that unlike Proclamation 9705, Proclamation 9980 was not preceded by a Section 232 investigation and report by the Secretary. *See* ECF 60, at 49 ("The Secretary was not required to conduct another investigation or to follow the procedures for an investigation ...."); ECF 78, at 37 (referring to PrimeSource's "incorrect belief that the President had to request an entirely separate investigation ...").

D. This suit and the pending motions

Plaintiff PrimeSource Building Products, Inc., brought this suit challenging Proclamation 9980. ECF 1.[6] PrimeSource's amended complaint alleges that it is an importer of steel nails injured by duties imposed by Proclamation 9980. ECF 22, at 7–10.[7] An affidavit of a PrimeSource executive attached to its amended complaint provides evidentiary substantiation of these allegations. ECF 22-1, at 16–17.

PrimeSource's amended complaint names the United States, the President, the U.S. Department of Commerce, the Secretary of Commerce, U.S. Customs and Border Protection, and the Acting Commissioner of Customs as defendants. ECF 22, at 7.

PrimeSource asserts the following claims: Count 1—an Administrative Procedure Act claim based on the Secretary's alleged violations of Section 232's procedural requirements, *id.* at 19–21; Count 2—a nonstatutory review claim based on the President's alleged violation of Section 232's procedural requirements, *id.* at 22; Count 3—a due process claim based on the

5. Proclamation 9980 also extended tariffs to certain aluminum article derivatives not at issue in this case.

6. Chief Judge Stanceu thereafter assigned this case to this three-judge panel. *See* 28 U.S.C. § 255(a) (authorizing the chief judge to designate a three-judge panel to hear and determine any civil action which "(1) raises an issue of the constitutionality of ... a proclamation of the President ...; or (2) has broad or significant implications in the administration or interpretation of the customs laws."). Chief Judge Stanceu concurrently assigned several other related cases challenging Proclamation 9980 to the same panel.

7. In this opinion, pagination references in citations to the Court record are to the pagination found in the ECF header at the top of each page.

President's alleged actions, *id.* at 22–23; Count 4—a constitutional claim based on Congress's alleged overdelegation of authority to the President in Section 232, *id.* at 23–24; and Count 5—a nonstatutory review claim based on the Secretary's alleged violations of Section 232's procedural requirements, *id.* at 24.

PrimeSource requests that the Court "[e]njoin Defendants from implementing or further enforcing Proclamation 9980," "declare Proclamation 9980 unlawful," and order a "[r]efund to PrimeSource [of] any duties that may be collected on its imported articles pursuant to Proclamation 9980." *Id.* at 25.

The government moves to dismiss for failure to state a claim, *see* USCIT R. 12(b)(6). ECF 60. PrimeSource opposes and cross-moves for summary judgment, *see* USCIT 56. ECF 73.[8]

Analysis

I. We have no jurisdiction to enter relief directly against the President and should dismiss him from the case.

In my view, we should dismiss the President as a party for two separate and independent reasons.[9] First, the statute giving us jurisdiction to hear this case does not confer jurisdiction over such claims. Second, even if our jurisdictional statute permitted us to award relief against the President, the separation of powers does not.

Although the government has not questioned our jurisdiction to enter relief against the President, our subject-matter jurisdiction, like standing, "is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6, 116 S.Ct. 2174, 135 L.Ed.2d 606 (1996). Jurisdiction must exist as to "each claim" a plaintiff "seeks to press and for each form of relief that is sought." *Town of Chester, N.Y. v. Laroe Estates*, —— U.S. ——, 137 S. Ct. 1645, 1650, 198 L.Ed.2d 64 (2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734, 128 S.Ct. 2759, 171 L.Ed.2d 737 (2008)).

Thus, we have an independent obligation to determine whether we have subject-matter jurisdiction to enter relief directly against the President, *see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514, 126 S.Ct. 1235, 163 L.Ed.2d 1097 (2006) (federal courts have an independent duty to examine their

8. The affidavit attached to the amended complaint establishes PrimeSource's constitutional standing for purposes of its cross-motion for summary judgment.

9. My colleagues avoid the jurisdictional issue, stating "we do not construe the claim in Count 2 [the lone claim surviving today's decision] as a claim against the President. The claim is directed against Proclamation 9980 itself, not the President, against whom no remedy is sought." *Ante* at 1344 n.4. Unfortunately, we cannot so easily wish this jurisdictional problem away. The *President*, not Proclamation 9980, is a defendant in this litigation. Count 2, which alleges that Proclamation 9980 is invalid, is merely a legal claim asserted against the President and the other defendants. *See* ECF 22, at 22. As relief for this claim, PrimeSource requests that the Court issue a declaratory judgment and injunction against all defendants, including the President. *Id.* at 25. There is no plausible basis upon which to state that Count 2 is directed against every defendant except the President, or that—even if we withhold injunctive relief against the President—any declaratory relief that we might ultimately grant would merely apply against Proclamation 9980, as opposed to the defendants, including the President. Declaratory relief under 28 U.S.C. § 2201 binds parties, not things. *See Restatement (Second) of Judgments* § 33 (1982) ("A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared, and, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.").

jurisdiction), even though the practical consequences of our decision may be the same because we can enjoin the President's subordinates from executing his unlawful orders in limited situations through nonstatutory review.[10] *Cf. McGirt v. Oklahoma*, —— U.S. ——, 140 S. Ct. 2452, 2504, 207 L.Ed.2d 985 (2020) (Thomas, J., dissenting) ("The Court might think that, in the grand scheme of things, this jurisdictional defect is fairly insignificant. After all, we were bound to resolve this ... question sooner or later. But our desire ... for ... convenience and efficiency must yield to the overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere.") (cleaned up).

Our obligation to consider our jurisdiction is even more pronounced in this case because the Judiciary has the "responsibility to police the separation of powers in litigation involving the executive," *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 402, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004) (Ginsburg, J., dissenting) (cleaned up), even if, as here, the Executive Branch declines to defend its own constitutional prerogatives. The "separation of powers does not depend on the views of individual Presidents, *see Freytag v. Comm'r of Internal Revenue*, 501 U.S. 868, 879–80, 111 S.Ct. 2631, 115 L.Ed.2d 764 (1991), nor on whether 'the encroached-upon branch approves the encroachment.' " *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497, 130 S.Ct. 3138, 177 L.Ed.2d 706 (2010) (quoting *New York v. United States*, 505 U.S. 144, 182, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992)). The President "cannot ... choose to bind his successors by diminishing their powers." *Id.* The government's failure to seek dismissal of the

10. "Nonstatutory review" is "the type of review of administrative action which is available, not by virtue of those explicit review provisions contained in most modern statutes which create administrative agencies, but rather through the use of traditional common-law remedies—most notably, the writ of mandamus and the injunction—against the officer who is allegedly misapplying his statutory authority or exceeding his constitutional power." 33 Wright & Miller, *Federal Practice and Procedure* § 8304 (2d ed. 2020) (quoting Antonin Scalia, *Sovereign Immunity Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 Mich. L. Rev. 867, 870 (1969–70)).

Federal courts entertain claims for nonstatutory review against the President's subordinates to enjoin them from enforcing allegedly unlawful Presidential orders. *See Franklin v. Massachusetts*, 505 U.S. 788, 828, 112 S.Ct. 2767, 120 L.Ed.2d 636 (1992) (Scalia, J., concurring) ("Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President's directive ...."). The Supreme Court has assumed, but never directly recognized, the availability of such nonstatutory review for claims against Presidential subordinates based on the President's alleged violation of a statutory mandate. *See Dalton v. Specter*, 511 U.S. 462, 474, 114 S.Ct. 1719, 128 L.Ed.2d 497 (1994) ("We may assume for the sake of argument that some claims that the President has violated a statutory mandate are judicially reviewable outside the framework of the APA.").

In the Federal Circuit, nonstatutory review claims against Presidential subordinates for the President's alleged violation of a statute are "only rarely available," *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018), and are limited to whether the President has violated "an explicit statutory mandate." *Id.* (quoting *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1361 (Fed. Cir. 2006) (en banc)); *see also Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) (federal court review of Presidential action under a statute is limited to situations involving "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority"). Thus, dismissal of the President from this suit would not preclude us from granting declaratory and injunctive relief against the President's subordinates based on his alleged violation of Section 232's procedural requirements in issuing Proclamation 9980.

President does not relieve us of our obligations under the separation of powers.

A. Jurisdiction under 28 U.S.C. § 1581(i) does not encompass claims against the President.

PrimeSource invokes 28 U.S.C. § 1581(i) as the jurisdictional basis for this suit. ECF 22, at 4.[11] In 2003, the Federal Circuit held that § 1581(i) jurisdiction does not encompass claims against the President, noting that while "the President's *actions* are subject to judicial review, it does not necessarily follow that a claim for relief may be asserted against the President directly." *Corus Grp. PLC v. ITC*, 352 F.3d 1351, 1359 (Fed. Cir. 2003) (emphasis added). The court recognized the principle that the APA does not authorize an action directly against the President[12] and then explained as follows:

> This reasoning seems equally applicable to actions under 28 U.S.C. § 1581(i), which refers only to actions "against the United States, its agencies, or its officers" and does not specifically include the President. We conclude that section 1581(i) does not authorize proceedings directly against the President. Since the complaint in this action relied solely on section 1581 as the basis of jurisdiction, the President should have been dismissed as a party.

Corus Grp., 352 F.3d at 1359 (cleaned up).

Six months later, a decision of this court held that *Corus Group* was wrongly decided because it misread an earlier Federal Circuit decision holding that § 1581(i) waived the sovereign immunity of the President and other officials. *See Motion Sys. Corp. v. Bush*, 342 F. Supp. 2d 1247, 1254–56 (CIT 2004) (discussing *Corus Group* and *Humane Society of the United States v. Clinton*, 236 F.3d 1320 (Fed. Cir. 2001)).

On appeal in *Motion Systems*, the Federal Circuit granted rehearing en banc to consider whether *Corus Group* should "be overruled *en banc* insofar as it holds that § 1581(i) does not authorize relief against the President." *Motion Sys. Corp. v. Bush*, 140 F. App'x 257, 258 (Fed. Cir. 2005) (en banc) (per curiam). Significantly, the later merits opinion never addressed this question, apparently because the en banc court found the President's actions not subject to judicial review. *See Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1359 (Fed. Cir. 2006) (en banc).[13]

11. The statute provides in relevant part that our Court "shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for," *inter alia*, "(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue." 28 U.S.C. § 1581(i).

12. *See, e.g., Franklin*, 505 U.S. at 801, 112 S.Ct. 2767 ("As the APA does not expressly allow review of the President's actions, we must presume that his actions are not subject to its requirements.").

13. Because it did not directly address the question, *Motions Systems* cannot be read as implicitly endorsing the conclusion that the President can be sued under § 1581(i). The Supreme Court has "described such unrefined dispositions as 'drive-by jurisdictional rulings' that should be accorded 'no precedential effect' on the question whether the federal court had authority to adjudicate the claim in suit." *Arbaugh*, 546 U.S. at 511, 126 S.Ct. 1235 (quoting *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 91, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)); *cf. Am. Legion v. Am. Humanist Ass'n*, —— U.S. ——, 139 S. Ct. 2067, 2100, 204 L.Ed.2d 452 (2019) (Gorsuch, J., concurring) (explaining that "drive-by jurisdiction" means that a court's failure to directly address issues such as standing or jurisdiction "cannot be mistaken as an endorsement of it").

In my view, *Corus Group* is binding on us, notwithstanding the earlier Federal Circuit decision in *Humane Society* allowing the President and other officers to be sued under § 1581(i).[14] First, the *Corus Group* court explained that *Humane Society* "dealt only with the general issue of the government's sovereign immunity and not with the applicability of § 1581(i) to the President individually." *Corus Grp.*, 352 F.3d at 1359 n.5. Thus, in the eyes of the Federal Circuit, the two cases do not conflict. If judicial hierarchy means anything, it must mean that the Federal Circuit's reading of its own cases binds this Court.

Because the *Corus Group* court distinguished *Humane Society*, we are bound to follow *Corus Group* and to dismiss the President as a party. *See Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1309 (Fed. Cir. 2008) ("A prior precedential decision on a point of law by a panel of this court is binding precedent and cannot be overruled *or avoided* unless or until the court sits *en banc*.") (emphasis added).

Second, even if *Corus Group*'s reading of *Humane Society* is not binding on us, my own reading of *Humane Society* is the same as *Corus Group*'s. As the *Humane Society* panel merely assumed that § 1581(i)'s jurisdictional grant includes claims against the President, that drive-by jurisdictional assumption is not entitled to any weight, *see supra* note 13, and *Corus Group* controls that question.

B. The separation of powers prevents us from issuing injunctive or declaratory relief directly against the President in the performance of his official duties.

For separation of powers purposes, "[t]he President's unique status under the Constitution distinguishes him from other executive officials." *Nixon v. Fitzgerald*, 457 U.S. 731, 750, 102 S.Ct. 2690, 73 L.Ed.2d 349 (1982); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982) ("Suits against other officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.").

Because of these separation of powers considerations, any request for relief directly against the President "should ... raise[ ] judicial eyebrows." *Franklin*, 505 U.S. at 802, 112 S.Ct. 2767 (plurality opinion of O'Connor, J.). The *Franklin* plurality of four justices[15] observed that "in general, 'this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.' " *Id.* at 802–03, 112 S.Ct. 2767 (plurality opinion of O'Connor, J.) (quoting *Mississippi v. Johnson*, 4 Wall. 475, 501, 71 U.S. 475, 18 L.Ed. 437 (1867)). On this point, Justice Scalia agreed with the plurality and explained that "[t]he apparently unbroken historical tradition supports the view that ... the President and the Congress (as opposed to their agents)—may not be ordered to perform particular executive or legislative acts at the behest of the Judiciary." *See id.* at 827, 112 S.Ct. 2767 (Scalia, J., concurring).[16]

14. Where two Federal Circuit panel decisions *directly* conflict, the earlier opinion controls unless and until the en banc court rules otherwise. *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988).

15. Chief Justice Rehnquist and Justices White and Thomas joined the relevant portion of Justice O'Connor's opinion in *Franklin*.

16. Although the Supreme Court has recognized that the President is not totally immune to judicial process, *see, e.g., Trump v. Vance,*

If the Supreme Court cannot grant injunctive relief against the President in the performance of his official duties, as five justices of the Court agreed that it cannot do, then lower federal courts may not do so either.[17]

Nor may we issue even declaratory relief against the President. In at least two different contexts, the Supreme Court has recognized that because declaratory relief is functionally equivalent to injunctive relief, any bar on the latter also applies to the former. *See, e.g.*, *California v. Grace Brethren Church*, 457 U.S. 393, 407–08, 102 S.Ct. 2498, 73 L.Ed.2d 93 (1982) (holding that "because there is little practical difference between injunctive and declaratory relief," the Tax Injunction Act bars federal court jurisdiction over suits seeking declaratory as well as injunctive relief to "enjoin, suspend or restrain the ... collection of any tax under State law") (quoting 28 U.S.C. § 1341); *Samuels v. Mackell*, 401 U.S. 66, 73, 91 S.Ct. 764, 27 L.Ed.2d 688 (1971) (holding that because "the practical effect of the two forms of relief will be virtually identical," *Younger* abstention principles apply to declaratory relief as much as injunctive relief). Lower courts have applied this principle in addi-

—— U.S. ——, 140 S. Ct. 2412, 2421–24, 207 L.Ed.2d 907 (2020) (tracing over 200 years of case law involving subpoenas directed to presidents), the critical distinction is that in those cases the President was to ''provide information relevant to an ongoing criminal prosecution [or, in *Trump v. Vance*, a grand jury investigation], which is what any citizen might do; [the court orders] did not require him to exercise the 'executive Power' in a judicially prescribed fashion.'' *Franklin*, 505 U.S. at 826, 112 S.Ct. 2767 (Scalia, J., concurring). In *Franklin*, the plurality also noted that ''[w]e have left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely 'ministerial' duty.'' *Id.* at 802, 112 S.Ct. 2767 (plurality opinion of O'Connor, J.); *see also id.* at 827, 112 S.Ct. 2767 n.2 (Scalia, J. concurring) (making the same observation). The President's issuance of Proclamation 9980 plainly does not involve ''ministerial'' duties.

17. *See, e.g.*, *In re Trump*, 958 F.3d 274, 297 (4th Cir. 2020) (en banc) (Wilkinson, J., dissenting) (''Over the course of this nation's entire existence, there has been an unbroken historical tradition implicit in the separation of powers that a President may not be ordered by the Judiciary to perform particular Executive acts.'') (cleaned up), *vacated as moot*, No. 20-331, —— U.S. ——, 141 S.Ct. 1262, 209 L.Ed.2d 5 (2021); *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir.) (''Finally, the Government argues that the district court erred by issuing an injunction that runs against the President himself. This position of the government is well taken. Generally, we lack jurisdiction of a bill to enjoin the President in the performance of his official duties.... [T]he extraordinary remedy of enjoining the President is not appropriate here.'') (cleaned up), *vacated on other grounds*, —— U.S. ——, 138 S. Ct. 377, 199 L.Ed.2d 275 (2017) (mem.); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (''The only apparent avenue of redress for plaintiffs' claimed injuries would be injunctive or declaratory relief against all possible President-elects and the President himself. But such relief is unavailable.... With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.'') (cleaned up); *Anderson v. Obama*, 2010 WL 3000765, at *2 (D. Md. July 28, 2010) (denying motion for preliminary injunction seeking to prevent President Obama from signing or enforcing the Affordable Care Act ''because the Court lacks power to grant the requested relief. The Court has no jurisdiction to issue an injunction against the President in his official capacity and in the performance of non-ministerial actions.''); *Willis v. U.S. Dep't of Health & Human Servs.*, 38 F. Supp. 3d 1274, 1277 (W.D. Okla. 2014) (finding that suit attempting to enjoin President Obama from enforcing any part of the ACA ''contravenes an extensive amount of well-settled law'' and ''raises serious separation of powers concerns'' because ''[l]ongstanding legal authority establishes that the judiciary does not possess the power to issue an injunction against the President or Congress'').

tional contexts. *See, e.g.*, *Tex. Emps.' Ins. Ass'n v. Jackson*, 862 F.2d 491, 506 (5th Cir. 1988) ("If an injunction would be barred by [the Anti-Injunction Act, 28 U.S.C.] § 2283, this should also bar the issuance of a declaratory judgment that would have the same effect as an injunction.") (cleaned up and quoting Charles Alan Wright, *Federal Courts* § 47, at 285 (4th ed. 1983)).

Because declaratory relief is functionally equivalent to injunctive relief, the same structural separation of powers principles that counsel against enjoining the President necessarily also apply to issuing "a declaratory judgment against the President. It is incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court." *Franklin*, 505 U.S. at 827, 112 S.Ct. 2767 (Scalia, J., concurring); *see also Newdow*, 603 F.3d at 1013 (D.C. Cir. 2010) (declaratory relief against the President is unavailable); *In re Trump*, 958 F.3d at 302 ("We have no more power to issue a declaratory judgment against the President regarding the performance of an official duty than we do an injunction.") (Wilkinson, J., dissenting).

In short, even if § 1581(i) permitted the assertion of claims against the President in our Court, in my view the statute would violate the separation of powers. We should dismiss all claims against the President for lack of jurisdiction. Our failure to do so only invites "more and more disgruntled plaintiffs [to] add his name to their complaints" in our Court and thereby produce "needless head-on confrontations between [us] and the Chief Executive." *Franklin*, 505 U.S. at 827, 112 S.Ct. 2767 (Scalia, J., concurring).

II. Count 5 fails because PrimeSource has abandoned any claim for nonstatutory review against the Secretary outside of the APA.

In Count 5, PrimeSource appears to assert a claim against the Secretary outside of the APA for alleged procedural violations of Section 232:

> The Secretary of Commerce violated Section 232 by making "assessments", "determinations" and providing other "information" to the President without following any of the statutory procedures for new action and by doing so outside the statutory time periods applicable to the 2017–18 investigation conducted by the Secretary of Commerce that resulted in Proclamation 9705.

ECF 22, at 24. According to my colleagues, "for PrimeSource's fifth count to be cognizable, judicial review must exist under the APA" because "Section 232 does not provide for judicial review of any action taken thereunder." *Ante* at 1343. My colleagues therefore conclude that because PrimeSource's APA claim against the Secretary in Count 1 fails for lack of final agency action, then Count 5 necessarily fails as well.

My colleagues imply that absent a statutory cause of action in the statute under which official action is taken, which Wright and Miller refer to as "special statutory review," *see* 33 *Federal Practice & Procedure* § 8301 (2d ed. 2020), the only recourse that a person or entity injured by official action has is an action under the APA, which Wright and Miller denominate as "general statutory review." *Id.* My colleagues overlook a third possible avenue for judicial relief against official agency action, nonstatutory review.

Courts have recognized that a person threatened with injury by actions of Executive Branch officials may sometimes seek declaratory and injunctive relief against

such officials even though the underlying statute provides no cause of action and no relief is available under the APA. Such actions are known as "nonstatutory review." *Id.*; *see also supra* note 10 (explaining nonstatutory review in the context of challenges to agency enforcement of *Presidential* actions); 33 *Federal Practice & Procedure* § 8304 (2d ed. 2020). "It does not matter . . . whether traditional APA review is foreclosed" because nonstatutory review is available "when an agency is charged with acting beyond its authority." *Aid Ass'n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166, 1172 (D.C. Cir. 2003) (quoting *Dart v. United States*, 848 F.2d 217, 221 (D.C. Cir. 1988)).

Nevertheless, nonstatutory review is available in only very limited circumstances. "Non-statutory review is a doctrine of last resort, 'intended to be of extremely limited scope' and applicable only to preserve judicial review when an agency acts 'in excess of its delegated powers.' " *Schroer v. Billington*, 525 F. Supp. 2d 58, 65 (D.D.C. 2007) (quoting *Griffith v. Fed. Lab. Rel. Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988)); *see also* Kathryn E. Kovacs, *Revealing Redundancy: The Tension Between Federal Sovereign Immunity and Nonstatutory Review*, 54 Drake L. Rev. 77, 107 (2005) (to state a claim for nonstatutory review challenging agency action, "[a] plaintiff must allege more than that an agency acted illegally or even interfered with his rights; he must allege that the agency did so in a manner that exceeded its statutory or constitutional authority"). In short, nonstatutory review relief against an agency official is roughly analogous to mandamus relief against a district court or our Court—strong medicine that is only rarely available. *Cf. Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380, 124 S.Ct. 2576, 159 L.Ed.2d 459 (2004) (mandamus "is a 'drastic and extraordinary' remedy 'reserved for really extraordinary causes' " such as when the district court has departed from "the lawful exercise of its prescribed jurisdiction") (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60, 67 S.Ct. 1558, 91 L.Ed. 2041 (1947)).

Given these principles, I read Count 5 of PrimeSource's complaint as asserting a nonstatutory review claim based on the *Secretary's* alleged violations of Section 232's procedural requirements, just as Count 2 is a nonstatutory review claim based on the *President's* alleged violations of Section 232's procedural requirements.

Nevertheless, PrimeSource has effectively abandoned Count 5 by tethering it to its APA claim in Count 1. *See* ECF 73-1, at 7 n.1 (characterizing "both Counts 1 and 5 from PrimeSource's amended complaint" as involving whether the Secretary, "in failing to follow the procedures set forth in Section 232 . . . violated the *Administrative Procedure[ ] Act*") (emphasis added). Because I agree with my colleagues that PrimeSource's APA claim under Count 1 fails for lack of final agency action, *see ante* at 1341–43, PrimeSource's linkage of Count 5 to Count 1 dooms the former.

III. Proclamation 9980 did not violate Section 232.

PrimeSource contends that Proclamation 9980 violated Section 232 by imposing tariffs on steel derivative products outside of the statutory deadlines for implementing such action. Although not expressly framed as such, PrimeSource appears to assert two alternative theories (even as it repeatedly blurs the two theories together).

First, citing the Court's decision in *Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267 (CIT 2019) (*Transpa-*

cific I),[18] PrimeSource argues that after the President timely implements Section 232 import restrictions, he cannot later *modify* such restrictions outside of the 105-day period for taking action upon receiving a report from the Secretary.[19] *See* ECF 73-1, at 20 (invoking *Transpacific I* against the government's argument that Section 232 "provide[s] the President with flexibility to modify his actions" outside of the statutory deadline for acting).

Although my colleagues distinguish the *Transpacific* litigation on its facts, *see ante* at 1346 n.8 (noting that case involved a modification to the *means* of Section 232 import restrictions rather than—as here—the *products* covered by such restrictions), in denying the government's motion to dismiss Count 2 my colleagues nonetheless appear to tacitly embrace the *Transpacific* opinions' rationale, which reads the 1988 amendments as barring modifications to Section 232 action after the statutory implementation deadline has passed. *See ante* at 1350 ("[W]e are unconvinced by defendants' argument that the[ ] [1988] amendments maintained, unchanged, the 'continuing authority' of the President."); *ante* at 1351 ("[T]here is no 'flexible' reading of [Section 232] under which the express time limitations on a Presidential 'action,' and implementation thereof, do not apply."); *ante* at 1354 ("Section 232(c)(1) . . . unambiguously placed time limits on the President's authority to adjust imports of derivatives as well as the imports of the investigated article."). Thus, notwithstanding my colleagues' distinguishing of the *Transpacific* case on its facts, their rationale would—like *Transpacific*'s—bar modifications of Section 232 import restrictions after the statutory deadline for implementation even as to the means of such restrictions.

PrimeSource also appears to argue in the alternative that even if Section 232 permits such modifications of import restrictions outside of the statutory deadlines for taking new action, Proclamation 9980's tariffs on steel derivative products nevertheless constituted entirely new Section 232 action subject to the statute's procedural requirements, rather than a permissible modification, because Proclamation 9705 was limited to steel *articles* and did not include steel derivatives. *See* ECF 73-1, at 30 (contending that Proclamation 9980 "was not "a *permissible* modification of Proclamation 9705") (emphasis added); *id.* at 31 ("The instant case goes one step beyond *TransPacific* because here the untimely additional duties are being extended to types of products *that were never even previously investigated.*") (emphasis added); *id.* at 53 ("Given that the Secretary determined a hearing was appropriate in the initial investigation, he cannot now issue additional recommenda-

18. In *Transpacific I,* a different three-judge panel of the Court held—in the context of denying the government's Rule 12(b)(6) motion to dismiss—that the President's modification of Proclamation 9705 to increase duties on Turkish steel imports violated Section 232 because the statute does not permit such modifications after the statutory implementation deadline has passed absent another formal investigation and report by the Secretary. *See* 415 F. Supp. 3d at 1273–76; *see also Transpacific Steel LLC v. United States*, 466 F. Supp. 3d 1246, 1253 (CIT 2020) (*Transpacific II*) (holding, in the context of summary judgment, that "nothing in the statute . . . support[s] . . . continuing authority to modify Proclamations outside of the stated timelines."), *appeal docketed,* No. 20-2157 (Fed. Cir. Aug. 17, 2020).

19. The "105-day period" reflects the initial 90-day period for the President to determine whether he concurs in the Secretary of Commerce's finding and, if so, to determine the nature and duration of the action he deems necessary, plus the subsequent 15-day period for him to "implement that action." *See* 19 U.S.C. § 1862(c)(1)(A)–(B).

tions to the President on *new* products that were not subject to initial investigation.") (emphasis added).

My colleagues also appear to embrace this alternative theory as a basis for denying the government's motion to Count 2. *See ante* at 1351 (stating that Proclamation 9705 and 9980 "stemmed from two separate Presidential determinations and were directed at two different sets of products. Each necessarily required its own implementation.").

I disagree with both of PrimeSource's alternative theories, and for that reason would grant the government's motion to dismiss Count 2. I begin with the *Transpacific* theory—namely, that the 1988 amendments to the statute bar the President from modifying Section 232 import restrictions after the statutory deadline for implementing those restrictions has passed.

A. Section 232 permits the President to modify import restrictions after the statutory implementation deadline has passed.

In my view, Section 232 permits the President to modify import restrictions without repeating the formal procedures necessary for initial action. As explained below, (1) the original statute that Congress enacted in 1955 and later reenacted as Section 232 permitted the President to modify import restrictions; (2) the 1988 amendments to Section 232 did not withdraw the President's preexisting authority to modify such restrictions; and (3) given that Section 232 import restrictions can last for decades, it would be both incongruous and unworkable to read the statute as precluding later modifications of such restrictions.

1. The pre-1988 statutory language permitted the President to modify import restrictions.

a. The word "action" in the original 1955 statute gave the President continuing authority to modify import restrictions.

Section 232 originated in the Trade Agreements Extension Act of 1955, Pub. L. No. 86–169, § 7, 69 Stat. 162, 166. That statute required the Director of the Office of Defense Mobilization to notify the President whenever the Director had "reason to believe that any article is being imported into the United States in such quantities as to threaten to impair the national security." *Id.* If the President agreed, the statute required him to order the Director to investigate the matter and report back. If, in turn, the investigation and the subsequent report led the President to conclude that imports of the article threatened national security, the statute required that he "take *such action* as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security." *Id.* (emphasis added).[20]

In 1975, Attorney General William Saxbe examined this statutory language and opined [21] that the words "such action" implied a continuing course of conduct that could include modifications:

> The normal meaning of the phrase "such action," in a context such as this, is not a single act but rather a continuing course of action, with respect to which the ini-

20. The original 1955 statute did not include the words ''and its derivatives'' following the words ''imports of such article.''

21. Although issued in the name of Attorney General Saxbe, the Justice Department official responsible for this memorandum presumably was then–Assistant Attorney General Antonin Scalia, who headed the Office of Legal Counsel from 1974 until 1977.

> tial investigation and finding would satisfy the statutory requirement. This interpretation is amply supported by the legislative history of the provision, which clearly contemplates a continuing process of monitoring and modifying the import restrictions, as their limitations become apparent and their effects change.

Restriction of Oil Imports, 43 Op. Att'y Gen. No. 20, at 3–4 (Jan. 14, 1975).[22]

Attorney General Saxbe opined that for both modification or continuation of restrictions, the statute presumed that the appropriate agency would monitor the factual situation and the effectiveness of any restrictions and advise the President to act accordingly. 43 Op. Att'y Gen. No. 20, at 3–4. This continued monitoring did "not have to comply with the formal investigation and finding requirements applicable to the original imposition of the restriction." *Id.* at 4.

b. The 1958 amendments enhanced the President's power.

In the Trade Agreements Extension Act of 1958, Congress amended the statute while retaining the key language—"such action"—authorizing modifications of import restrictions. As amended, the statute provided:

> (b) Upon request of the head of any Department or Agency, upon application of an interested party, or upon his own motion, the Director of the Office of Defense Mobilization (hereinafter in this section referred to as the "Director") shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from other appropriate Departments and Agencies, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. If, as a result of such investigation, the Director is of the opinion that the said article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall promptly so advise the President, and unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security as set forth in this section, *he shall take such action*, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security.

Pub. L. No. 85–686, § 8(a), 72 Stat. 673, 678 (emphasis added).

These amendments enhanced the President's power under the statute in at least three ways. First, Congress eliminated the wasteful requirement that the relevant agency first seek the President's approval to undertake the investigation, thereby allowing a more streamlined process for initiating action in the first instance. Second, Congress made clear that the President's discretion regarding "action" also included the "time" that action would last. Third, Congress gave the President the power to act with respect to *derivatives* of products

22. Attorney General Saxbe noted a statement by Congressman Cooper, floor manager for the legislation, that "having taken an action, [the President] would retain flexibility with respect to the continuation, modification, or suspension of any decision that had been made." 43 Op. Att'y Gen. No. 20, at 3 (quoting 101 Cong. Rec. 8160–61 (1955)). The Attorney General further referenced the Conference Report for the bill, which stated that "it is . . . the understanding of all the conferees that the authority granted to the President under this provision is a continuing authority." *Id.* (quoting H.R. Rep. 84-745, at 7 (1955)).

identified in the agency's report, even if the report itself did not address such derivatives.

As my colleagues observe, the legislative history of these 1958 amendments reflects that Congress authorized the President to act as to derivatives of an investigated article out of concern that such imports might allow circumvention of restrictions on that article. *See ante* at 26–27.

c. Congress made technical changes between 1962 and 1988.

In 1962, Congress reenacted the provision as Section 232 of the Trade Expansion Act of 1962, Pub. L. No. 87–794, 76 Stat. 872, 877. This reenactment and codification did not materially change the statute. *See* S. Rep. 87-2059, 1962 USCCAN 3118.

In the ensuing quarter century after the 1962 reenactment, Congress made various technical changes to the statute, but none of them materially changed the President's powers under the statute conferred by the original 1955 legislation and enhanced by the 1958 amendments.[23] Thus, on the eve of Congress's 1988 amendments, Section 232 provided in relevant part:

> Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of the Treasury (hereinafter referred to as the "Secretary") shall immediately make an appropriate investigation . . . to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. The Secretary shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation. The Secretary shall report the findings of his investigation under this subsection with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, his recommendation for action or inaction under this section to the President within one year after receiving an application from an interested party or otherwise beginning an investigation under this subsection.
>
> If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall so advise the President and the President *shall take such action*, and for such time, as he deems necessary to adjust the imports of such article and its derivatives 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 or under such circumstances as to threaten to impair the national security.

19 U.S.C. § 1862(b) (1980) (emphasis added).[24]

d. Presidents repeatedly modified Section 232 import restrictions in the three decades prior to the 1988 amendments.

In 1959, President Eisenhower invoked Section 232 after a formal agency investi-

23. In 1975, Congress amended the statute for the primary purpose of reassigning duties to different subordinate officials. *See* Trade Act of 1974, § 127(d)(3), Pub. L. No. 93–618, 88 Stat. 1978, 1993 (1975). In 1980, Congress amended Section 232 to establish a procedure whereby Congress could invalidate Presidential action to adjust imports of petroleum or petroleum products upon the enactment of a disapproval resolution. *See* Crude Oil Windfall Profit Tax Act of 1980, § 402, Pub. L. No. 96–223, 94 Stat. 229, 301.

24. To enhance readability, the block quotation above separates Section 232(b) into separate paragraphs.

gation and report found that crude oil and derivatives thereof were "being imported in such quantities and under such circumstances as to threaten to impair the national security." Proclamation No. 3729 of March 10, 1959, *Adjusting Imports of Petroleum and Petroleum Products into the United States*, 24 Fed. Reg. 1781 (Mar. 12, 1959). President Eisenhower imposed import quotas on "crude oil, unfinished oils, and finished products." *Id.* He also directed the relevant officials to advise him "of any circumstances which ... might indicate the need for further Presidential action" under the statute. *Id.* at 1784 § 6(a).[25]

President Eisenhower and his successors thereafter modified Proclamation 3279 at least 26 times between 1959 and the end of 1974, and none of those amendments involved a further investigation or report even though some involved significant alterations to the means of restricting petroleum imports. *See* 43 Op. Att'y Gen. No. 20, at 3. No new investigation was conducted, and no new report was issued, until 1975.[26]

Reviewing this history in 1975, Attorney General Saxbe emphasized that Congress had acquiesced in this interpretation of Section 232: "The interpretation here proposed, whereby import restrictions once imposed can be modified without an additional investigation and finding, has been sanctioned by the Congress' failure to object to the President's proceeding on that basis repeatedly during the past 15 years." 43 Op. Att'y Gen. No. 20, at 5. After Attorney General Saxbe issued his opinion in 1975, this practice continued. By my count, Presidents modified prior Section 232 action without repeating the statute's formal investigation and report procedures over a dozen times between 1975 and the 1988 amendments. *See* Addendum.

This unbroken "statutory history" of administrative practice and interpretation "form[s] part of the context of the statute, and ... can properly be presumed to have been before all the members of [Congress] when they voted" on the 1988 amendments to Section 232. Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012); *cf. Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1440–43 (Fed. Cir. 1998) (tracing a statute's evolution over time to ascertain a word's meaning); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 267–68, 112 S.Ct. 1311, 117 L.Ed.2d 532 (1992) (interpreting a statute by tracing the history of another provision upon which the one at issue was modeled and noting that "we can only assume [Congress] intended them to have the same meaning that courts had already given them").

2. The 1988 amendments did not withdraw the President's preexisting modification power.

a. The 1988 amendments retained the statutory language authorizing modifications.

In 1988, Congress amended Section 232. *See* Omnibus Trade and Competitiveness

25. The quoted language is strikingly similar to the instruction in Proclamation 9705 directing the Secretary of Commerce to continue to monitor steel imports. *See* 83 Fed. Reg. at 11,628 ¶ (5)(b).

26. Despite General Saxbe's advice that there was no need to do so, the Secretary of the Treasury decided to go through the investigation-and-report process in the leadup to President Ford issuing Proclamation 4341, which amended Proclamation 3279 and provided for a long-term system of license fees. *See* Proclamation No. 4341 of January 23, 1975, *Modifying Proclamation 3279, Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees*, 40 Fed. Reg. 3965 (Jan. 27, 1975) (referring to the Secretary of the Treasury's investigation and report).

Act of 1988, § 1501(a), Pub. L. No. 100–418, 102 Stat. 1107, 1258. Some of the amendments were clearly stylistic—the amended version, for example, avoids the masculine pronouns "he" and "his" when referring to the President and cabinet officials in favor of gender-neutral terminology (for example, "as he deems necessary" versus "in the judgment of the President"). Some of the changes were of a structural nature—the old statute contained lengthy paragraphs and the amendments broke those down into shorter, more readable pieces with multiple subparagraphs.

One of those structural changes entailed moving the provisions conferring authority upon the President to subsection (c)(1), which as discussed below also imposed a 105-day deadline for the President to exercise that authority.[27] As so amended, subsection (c)(1) provides:

> (c)(1) (A) Within 90 days after receiving a report submitted under subsection (b)(3)(A) in which the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President shall—
>
> (i) determine whether the President concurs with the finding of the Secretary, and
>
> (ii) if the President concurs, *determine the nature and duration of the action* that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.
>
> (B) If the President determines under subparagraph (A) to *take action* to adjust imports of an article and its derivatives, the President *shall implement that action* by no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A).

19 U.S.C. § 1862(c)(1) (emphasis added).

Critically for present purposes, subsection (c)(1) retained the statutory language noted by Attorney General Saxbe granting the President's continuing authority to modify Section 232 action previously taken—the words "the action," "take action," and "that action." *See* 43 Op. Att'y Gen. No. 20, at 3–4. Under the prior-construction canon of statutory construction, Congress's reenactment of the same statutory language implicitly ratified Attorney General Saxbe's interpretation and the prior administrative practice of the preceding three decades. *See Bragdon v. Abbott*, 524 U.S. 624, 645, 118 S.Ct. 2196, 141 L.Ed.2d 540 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well."); *see also* Scalia & Garner, *supra*, at 324 (explaining that "when a term . . . has been authoritatively interpreted by a high court, or has been given uniform interpretation by the lower courts or the responsible agency . . . [t]he term has acquired . . . a technical sense . . . that should be given effect in the construction of later-enacted statutes").

My colleagues contend that reading "action" as investing the President with continuing authority is "contrary to [its] plain and ordinary meaning." *Ante* at 1351. But they do not proffer any definition of action to support this contention.

27. The 1988 amendments also imposed a 270-day deadline for the Secretary to issue a report upon initiating an investigation. *See* 19 U.S.C. § 1862(b)(3)(A).

Even if their reading of the word "action" were correct, however, my disagreement with my colleagues is that they read the statute as if Congress wrote the 1988 legislation on a blank slate. But 1988 is not Year One for our purposes. The 1988 legislation amended a statute with a preexisting 30-year history of administrative interpretation and practice under which the word "action" invests the President with continuing authority. As Congress is presumed to have been aware of that history when it amended the statute and retained the word "action," this is one of those contexts in which "[t]he past is never dead. It's not even past." William Faulkner, *Requiem for a Nun* 73 (Knopf Doubleday Publishing Group 2011).

In *Transpacific II*, the court acknowledged this history of Presidential modifications to Section 232 import restrictions, but reasoned that the 1988 amendments removed this authority by deleting "language that could be read to give the President the power to continually modify Proclamations." 466 F. Supp. 3d at 1253. The 1988 amendments changed "the President *shall take such action, and for such time*, as he deems necessary," 19 U.S.C. § 1862(b) (1980), to the President shall "*determine the nature and duration of the action* that, in the judgment of the President, must be taken ...." 19 U.S.C. § 1862(c)(1)(A)(ii) (emphasis added). The *Transpacific II* court noted that the 1988 amendments "omit[ted] the clause 'and for such time.'" 466 F. Supp. 3d at 1253.

In my view, *Transpacific II* erred in ascribing significance to this change. First, the President's modification authority under the pre-1988 version of the statute stemmed from the words "such action," *not* "for such time." *See* 43 Op. Att'y Gen. No. 20, at 2 ("The normal meaning of the phrase '*such action*,' in a context such as this, is not a single act but rather a continuing course of action.") (emphasis added).

Second, even if "for such time" in the pre-1988 statute were the source of the President's modification authority, that clause means the same thing as "the ... duration" in the current statute: "[T]he length of time something lasts." Duration, *Black's Law Dictionary* (11th ed. 2019). Thus, the change from "for such time" to "the duration" was purely stylistic.

The legislative history bears out this reading. For example, the House Committee report included the following side-by-side comparison summaries of the then-existing statutory language and the meaning of the proposed changes. The key elements of the then-existing law and proposed amendments are underscored; notably, there is no underscoring of either "for such time" in the then-existing law or "the ... duration" in the proposed amendments:

MISCELLANEOUS TRADE LAW PROVISIONS

Item	Present Law	Subcommittee Proposal
1. National security relief	Section 232 of the Trade Expansion Act of 1962, requires the Secretary of Commerce to investigate, upon request or own motion, the effects of imports of an article on national security and report his findings and recommendations to the President within one year. If he finds "an article is being imported in such quantities or under such circumstances as to threaten to impair the national security," the President, if he concurs with the finding, must take such action for such time as he deems necessary to "adjust" the imports. There is no time limit for the President's decision.	Reduces the period for investigation by Commerce to 9 months. Imposes a 90-day time limit for the President to determine whether he concurs with the Secretary's advice and, if so, the nature and duration of action. Requires proclamation of any action within 15 days.

Staff of H. Comm. on Ways and Means, 100th Cong., Amendments to H.R. 3, Comprehensive Trade Policy Reform Legislation, As Reported by the Subcomm. on Trade, Explanation and Comparison with Present Law 92 (Comm. Print 1987).

* * *

If I am correct and Congress's retention of the word "action" presumptively carried forward the meaning reflected in the preceding three decades of administrative interpretation and practice, the question then becomes whether other language in the 1988 amendments rebuts that presumption by effectively repealing the President's modification authority in the word "action." I now turn to that question.

b. The 1988 amendments' insertion of a deadline for the President to implement his action did not impliedly repeal the President's continuing authority to modify action once taken.

According to PrimeSource, the statute's 15-day deadline to "implement" Section 232 action bars later modification of such action. ECF 73-1, at 30. The plain meaning of the word "implement," however, does not foreclose future modifications to action—rather, the word "implement," in its relevant sense, merely means to "put (a decision or plan) into effect." 1 *Shorter Oxford English Dictionary* 1330 (5th ed. 2002);[28] *see also The American Heritage Dictionary of the English Language* 660 (1981) (defining "implement" as "[t]o provide a definite plan or procedure to ensure the fulfillment of"). Although my colleagues invoke the plain meaning of "implement" to hold that it repealed the President's preexisting modification authority, *see ante* at 1351–52, they do not proffer any competing definition.

As amended in 1988, all the statute requires is that the President "implement" the action within the 15 days of determining to act, that is, to put the plan of action into effect. It does not contain any language limiting the President's preexisting statutory authority to modify that action later as necessary to protect the national security. Put differently, Section 232 does not prohibit the President from "implementing" a plan of continuing action that says, in essence, "We'll try x, but if our ongoing monitoring reveals that x doesn't work or that the relevant facts have changed, then we'll adjust it as necessary."

Consistent with the practice of his predecessors, that's what the President did here. In Proclamation 9705, he "implemented" a system of tariffs intended to address steel imports on an ongoing basis. Under that action, he directed the Secretary to monitor the effectiveness of the restrictions taken. *See* 83 Fed. Reg. at 11,628. After the Secretary advised the President that further action was necessary because steel derivative imports circumvented Proclamation 9705, the President issued Proclamation 9980.

To read Section 232 as granting the President ongoing authority to modify his actions, as past presidents did, does not—contrary to *Transpacific I*—read the deadlines out of the statute. *See Transpacific I*, 415 F. Supp. 3d at 1275 n.13 ("If the President has the power to continue to act, to modify his actions, beyond these deadlines, then these deadlines are meaningless."). The new deadlines inserted by the 1988 amendments require prompt *implementation*, i.e., putting a plan of action into effect, without which the President

28. The other definitions of "implement" as a transitive verb are of a sort that cannot be relevant in the Section 232 context.

has no authority to act at all assuming those deadlines are mandatory,[29] but those deadlines do not apply to modifications of action that was otherwise timely implemented in the first instance. Thus, as amended in 1988, the statute requires the President to decide on his plan within 90 days of receiving the Secretary's report and put that plan into place within 15 days of so deciding, but so long as he does so, it does not prohibit him from later modifying that plan.

Because the 1988 amendments' insertion of deadlines for the President to "implement action" can peacefully coexist with Congress's retention of the President's modification authority in the word "action" from the pre-1988 statute, those deadlines cannot be read as impliedly repealing the latter. "Repeal by implication is invoked only when an enactment *is irreconcilable* with an earlier statute, or the enactment so comprehensively covers the subject matter of the earlier statute that it must have been intended as a substitute. In either case, Congress' intention to repeal the earlier law must be 'clear and manifest.'" *Todd v. Merit Sys. Prot. Bd.*, 55 F.3d 1574, 1577 (Fed. Cir. 1995) (cleaned up and emphasis added); *see also* 1A Sutherland Statutes and Statutory Construction § 22:34 (7th ed. 2020 update) ("[P]rovisions introduced by an amendatory act should be read together with provisions of the original section that were reenacted or left unchanged as if they had originally been enacted as one section. Effect is to be given to each part, and they are interpreted so they do not conflict."). Here, because the implementation deadline added by the 1988 amendments *is* reconcilable with the President's continuing authority to act in the word "action," there is no clear and manifest intention on the part of Congress to repeal that preexisting authority.

The presumption against an implied repeal of the President's preexisting authority to modify Section 232 action is even stronger here because of the three decades of administrative practice and interpretation of Section 232 recognizing that authority prior to the 1988 amendments. If Congress removed the authority, we should expect to find a clear indication that Congress affirmatively sought to make such a radical change. "Here, the applicable principle is that Congress does not enact substantive changes *sub silentio*." *United States v. O'Brien*, 560 U.S. 218, 231, 130 S.Ct. 2169, 176 L.Ed.2d 979 (2010) (citing *Director of Revenue of Mo. v. CoBank ACB*, 531 U.S. 316, 323, 121 S.Ct. 941, 148 L.Ed.2d 830 (2001)); *see also CoBank ACB*, 531 U.S. at 324, 121 S.Ct. 941 (rejecting interpretation of statutory amendments "that Congress made a radical—but entirely implicit—change" that overruled a "50-year history"); *In re Cuozzo Speed Techs., Inc.*, 793 F.3d 1268, 1277 (Fed. Cir. 2015) (noting that Congress is assumed to recognize longstanding existing law and that it is improper to assume Congress alters that sort of thing *sub silentio*).

To appreciate just how radical a change PrimeSource's reading of the 1988 amendments represents, it's worth considering President Reagan's use of Section 232 authority in the runup to those amendments. In 1982, Muammar Kaddafi's Libya was a serious, lethal menace to U.S. national security interests.[30] That year, without a for-

29. For present purposes, I assume that the statute's deadlines are mandatory. I do not reach, and therefore express no view on, the government's alternative argument that that the statute's deadlines are directory rather than mandatory. *See* ECF 60, at 45–47.

30. Among other things, in late 1981 "American intelligence picked up reports from multiple sources (including an intercepted phone call of Kaddafi himself) that Kaddafi was plotting to assassinate Reagan." Steven F. Hayward, *The Age of Reagan—The Conservative*

mal Section 232 investigation and report, President Reagan modified the oil import restrictions of Proclamation 3729—issued by President Eisenhower in 1959—to exclude Libyan oil imports indefinitely. President Reagan explained he did so because the applicable cabinet officials had advised him that continued oil imports from Libya were "inimical to the United States national security." Proclamation No. 4907 of March 10, 1982, *Imports of Petroleum*, 47 Fed. Reg. 10,507 (Mar. 11, 1982).

Under the theory advanced by PrimeSource, Congress in 1988 outlawed President Reagan's restriction of Libyan oil imports because he failed to receive a formal Section 232 report before acting. This is purportedly so even though only two years earlier, in 1986, Libyan agents had executed a terrorist attack on American servicemembers in West Berlin, and President Reagan ordered military strikes on Libya in retaliation. Hayward, *supra* note 30, at 489–91. In view of this contemporaneous statutory history, PrimeSource's theory asks us to read the 1988 amendments as implicitly working a revolutionary change in the statute.

In short, because the 1988 amendments requiring the President to exercise Section 232 action within 105 days of receiving the Secretary's report do not clearly indicate that Congress *also* sought to curtail the "systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned," *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11, 72 S.Ct. 863, 96 L.Ed. 1153 (1952) (Frankfurter, J., concurring), of the type taken by President Reagan in 1982 as to Libyan oil imports, we should construe the statute as preserving that authority.

Counterrevolution 1980–1989 at 178 (Three Rivers Press 2009).

c. The President's continuing authority to act under subsection (c)(3) added by the 1988 amendments is consistent with the President's continuing authority to act retained in subsection (c)(1).

One of the substantive changes made by the 1988 amendments was to add a completely new provision broadening the scope of permissible Section 232 "action" to include seeking to negotiate an agreement restricting the imports of articles threatening national security. This provision was inserted as a new paragraph (3) in subsection (c), where it functions in tandem with the preexisting grant of Presidential authority to take "action" in paragraph (1). It provides:

> (3) (A) If—
>
> (i) the action taken by the President under paragraph (1) is the negotiation of an agreement which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security, and
>
> (ii) either—
>
> (I) no such agreement is entered into before the date that is 180 days after the date on which the President makes the determination under paragraph (1)(A) to take such action, or
>
> (II) such an agreement that has been entered into is not being carried out or is ineffective in eliminating the threat to the national security imposed by imports of such article,
>
> *the President shall take such other actions* as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security. The Presi-

dent shall publish in the Federal Register notice of any additional actions being taken under this section by reason of this subparagraph.

(B) If—

(i) clauses (i) and (ii) of subparagraph (A) apply, and

(ii) the President determines not to take any additional actions under this subsection,

the President shall publish in the Federal Register such determination and the reasons on which such determination is based.

19 U.S.C. § 1862(c)(3) (emphasis added).

Subsection (c)(3) thus contains an alternative procedure, with different time periods, applicable when the President decides—as the "action" taken under (c)(1)—to negotiate an agreement restricting the importation of the article that threatens to impair national security. It provides that if either no agreement is reached within 180 days of the President's decision to negotiate *or* an agreement was reached but is not being carried out or is ineffective, "the President shall *take such other actions* as the President deems necessary to adjust the imports of such article so that imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(3)(A) (emphasis added). Under subsection (c)(3), the President plainly has authority to take further action without first obtaining a new report and investigation from the Secretary.

Invoking *Transpacific I*, PrimeSource contends that subsection (c)(3)'s grant of modification authority implies that no similar authority exists under subsection (c)(1). *See* ECF 73-1, at 19 (citing *Transpacific I*, 415 F. Supp. 3d at 1276 n.15). The *Transpacific I* court reasoned that Section 232 did not permit the President to modify import restrictions by increasing them, in part because "[w]here Congress envisioned ongoing action by the President it provided for it." *Transpacific I*, 415 F. Supp. 3d at 1276 n.15 (citing 19 U.S.C. § 1862(c)(3)). My colleagues make essentially the same point. *See ante* at 1351–52.

I disagree with this conclusion for several reasons. To begin with, it ignores that the 1988 amendments were only that—amendments to a preexisting statute that already permitted the President to modify import restrictions. As explained above, the 1988 amendments left intact the statutory language in subsection (c)(1) permitting such modifications—"action"—and under the prior-construction canon Congress is presumed to have incorporated that meaning into the amended Section 232.

Subsection (c)(3), on the other hand, represented an entirely *new* substantive grant of authority uncontemplated in the pre-1988 statute. It makes clear that the "action" taken by the President under (c)(1) within the new deadlines now includes—in addition to the unilateral action by the President contemplated by the pre-1988 statute such as tariffs or import quotas—an attempt to negotiate import restrictions with foreign partners, i.e., *bilateral* action. Of course, such negotiations might fail, meaning that the President's bilateral action within the relevant deadline might be stillborn.

In specifying that the President can take "other actions" in such circumstances, Congress simply made the President's authority to take bilateral action under the new subsection (c)(3) symmetrical with the President's preexisting authority under subsection (c)(1) to make such modifications in the context of unilateral action. Far from implying that no such power exists under subsection (c)(1), Congress's provision of such authority in subsection (c)(3) simply provides further support that Congress did not repeal such preexisting authority in subsection (c)(1).

Finally, neither PrimeSource nor the *Transpacific* decisions have any answer to this question: Why would Congress *repeal* the President's preexisting authority to modify Section 232 action in the context of unilateral action, and yet in the same breath expressly *grant* that same authority solely in the limited context of unsuccessful attempts to restrict imports by agreement? It defies common sense that for no apparent reason Congress would take away preexisting authority in every other context that it was simultaneously *conferring* in the new context of failed bilateral action.

When statutory interpretation yields such irrational results, it suggests that something is wrong with the interpretation. *See, e.g.*, *W. Air Lines, Inc. v. Bd. of Equalization of State of S.D.*, 480 U.S. 123, 133, 107 S.Ct. 1038, 94 L.Ed.2d 112 (1987) (noting that where an interpretation yields illogical results, it "argue[s] strongly against the conclusion that Congress intended these results"); *Greenlaw v. United States*, 554 U.S. 237, 251, 128 S.Ct. 2559, 171 L.Ed.2d 399 (2008) (citing the foregoing language from *Western Air Lines* to support the conclusion that "[w]e resist attributing to Congress an intention to render a statute so internally inconsistent"); *Bayer AG v. Housey Pharms., Inc.*, 340 F.3d 1367, 1377–78 (Fed. Cir. 2003) (refusing to interpret statute in a way that yielded "an illogical result").[31]

3. Interpreting Section 232 to bar modifications of import restrictions compromises the statute's effectiveness.

Section 232 import restrictions might last for years. Proclamation 3729 is a good example—President Eisenhower promulgated it in 1959 and it remained in effect, with a substantial number of modifications, until President Reagan eventually revoked it in 1983. *See* Proclamation No. 5141 of December 22, 1983, *Imports of Petroleum and Petroleum Products*, 48 Fed. Reg. 56,929, 56,929, 98 Stat. 3543, 3544, § 1 (Dec. 27, 1983) ("Proclamation No. 3279, as amended, is revoked."). In effect, Section 232 authorizes the President to establish an ongoing regulatory *program* as to imports of an article and its derivatives.

It is precisely because Section 232 allows the President to establish a regulatory program that it is essential and appropriate for the President to be able to quickly adjust the program after the cumbersome initial machinery of the formal investigative and reporting process has already determined the existence of a national security threat. As General Saxbe noted in 1975, "facts constantly change." 43 Op. Att'y Gen. No. 20, at 6.

To read the statute as restricting the President's authority to make adjustments in real time to respond to evolving threats violates the canon of effectiveness, under which "[a] textually permissible interpretation that furthers rather than obstructs the document's purpose should be favored." Scalia & Garner, *supra*, at 63. "This canon follows inevitably from the facts that (1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness." *Id.*

By precluding the President from using Section 232 to establish an ongoing regu-

31. My colleagues imply that the President's authority under subsection (c)(3)—either as to action in the first instance or continuing authority—does not extend to derivatives because, unlike subsection (c)(1), subsection (c)(3) does not expressly encompass derivatives. *See ante* at 1351–52. As this case does not involve action under (c)(3), we do not have to resolve that issue today, but I note that (c)(3) cross-references action taken under (c)(1), and therefore (c)(3)'s grant of authority may extend to derivatives as well.

latory program to adjust imports, PrimeSource's theory compromises the effectiveness of the statute as a tool for "[s]afeguarding national security." 19 U.S.C. § 1862; *cf.* 2A *Sutherland Statutory Construction* § 45:12 (7th ed. 2019 update) ("[A] statute should not be read in an atmosphere of sterility, but in the context of what actually happens when humans fulfill its purpose."). Even if PrimeSource's interpretation were textually permissible, it would be disfavored against another textually permissible interpretation that preserves, rather than diminishes, the statute's effectiveness.[32]

Finally, if there is any context where the canon of effectiveness must not be overlooked, it is in this realm of national security. The President's most solemn duty is to protect the nation in a perilous world, and to that end we should choose a textually permissible interpretation of the statute that allows the President to "anticipate distant danger, and meet the gathering storm[.]" A. Hamilton, *The Federalist No. 25*, at 161 (J. Cooke ed. 1961).[33]

B. Proclamation 9980's extension of import restrictions to steel derivatives was a permissible modification of Proclamation 9705 rather than new action.

PrimeSource appears to argue in the alternative, and my colleagues agree, that even if the President has the power to modify Section 232 action that was otherwise timely implemented, that power is limited to the specific universe of imported articles and derivatives addressed by the original proclamation and that any later action restricting derivatives not included in the original action requires a new Section 232 investigation and report. Specifically, my colleagues conclude that because Proclamation 9705's restrictions were limited to steel *articles*, Proclamation 9980's restrictions of steel *derivatives* "implemented" a new action for purposes of Section 232's procedural requirements. *Ante* at 1351.

I disagree for two reasons. First, the President's power to act in the first instance extends to derivatives of articles that are the subject of an investigation and report by the Secretary, even if such an

32. Indeed, the 1988 amendments were motivated by Congress's "frustration" with the President's failure to take timely Section 232 action once the Secretary had identified a national security threat. *See Transpacific II*, 466 F. Supp. 3d at 1252. It is incongruous that in moving to expedite action under the statute, Congress would have simultaneously enfeebled longstanding Presidential authority to adjust such action to respond to changing facts in real time.

33. On this issue, my colleagues may eventually reach the same destination as I do, but they take a more circuitous route. They deny PrimeSource's motion for summary judgment as to Count 2, reasoning that there is a genuine issue of material fact in dispute as to whether the Secretary's "assessments" referenced in Proclamation 9980 might qualify as a Section 232 report, *see ante* at 50–55, notwithstanding the government's concession to the contrary. While my colleagues may be correct that we might ultimately be able to characterize Proclamation 9980 as a timely "new" Section 232 action by characterizing the Secretary's assessments as a "report," I would take the government at its word here rather than invite the President to characterize every recommendation by the Secretary as a Section 232 report authorizing new action. In effect, my colleagues' reading of the 1988 amendments as revoking the President's modification authority on the back end compels them to potentially water down the statute's procedural requirements on the front end to avoid compromising the statute's effectiveness as a national security tool. *Cf. Transpacific II*, 466 F. Supp. 3d at 1255 ("The President is not authorized to act under Section 232 based on any offhanded suggestion by the Secretary; the statute requires a formal investigation and report.").

investigation and report did not address derivatives. Second, if the President has the power to modify Section 232 action, that power is necessarily coextensive with his power to act in the first instance.

1. The President's power to act in the first instance extends to an article and its derivatives.

Section 232 directs the Secretary to investigate, and report to the President about, the national security effects of imports of "the article." 19 U.S.C. §§ 1862(b)(1)(A), (b)(2)(B), (b)(3)(A), (c)(1)(A).[34] The statute directs the President, provided he concurs with the Secretary's findings, to take action to adjust the imports "of the article *and its derivatives.*" *Id.* § 1862(c)(1)(A)(ii) (emphasis added); *see also id.* § 1862(c)(1)(B) (directing the President to "implement" his decision "to take action to adjust imports of an article *and its derivatives*") (emphasis added).

Thus, it is indisputable that the Secretary is to investigate imports of an article, but the President can then act as to the article *and its derivatives*, even if the Secretary's investigation and report did not address derivatives. PrimeSource complains that the Secretary's investigation and report were focused on "imports of steel" and "did not mention steel nails specifically, nor any derivative articles generally," and further complains that none of the public comments "put PrimeSource on notice that Commerce was considering" applying tariffs to imported steel nails. ECF 73-1, at 9. But had the President included steel nails—derivatives of the steel articles that were the subject of the Secretary's report and investigation—in Proclamation 9705, PrimeSource would have no valid objection because Section 232(c)(1)(A)(ii) and (B) allow the President to act to adjust imports of the "article *and its derivatives.*" 19 U.S.C. § 1862(c)(1)(A)(ii), (c)(1)(B) (emphasis added). That the Secretary's investigation and report did not address derivatives of steel articles did not mean that the President's proclamation could not do so.

2. The President's power to modify import restrictions is coextensive with his power to act in the first instance.

If the President has the power to modify Section 232 action without another formal investigation and report by the Secretary—and as discussed above at length, I believe that he does—I see nothing in the statute suggesting that the President's modification power is narrower than his power to act in the first instance. The statute—not the President's original Section 232 action—sets the boundaries on the scope of the President's power to modify such action, and the statute permits the President to take action—both initial action within the 105 days after the Secretary's report *and* thereafter continuing action under the pre-1988 interpretation ratified by the 1988 amendments—as to an "article *and its derivatives.*" 19 U.S.C. § 1862(c)(1)(A)(ii), (c)(1)(B) (emphasis added). In short, the President's statutory power to modify is necessarily coextensive with the original power to act in the first instance absent any statutory restriction to the contrary.

Thus, that Proclamation 9705's import restrictions on steel articles did not encompass steel derivatives did not mean that the President could not later extend those

34. 19 U.S.C. § 1862(c)(1)(A) is focused on what actions the President is to take after receiving a report from the Secretary, but it begins by referring to the President's "receiving a report submitted under subsection (b)(3)(A) in which the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security."

restrictions to such derivatives absent another formal investigation and report. To read the statute otherwise—that is, as prohibiting the President from extending Section 232 import restrictions to derivatives unless the Secretary has first formally investigated and reported on those derivatives—makes no sense when the statute permits the President to act as to derivatives in the first instance without any such formal investigation and report by the Secretary *as to derivatives.* What is the point of requiring a formal investigation and report as to derivatives at the modification stage when no such investigation and report (as to derivatives) is even necessary at the implementation stage?

As Attorney General Saxbe opined in 1975, the statute presumes that the relevant officials will advise the President in real time of changes in underlying facts that warrant adjusting Section 232 action. 43 Op. Att'y Gen. No. 20, at 3–4. And there is no question here that the Secretary did just that by timely advising the President that steel article derivative imports were undermining Proclamation 9705 and therefore required prompt remedial action. *See* 85 Fed. Reg. at 5282.

To read the statute as nevertheless demanding that the President defer acting on such advice until the Secretary conducts a formal investigation and report as to the continued existence of a national security threat is to exalt supposed form over actual substance and reintroduces into the statute wasteful inefficiency akin to that which Congress eliminated in 1958. *See supra* at 81–83 (discussing pre-1958 version of the statute that permitted the Secretary to initiate an investigation only after first receiving direction from the President to do so, even though the Secretary had already advised the President of the need for action). Such a reading also violates the canon of effectiveness previously discussed. *See* Scalia & Garner, *supra*, at 63.

Finally, I note that the historical record confirms my reading of the statute. That record shows that Presidents repeatedly modified Proclamation 3279—President Eisenhower's Section 232 import restrictions on petroleum products that lasted almost a quarter century—to add derivative products not encompassed by the original proclamation. *See, e.g.*, Proclamation No. 3509 of November 30, 1962, *Modifying Proclamation 3279 Adjusting Imports of Petroleum and Petroleum Products*, 27 Fed. Reg. 11,985, 11,985–87, 77 Stat. 963 (Dec. 5, 1962) (adding natural gas); Proclamation No. 3823 of January 29, 1968, *Modifying Proclamation 3279 Adjusting Imports of Petroleum and Petroleum Products*, 33 Fed. Reg. 1171, 1171–73, 82 Stat. 1603 (Jan. 30, 1968) (adding liquids derived from tar sands); Proclamation No. 4178 of January 17, 1973, *Modifying Proclamation No. 3279, Relating to Imports of Petroleum and Petroleum Products*, 38 Fed. Reg. 1719, 1719–21, 87 Stat. 1150 (Jan. 18, 1973) (adding liquid hydrocarbons produced from gilsonite and oil shale).

As discussed above, this history of administrative interpretation and practice forms part of the statutory history that "can properly be presumed to have been before all the members of the legislature when they voted" on the 1988 amendments. Scalia & Garner, *supra*, at 256. If the 1988 amendments retained the President's power to modify Section 232 action without another formal investigation and report—and, as explained above, my view is that they did—those amendments *also* necessarily retained the President's power to modify Section 232 action by extending import restrictions to derivatives of an article encompassed by an original action. *See Bragdon*, 524 U.S. at 645, 118 S.Ct.

2196 ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.").[35]

Conclusion

For the reasons set forth above, I respectfully dissent from my colleagues' decision to avoid confronting the question of whether we have subject-matter jurisdiction over claims against the President. I concur in their decision to grant the government's motion to dismiss Counts 1, 3, 4, and 5 of the amended complaint for failure to state a claim, as well as in their decision to deny PrimeSource's cross-motion for summary judgment as to those same counts. I join their opinion as to Counts 1, 3, and 4. Finally, although I concur in their decision to deny PrimeSource's cross-motion for summary judgment as to Count 2, I respectfully dissent from their decision to deny the government's motion to dismiss that count for failure to state a claim.

/s/ *M. MILLER BAKER*
M. MILLER BAKER, Judge

Attachment

Presidential Modifications of Section 232 Actions Without New Formal Investigations and Reports Between 1975 and 1988

1. Proclamation No. 4355 of March 4, 1975, *Modifying Proclamation 3279, as Amended, Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees*, 40 Fed. Reg. 10,437, 89 Stat. 1248 (Mar. 6, 1975).
2. Proclamation No. 4377 of May 27, 1975, *Modifying Proclamation No. 3279, as Amended, Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees*, 40 Fed. Reg. 23,429, 89 Stat. 1275 (May 30, 1975).
3. Proclamation No. 4412 of January 3, 1976, *Modifying Proclamation No. 3279, as Amended, Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum Products Through a System of License Fees*, 41 Fed. Reg. 1037, 90 Stat. 3073 (Jan. 6, 1976).
4. Proclamation No. 4543 of December 27, 1977, *Modifying Proclamation No. 3279, as Amended, Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees*, 42 Fed. Reg. 64,849, 92 Stat. 3907 (Dec. 29, 1977).
5. Proclamation No. 4629 of December 8, 1978, *Imports of Petroleum and Petroleum Products*, 43 Fed. Reg. 58,077, 93 Stat. 1476 (Dec. 12, 1978).
6. Proclamation No. 4655 of April 6, 1979, *Imports of Petroleum and Petroleum Products*, 44 Fed. Reg. 21,243, 93 Stat. 1508 (Apr. 10, 1979).

35. This case does not present, and therefore I express no view on, the issue of whether the President's Section 232 modification authority extends to *articles* that were not the subject of any investigation and report by the Secretary.

Attachment—Continued

7. Proclamation No. 4702 of November 12, 1979, *Imports of Petroleum and Petroleum Products*, 44 Fed. Reg. 65,581, 93 Stat. 1554 (Nov. 14, 1979).

8. Proclamation No. 4748 of April 11, 1980, *Technical Amendments to Proclamation 4744*, 45 Fed. Reg. 25,371, 94 Stat. 3747 (Apr. 15, 1980).

9. Proclamation No. 4751 of April 23, 1980, *Amendment to Proclamation 4744*, 45 Fed. Reg. 27,905, 94 Stat. 3750 (Apr. 25, 1980).

10. Proclamation No. 4762 of June 6, 1980, *Petroleum Import Licensing Requirements*, 45 Fed. Reg. 39,237, 94 Stat. 3760 (June 10, 1980).

11. Proclamation No. 4766 of June 19, 1980, *Imports of Petroleum and Petroleum Products*, 45 Fed. Reg. 41,899, 94 Stat. 3763 (June 23, 1980).

12. Proclamation No. 4907 of March 10, 1982, *Imports of Petroleum*, 47 Fed. Reg. 10,507, 96 Stat. 2709 (Mar. 11, 1982).

13. Proclamation No. 5141 of December 22, 1983, *Imports of Petroleum and Petroleum Products*, 48 Fed. Reg. 56,929, 98 Stat. 3543 (Dec. 27, 1983).

SHELTER FOREST INTERNATIONAL ACQUISITION, INC., et al., Plaintiffs,

and

IKEA Supply AG, Consolidated Plaintiff,

and

Taraca Pacific, Inc. et al., Plaintiff-Intervenors,

v.

UNITED STATES, Defendant,

Coalition for Fair Trade in Hardwood Plywood, Defendant-Intervenor.

Slip Op. 21-19
Consol. Court No. 19-00212

United States Court of International Trade.

February 18, 2021

Background: Companies brought actions against government, challenging affirmative determination by Department of Commerce that certain merchandise constituted later-developed merchandise and was circumventing antidumping and countervailing duty orders on hardwood plywood from People's Republic of China (PRC). Following consolidation of actions, companies moved for judgment on agency record.

Holdings: The Court of International Trade, Jane A. Restani, Senior Judge, held that:

(1) substantial evidence did not support determination that inquiry merchandise constituted later-developed merchandise;

(2) Department's rejection of certain submission of new factual information was not reasonable;

PRIMESOURCE BUILDING PRODUCTS, INC., Plaintiff,

v.

UNITED STATES, et al., Defendants.

Slip Op. No. 21-36
Court No. 20-00032

United States Court of International Trade.

April 5, 2021

Background: Importer of steel nails filed suit challenging Presidential Proclamation, imposing 25% tariffs on imported products made of steel, including steel nails, and 10% duty on imported articles made from aluminum, as allegedly authorized by Trade Expansion Act and previous proclamations, and based on assessments provided by Secretary of Commerce.

Holdings: The Court of International Trade, Timothy C. Stanceu, Chief Judge, held that:

(1) government waived any defense to timeliness of proclamation, and

(2) proclamation was untimely under Trade Expansion Act.

Ordered accordingly.

M. Miller Baker, J., filed dissenting opinion.

See also, 2021 WL 276338.

1. Customs Duties ⇨84(8.1)

Court of International Trade may enter summary judgment for a party sua sponte. USCIT, Rule 56(f).

2. Customs Duties ⇨84(8.1)

On Court of International Trade's sua sponte entry of summary judgment for a party, all that is required is notice to the party with the burden of proof that she had to come forward with all of her evidence. USCIT, Rule 56(f).

3. Customs Duties ⇨84(8.1)

In determining whether to enter summary judgment sua sponte, Court of International Trade must ensure that prejudice will not accrue to the would-be losing party stemming from that party's inability to present evidence of a genuine dispute of material fact. USCIT, Rule 56(f).

4. Customs Duties ⇨84(2, 8.1)

Government waived any argument that Presidential Proclamation, imposing 25% tariffs on imported products made of steel and 10% duty on imported articles made from aluminum, was issued within 105-day time period beginning on President's receipt of report qualifying under Trade Expansion Act, and thus absence of government's answer to importer's amended complaint was not procedural bar to sua sponte entry of summary judgment for importer, since government declined to present additional evidence to demonstrate existence of genuine dispute of material fact, expressly waived any defense that Secretary of Commerce's assessments, as described in proclamation, were functional equivalent of qualifying report, and waived any claim of prejudice resulting from summary judgment. 19 U.S.C.A. § 1862(b)(2)(A); Pres. Proc. No. 9980.

5. Customs Duties ⇨5
United States ⇨252

Presidential Proclamation, imposing 25% tariffs on imported products made of steel, including steel nails, and 10% duty on imported articles made from aluminum, was not implemented within 105-day time period, under Trade Expansion Act, that began to run on date of President's receipt of steel report, which was only submission made by Secretary of Commerce that could satisfy Act's requirements and upon which proclamation could have been based. 19 U.S.C.A. § 1862(b)(2)(A); Pres. Proc. No. 9980.

6. Customs Duties ⚿84(6)

United States ⚿254

To declare a Presidential Proclamation invalid, Court of International Trade must find a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.

Jeffrey S. Grimson, Mowry & Grimson, PLLC, of Washington, D.C., for plaintiff. With him on the brief were Kristin H. Mowry, Jill A. Cramer, Sarah M. Wyss, Bryan P. Cenko, and Wenhui Ji.

Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendants. With her on the brief were Tara K. Hogan, Assistant Director, and Stephen C. Tosini, Senior Trial Counsel.

OPINION

STANCEU, Chief Judge:

Plaintiff PrimeSource Building Products, Inc. ("PrimeSource"), a U.S. importer of steel nails, contested a proclamation issued by the President of the United States ("Proclamation 9980") in January 2020. *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Exec. Office of the President Jan. 29, 2020) ("*Proclamation 9980*"). Before the court is a "Joint Status Report" the parties submitted in response to our order in *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT ——, Slip. Op. 21-8, 497 F.Supp.3d 1333, 1343-45 (2021) ("*PrimeSource I*"). Joint Status Report (Mar. 5, 2021), ECF No. 108. In response to statements of the parties in the Joint Status Report, the court enters summary judgment in favor of plaintiff.[1]

I. Background

The background of this action is set forth in our prior opinion and summarized briefly herein. *See PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT ——, Slip. Op. 21-8, 497 F.Supp.3d 1333, 1343-45 (2021) ("*PrimeSource I*").

A. Proclamation 9980

On January 24, 2020, President Donald Trump issued Proclamation 9980, which imposed a 25% duty on certain imported articles made of steel, including steel nails, and a 10% duty on certain imported articles made of aluminum. As authority for its imposition of duties on the articles, identified as "derivative aluminum articles" and "derivative steel articles," Proclamation 9980 cited Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 ("Section 232").[2] Proclamation 9980 also cited previous Presidential proclamations that invoked Section 232, including Proclamation 9704, *Adjusting Imports of Aluminum Into the United States*, 83 Fed. Reg. 11,619 (Exec. Office of the President Mar. 15, 2018) ("*Proclamation 9704*"), and Proclamation 9705, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Exec. Office of the President Mar. 15, 2018) ("*Proclamation 9705*"). *Procla-*

1. Judge Baker dissents from the entry of summary judgment in favor of plaintiff for the reasons stated in his dissent from the court's prior opinion and order. *PrimeSource Bldg. Prods., Inc. v. United States,* 45 CIT ——, Slip. Op. 21-8, 497 F.Supp.3d 1333, 1343-45 (2021) (Baker, J., dissenting).

2. All citations to the United States Code are to the 2012 edition.

mation 9980 ¶¶ 9–10, 85 Fed. Reg. at 5,283.

B. Procedural History of this Litigation

On February 4, 2020, PrimeSource commenced this action, naming the United States, et al., as defendants and asserting five claims in contesting Proclamation 9980. Summons, ECF No. 1; Compl., ECF Nos. 8 (conf.), 9 (public). Defendants filed a Rule 12(b)(6) motion to dismiss an amended complaint on March 20, 2020 for failure to state a claim on which relief can be granted. Defs.' Mot. to Dismiss for Failure to State a Claim, ECF No. 60 ("Defs.' Mot."). Plaintiffs opposed defendants' motion to dismiss and moved for summary judgment on April 14, 2020. Rule 56 Mot. for Summ. J., Pl. PrimeSource Bldg. Prods. Inc.'s Mem. of Points and Authorities in Supp. of Mot. for Summ. J. and Resp. to Defs.' Mot. to Dismiss for Failure to State a Claim, ECF No. 73-1. Defendants responded to plaintiff's summary judgment motion on May 12, 2020. Defs.' Reply in Supp. of their Mot. to Dismiss and Resp. to Pl.'s Mot. for Summ. J., ECF No. 78. On June 9, 2020, plaintiff replied in support of its summary judgment motion. Pl. PrimeSource Bldg. Prods. Inc.'s Reply Br. in Supp. of its Mot. for Summ. J., ECF No. 91.

C. Our Decision in *PrimeSource I*

In *PrimeSource I*, we granted defendants' motion to dismiss as to all of plaintiff's claims in the amended complaint except one, stated as "Count 2," in which plaintiff claimed that Proclamation 9980 was issued beyond the statutory time limits set forth in Section 232. *PrimeSource I*, 45 CIT at ——, 497 F.Supp.3d at 1361. In Count 2, plaintiff argued that Proclamation 9980 was issued after the expiration of the 105-day time period set forth in Section 232(c)(1), which PrimeSource described as commencing upon the President's receipt, on January 11, 2018, of a report the Secretary of Commerce issued under Section 232(b)(3)(A) on the effect of certain steel articles on the national security of the United States (the "2018 Steel Report"). That report culminated in the President's issuance of Proclamation 9705 in March 2018, which imposed 25% duties on various steel articles, *see Proclamation 9705*, ¶¶ 1–2, 83 Fed. Reg. at 11,625, but not on the derivative steel articles affected by Proclamation 9980 in January 2020.

We stated in *PrimeSource I* that "[d]efendants do not dispute that the 2018 Steel Report is, for purposes of Section 232(c), 19 U.S.C. § 1862(c), the report issued according to Section 232(b)(3)(A), 19 U.S.C. § 1862(b)(3)(A), upon which the President based his adjustment to imports of steel derivatives, including steel nails." *PrimeSource I*, 45 CIT at ——, 497 F.Supp.3d at 1345 (citing Defs.' Mot. 24–29). In denying defendants' motion to dismiss Count 2, we concluded that Proclamation 9980 does not comply with the limitation on the President's authority imposed by the 105-day time limitation of Section 232(c)(1) if that time period is considered to have commenced upon the President's receipt of the 2018 Steel Report. *Id.* at ——, 497 F.Supp.3d at 1356-57. We held that in this circumstance Count 2 stated a plausible claim for relief. *Id.* at ——, 497 F.Supp.3d at 1359.

After denying defendants' motion to dismiss as to the claim in Count 2, we denied plaintiff's motion for summary judgment on that remaining claim upon determining that there existed one or more genuine issues of material fact. Although concluding that Proclamation 9980 was untimely under Section 232(c)(1) when viewed solely as an action taken in response to the Steel Report, we also concluded that there were genuine issues of material fact that bore on the extent to which the subsequent "assessment" or "assessments" of the

Commerce Secretary, as identified in Proclamation 9980, validly could be held to have served a function analogous to that of a Section 232(b)(3)(A) report. *Id.* at ——, 497 F.Supp.3d at 1360-61. We also noted that we did not know what form of inquiry or investigation the Commerce Secretary conducted prior to his submission of these communications to the President and whether, or to what extent, that inquiry or investigation satisfied the essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(b)(2)(A). *Id.*

In summary, we concluded in *PrimeSource I* that factual information pertaining to the Secretary's inquiry on, and his reporting to the President on, the derivative articles would be required in order for us to examine whether and to what extent there was compliance by the President with the procedural requirements of Section 232 and whether any noncompliance that occurred was a "significant procedural violation." *Id.* at ——, 497 F.Supp.3d at 1361 (quoting *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) (requiring that a procedural violation be "significant" in order to serve as a ground for judicial invalidation of a Presidential action)). We added that "at this early stage of the litigation, we lack a basis to presume that these unresolved factual issues are unrelated to the issue of whether the President clearly misconstrued the statute or the issue of whether the President took action outside of his delegated authority." *Id.* at ——, 497 F.Supp.3d at 1361. We noted that the "filing of a complete administrative record could be a means of resolving, or helping to resolve, these factual issues" and directed the parties to consult on this matter and file a scheduling order to govern the subsequent litigation. *Id.*

D. The Joint Status Report

On March 5, 2021, the parties submitted the Joint Status Report in lieu of a scheduling order. In it, defendants expressly waived "the opportunity to provide additional factual information that might show that the 'essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(B)(2)(A)' were met," adding that "[d]efendants do not intend to pursue that argument." Joint Status Report 2 (quoting *PrimeSource I*, 45 CIT at ——, 497 F.Supp.3d at 1360-61). Defendants informed the court that their "position continues to be that procedural preconditions for the issuance of Proclamation 9980 were met by the Secretary's 2018 Steel Report and the timely issuance of Proclamation 9705, a position that the majority has already rejected." *Id.* at ——, 497 F.Supp.3d at 1337. The Joint Status Report concludes by stating that "the parties agree and respectfully submit that there is no reason for this Court to delay entry of final judgment. In so representing, the parties fully reserve all rights to appeal any adverse judgment." *Id.* at ——, 497 F.Supp.3d at 1337.

II. Discussion

A. *Sua Sponte* Entry of Summary Judgment according to USCIT Rule 56(f)

[1] Because we denied plaintiffs' motion for summary judgment in *PrimeSource I*, no motion for summary judgment is now before us. Nevertheless, we may enter summary judgment for a party *sua sponte* under USCIT Rule 56(f), which provides that "[a]fter giving notice and a reasonable time to respond, the court may . . . consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute."

[2, 3] The United States Supreme Court in *Celotex Corp. v. Catrett*, 477 U.S. 317, 326, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) ("*Celotex*") opined that "district courts are widely acknowledged to possess the power to enter summary judgments *sua sponte*." In interpreting *Celotex*, the Court of Appeals for the Federal Circuit instructed that "[t]he *Celotex* Court also made clear that all that is required is notice [to the party with the burden of proof] that she had to come forward with all of her evidence." *Exigent Tech., Inc. v. Atrana Sols., Inc.*, 442 F.3d 1301, 1308 (Fed. Cir. 2006) (brackets in original). In determining whether to enter summary judgment *sua sponte*, a court must ensure that prejudice will not accrue to the would-be losing party stemming from that party's inability to present evidence of a genuine dispute of material fact. *See Celotex*, 477 U.S. at 326, 106 S.Ct. 2548.

B. Defendants' Waiver of the Opportunity to Present Evidence and of Any Defense Related to Procedures Subsequent to the 2018 Steel Report

[4] In this litigation, the parties, and defendants in particular, expressly have declined to pursue the opportunity to present additional evidence to demonstrate the existence of a genuine dispute of a material fact. Specifically, defendants waive any defense they might base on a showing that the " 'essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(b)(2)(A)' were met." Joint Status Report 2 (quoting *PrimeSource I*, 45 CIT at ——, 497 F.Supp.3d at 1361). Further, we note the significance of defendants' statement in the Joint Status Report that their "position continues to be that procedural preconditions for the issuance of Proclamation 9980 were met by the Secretary's 2018 Steel Report and the timely issuance of Proclamation 9705." *Id.* at 2–3. This statement constitutes a waiver of any defense that the assessments of the Commerce Secretary, as described in Proclamation 9980, were the functional equivalent of a Section 232(b)(3)(A) report.

By joining in the statement that "the parties agree and respectfully submit that there is no reason for this Court to delay entry of final judgment," *id.* at 3, defendants have waived any claim of prejudice that could result from the entry of summary judgment in favor of plaintiff, subject to their right to appeal. The parties have been given the full opportunity to "come forward" with any evidence of a dispute of material fact. A *sua sponte* order of summary judgment is, therefore, appropriate. *See Celotex*, 477 U.S. at 326, 106 S.Ct. 2548.

The court further notes that defendants did not file an answer to plaintiff's complaint or amended complaint. The court's opinion in *PrimeSource I* directed the parties to file a joint scheduling order to govern the remainder of the litigation, which normally would have included a date for the government to answer the complaint with respect to the remaining claim. Here, defendants having waived any argument that Proclamation 9980 was issued within the 105-day time period beginning on the President's receipt of a report qualifying under Section 232(b)(3)(A), there are no contested issues of fact. Therefore, the absence of an answer to the amended complaint is not a procedural bar to the entry of summary judgment.

C. In the Absence of a Genuine Dispute as to any Material Fact, Plaintiff Is Entitled to Judgment as a Matter of Law

[5] Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). As discussed above, there is no longer a genuine issue of material fact as a result of the representations of the parties in the Joint Status Report. In

particular, defendants have waived any defense grounded in a factual circumstance other than one in which the 2018 Steel Report is the only submission made by the Commerce Secretary that could satisfy the requirements of Section 232(b)(3)(A) and upon which Proclamation 9980 could have been based.

Plaintiff PrimeSource is now entitled to judgment as a matter of law. As we concluded in *PrimeSource I*, "the action taken by Proclamation 9980 to adjust imports of derivatives was not implemented during the 105-day time period set forth in § 1862(c)(1), if that time period is considered to have commenced upon the President's receipt of the Steel Report." 45 CIT at ——, 497 F.Supp.3d at 1356. Because defendants no longer may raise as a defense that the procedural requirements of Section 232 were met based on any procedure other than one reliant upon the 2018 Steel Report, summary judgment in favor of plaintiff is warranted on the ground that Proclamation 9980 was issued after the President's delegated authority to impose duties on derivatives of steel products had expired. As we held in *PrimeSource I*, any determination the President could have made to adjust the duties on imports of derivatives of the articles named in Proclamation 9705 was required by the statute to have been made during the 90-day period commencing with the President's receipt of a report of the Commerce Secretary satisfying the requirements of Section 232(b)(3)(A), and any action to implement that determination was required to have been taken, if at all, during the 15-day period following that determination. *See* 45 CIT at ——, 497 F.Supp.3d at 1351 (holding that "the 90- and 15-day time limitations in Section 232(c)(1) expressly confine the exercise of the President's discretion *regardless* of whether the President determines to adjust imports only of the 'article' named in the Secretary's report or, instead, to adjust imports of the 'article and its derivatives.' ") (emphasis in original).

[6] To declare Proclamation 9980 invalid, we must find "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Maple Leaf Fish Co.*, 762 F.2d at 89. Because the President issued Proclamation 9980 after the congressionally-delegated authority to adjust imports of the products addressed in that proclamation had expired, Proclamation 9980 was action outside of delegated authority. For the reasons we stated in *PrimeSource I*, 45 CIT at ——, 497 F.Supp.3d 1356–59, we reject defendants' position that Congress intended for the time limitations in Section 232(c)(1) to be merely directory, and we find in the untimeliness of Proclamation 9980 a significant procedural violation. As a remedy, PrimeSource is entitled to a declaratory judgment that Proclamation 9980 is invalid as contrary to law and to certain other relief, as described below.

III. Conclusion

We award summary judgment to PrimeSource on the remaining claim in this litigation, which was stated in Count 2 of the amended complaint. As relief on this claim, we will declare Proclamation 9980 invalid as contrary to law and, on that basis, direct that the entries affected by this litigation be liquidated without the assessment of duties pursuant to Proclamation 9980, with refund of any deposits for such duty liability that may have been collected pursuant to Proclamation 9980.[3] Also,

3. Earlier in this litigation, upon the consent of both parties, this Court entered a preliminary injunction against the collection of 25% cash deposits on PrimeSource's entries of merchandise within the scope of Proclamation 9980 and against the liquidation of the affected entries. *Order* (Feb. 13, 2020), ECF Nos. 39 (Conf.), 40 (Public). This preliminary injunc-

should any entries of PrimeSource's merchandise at issue in this litigation have liquidated with the assessment of 25% duties pursuant to Proclamation 9980, PrimeSource is entitled to reliquidation of those entries and a refund of any duties deposited or paid, with interest as provided by law.

tion will dissolve upon the entry of judgment. *Id.* If, despite the preliminary injunction, any cash deposits were made or collected, PrimeSource is entitled to a refund of these cash deposits, with interest as provided by law.

Judgment will enter accordingly.

/s/ TIMOTHY C. STANCEU
TIMOTHY C. STANCEU, Chief Judge

/s/ JENNIFER CHOE-GROVES
JENNIFER CHOE-GROVES, Judge

2021 WL 3293567
Only the Westlaw citation is currently available.
United States Court of **International Trade**.

PRIMESOURCE BUILDING PRODUCTS, INC., Plaintiff,
v.
UNITED STATES, et al., Defendants.

Slip Op. No. 21-94
|
Court No. 20-00032
|
August 2, 2021

Attorneys and Law Firms

Jeffrey S. Grimson, Mowry & Grimson, PLLC, of Washington, D.C., for plaintiff. With him on the brief were Kristin H. Mowry, Jill A. Cramer, Sarah M. Wyss, and Bryan P. Cenko.

Brian M. Boynton, Acting Assistant Attorney General, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendants. With him on the brief were Jeanne E. Davidson, Director, and Tara K. Hogan, Assistant Director.

OPINION AND ORDER

Stanceu, Judge:

1** Defendants move for a partial stay pending their appeal of the judgment this Court entered in ***PrimeSource *Bldg. Prods., Inc. v. United States*, Judgment (Apr. 5, 2021), ECF No. 111 ("Judgment"). The Judgment granted certain relief to plaintiff **PrimeSource** Building Products, Inc. ("**PrimeSource**"), an importer of steel nails, in a challenge to a Presidential action taken under Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 ("Section 232") imposing additional duties of 25% *ad valorem* on certain imported products made of steel, including steel nails. [1] *See* Proclamation 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Exec. Office of the President Jan. 29, 2020) ("Proclamation 9980"). Plaintiff opposes the motion for a stay.

The court grants the motion for a stay, orders suspension of liquidation of the entries affected by this litigation, and requires **PrimeSource** and the government to consult to obtain agreement on bonding of entries made on and after April 5, 2021, for protection of the revenue potentially owing due to Proclamation 9980.

I. BACKGROUND

The background of this action is set forth in our prior opinions and supplemented herein. *See* ***PrimeSource*** *Bldg. Prods., Inc. v. United States*, 45 CIT ——, 497 F. Supp. 3d 1333 (2021) ("***PrimeSource*** *I*"), ***PrimeSource*** *Bldg. Prods., Inc. v. United States*, 45 CIT ——, 505 F. Supp. 3d 1352 (2021) ("***PrimeSource*** *II*").

On February 13, 2020, upon the consent of both parties, this Court entered a preliminary injunction that prohibited defendants from collecting 25% cash deposits on **PrimeSource's** entries of merchandise within the scope of Proclamation 9980 and prohibited the liquidation of the affected entries. Order (Feb. 13, 2020), ECF Nos. 39 (conf.), 40 (public) ("Prelim. Inj. Order"). The preliminary injunction required, further, that **PrimeSource** terminate its existing continuous bond and replace it with a continuous bond having a higher limit of liability to reflect the additional duties **PrimeSource** otherwise would have been required to deposit. Prelim. Inj. Order 2.

On February 12, 2021, again with the consent of parties, the court amended the preliminary injunction to require **PrimeSource**, instead of conferring with defendants prior to the expiry of its continuous bond, "to monitor its subject imports and foregone duty deposits" and terminate and replace its continuous bond once the amount of foregone duty deposits reached the amount of the bond, minus the baseline bond amount as calculated pursuant to the general continuous bonding formula of U.S. Customs and Border Protection ("Customs" or "CBP"). [Amended] Order 1–2 (Feb. 12, 2021), ECF No. 105 ("Am. Prelim. Inj. Order"). The amended preliminary injunction also authorized Customs "to deny release to **PrimeSource's** entries until **PrimeSource** terminates its current continuous bond and obtains a new continuous bond ... or enters the merchandise using single transaction bonds in the amount of 100 percent of the value of the merchandise, plus 100 percent of the estimated duties,

taxes, and fees, plus the foregone duty deposit on each entry." *Id.* at 2.

2** This amended preliminary injunction dissolved upon the entry of judgment entered in ***PrimeSource *II* on April 5, 2021. *See* Judgment 1–2. In the Judgment, this Court ordered, *inter alia*, that defendants liquidate the duties affected by this litigation without the assessment of the 25% additional duties provided for in Proclamation 9980. *Id.*

Defendants filed a notice of appeal of the judgment entered in ***PrimeSource*** *II* on June 4, 2021, ECF No. 112, and filed the instant motion for a stay pending appeal the same day. Defs.' Mot. for Partial Stay of J. to Maintain the *Status Quo* Pending Appeal (June 4, 2021), ECF No. 113 (conf.); (June 9, 2021), ECF No. 114 (public) ("Defs.' Mot. for Stay"). Defendants requested that, for the pendency of the appeal, the court: (1) stay the requirement to liquidate **PrimeSource's** entries without the assessment of the 25% additional duties; (2) reinstate the order to suspend liquidation; and (3) reinstate the requirement that **PrimeSource** monitor its imports of merchandise covered by Proclamation 9980 and maintain a sufficient continuous bond for the duty liability on these imports. Defs.' Mot. for Stay 1–2.

Plaintiff filed its response in opposition to defendants' stay motion on June 25, 2021. Pl. **PrimeSource** Resp. to Defs.' Mot. for Partial Stay of J. to Maintain the *Status Quo* Pending Appeal, ECF No. 116 ("Pl.'s Resp.").

II. DISCUSSION

In exercising its traditional powers to further the administration of justice, a federal court may stay enforcement of a judgment pending the outcome of an appeal. *Nken v. Holder*, 556 U.S. 418, 421 (2009). "While an appeal is pending from ... [a] final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." USCIT R. 62(d). When that judgment was rendered by a three-judge panel, "the order must be made ... by the assent of all its judges, as evidenced by their signatures." *Id.*

The party seeking a stay pending appeal has the burden of showing that the stay is justified by the circumstances. *Nken*, 556 U.S. at 433–34 (citations omitted). We consider four factors in deciding whether the movant has met that burden: (1) whether defendants have made a strong showing that they will succeed on the merits; (2) whether they will be irreparably harmed absent the stay; (3) whether issuance of the stay will substantially injure the plaintiff; and (4) where the public interest lies. *See* *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). "There is substantial overlap between these and the factors governing preliminary injunctions." *Nken*, 556 U.S. at 434 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). The "likelihood of success" and "irreparable harm" factors, working together, are the most critical, and where the United States is a party, the balance of equities and the public interest factors "merge." *Id.* at 434–35.

We conclude that all four factors support our granting defendants' motion to stay.

A. Success on the Merits

A recent decision by the Court of Appeals for the Federal Circuit ("Court of Appeals") in *Transpacific Steel LLC v. United States*, No. 2020-2157, 2021 WL 2932512 (Fed. Cir. 2021) ("*Transpacific II*") causes us to conclude that defendants have made a sufficiently strong showing that they will succeed on the merits on appeal, so as to satisfy the first factor in our analysis. In *Transpacific II*, the Court of Appeals vacated a judgment of this Court in *Transpacific Steel LLC v. United States*, 44 CIT ——, 466 F. Supp. 3d 1246 (2020) ("*Transpacific I*"), rejecting a claim similar in some respects to a claim this Court found meritorious in ***PrimeSource*** *I* and ***PrimeSource*** *II*.

***3** The *Transpacific* litigation involves a Presidential proclamation that increased to 50% the then-existing 25% Section 232 duties on imports of steel products from Turkey. *See* Proclamation 9772, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 40,429 (Exec. Office of the President Aug. 15, 2018) ("Proclamation 9772"). In *Transpacific I*, this Court held the proclamation invalid as untimely and as a violation of equal protection. Regarding the former, *Transpacific I* held that Proclamation 9772 was issued after the close of the combined 105-day time period

Congress established in 1988 amendments to Section 232 (the time period codified as Section 232(c)(1), 19 U.S.C. § 1862(c)(1)), that commenced upon President Trump's receipt, on January 11, 2018, of a report by the Secretary of Commerce issued under the authority of 19 U.S.C. § 1862(b)(3)(A) (the "2018 Steel Report"). The President's receipt of that report by the Commerce Secretary had been the procedural predicate for the issuance of Proclamation 9705, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Exec. Office of the President Mar. 15, 2018) ("Proclamation 9705").

The Court of Appeals reversed and remanded the case to this Court. On the issue of the time limits added by the 1988 amendments to Section 232, the Court of Appeals reasoned that "[n]one of the new language in the statute, on its own or by comparison to what came before, implies a withdrawal of previously existing presidential power to take a continuing series of affirmative steps deemed necessary by the President to counteract the very threat found by the Secretary." *Transpacific II*, 2021 WL 2932512 at *19. The Court of Appeals stated that "[i]n this context, the directive to the President to act by a specified time is not fairly understood as implicitly meaning 'by then or not at all' as to each discrete imposition that might be needed, as judged over time." *Id.*

PrimeSource *I* and *II* arose from somewhat different facts than did the *Transpacific* litigation. Rather than upwardly adjust the tariffs imposed by a previous Section 232 proclamation, the action contested here imposed, for the first time, tariffs of 25% on a previously unaffected group of products. These products, identified in Proclamation 9980 as "Derivatives of Steel Articles," Proclamation 9980, 85 Fed. Reg. at 5,281, were different than the steel articles affected by the earlier Presidential proclamation, Proclamation 9705. In this litigation, defendants have relied upon the President's receipt of the 2018 Steel Report as the procedural basis upon which the President issued Proclamation 9980, arguing that the President retained "modification" authority over the previous Section 232 action. *See* ***PrimeSource*** *II*, 45 CIT at ——, 505 F. Supp. 3d at 1355 (noting that defendants' "position continues to be that procedural preconditions for the issuance of Proclamation 9980 were met by the Secretary's 2018 Steel Report and the timely issuance of Proclamation 9705.").

Proclamation 9980 was signed by the President on January 24, 2020 (and published in the Federal Register on January 29, 2020), long after the President's receipt, on January 11, 2018, of the 2018 Steel Report. This Court held that, due to the combined 105-day time limitation set forth in 19 U.S.C. § 1862(c)(1), the President's authority to adjust tariffs on the "derivative" articles of steel had expired by the time Proclamation 9980 was issued, if that time period were presumed to commence upon the receipt of the 2018 Steel Report. ***PrimeSource*** *I*, 45 CIT at ——, 497 F. Supp. 3d at 1356. We concluded, later, that defendants had waived any defense that the procedural requirements of Section 232 were met based on any procedure other than one reliant upon the 2018 Steel Report. ***PrimeSource*** *II*, 45 CIT at ——, 505 F. Supp. 3d at 1355.

4** Our decision in ***PrimeSource *II* is also distinguishable from *Transpacific II* in the length of time that transpired between the receipt of a Section 232(b)(3)(A) report from the Secretary of Commerce and the President's taking implementing action. In issuing Proclamation 9980, the President acted more than two years after receiving the 2018 Steel Report. In the *Transpacific* litigation, the analogous time period was approximately seven months. In *Transpacific II*, the Court of Appeals rejected the appellee's argument that Congress sought, through the time limits, to ensure that the President will have timely information on which to act. *See Transpacific II*, 2021 WL 2932512 at *21 ("Concerns about staleness of findings are better treated in individual applications of the statute, where they can be given their due after a focused analysis of the proper role of those concerns and the particular finding of threat at issue.").

Even though *Transpacific II* and this case arose from somewhat different facts, we nevertheless conclude that the opinion of the Court of Appeals potentially affects the outcome of this litigation. In reaching this conclusion, we do not opine on whether *Transpacific II* necessarily controls that outcome, i.e., whether the President's adjusting of tariffs on derivatives of steel products falls within what the Court of Appeals termed, in a different factual setting, "a continuing series of affirmative steps deemed necessary by the President to counteract the very threat found by the Secretary," *id.* at *19. But for purposes of ruling on the instant stay motion, it is sufficient that the discussion in *Transpacific II* of the "continuing" nature of Presidential Section 232 authority is expressed in broad terms. Accordingly, we conclude that defendants have made a showing that they will succeed on the

merits on appeal that is sufficient to satisfy the first factor in our analysis.

B. Irreparable Harm in the Absence of the Requested Stay

In their motion for a stay, defendants request that, for the pendency of the appeal, the court: (1) stay the requirement to liquidate **PrimeSource's** entries without the assessment of the 25% additional duties; (2) reinstate the order to suspend liquidation; and (3) reinstate the requirement that **PrimeSource** monitor its imports of merchandise covered by Proclamation 9980 and maintain a sufficient continuous bond for the duty liability on these imports. Defs.' Mot. for Stay 1–2. The court concludes that all three of these requested measures are necessary to prevent a form of irreparable harm to the United States. As we discuss below, that harm is the loss of the authority, provided for by statute and routinely exercised by Customs in every import transaction, to require and maintain such bonding as it determines is reasonably necessary to protect the revenue of the United States. Without the requested stay, the judgment entered in ***PrimeSource*** *II* would interfere with the exercise of that authority.

In Section 623(a) of the Tariff Act of 1930, Congress explicitly recognized the importance of security, such as bonding, to protect the revenue. In pertinent part, the relevant provision reads as follows:

> In any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue....

19 U.S.C. § 1623(a). This authority is effectuated in the Customs Regulations and applies generally to all import transactions. *See* 19 C.F.R. § 113. Due to the decision of the Court of Appeals in *Transpacific II*, the government has established a likelihood that ultimately it will assess Section 232 duties of 25% *ad valorem* on all entries at issue in this litigation. In any ordinary import transaction, i.e., one not affected by litigation such as this, Customs would exercise its statutory and regulatory authority to ensure that the basic importer's bond (be it a continuous or single transaction bond) has a sufficient limit of liability to secure the liability for all potential duties, such as the Section 232 duties that potentially will be owed by **PrimeSource**.

***5** Importers' bonds are the ordinary means by which the government ensures that the joint and several liability of the importer of record, and of its surety (up to the limit of liability on the bond) will attach for the payment of all duties and other charges eventually determined to be owed. Notably, in the situation posed by this litigation, **PrimeSource**, due to the consent preliminary injunction that dissolved upon the entry of judgment in this litigation, has made no cash deposits of estimated duties to cover potential duty liability from Proclamation 9980. The enhanced bonding required by the consent preliminary injunction was a substitute for these estimated duty deposits.

If an importer's bond has a limit of liability that is too low to cover the ordinary duties plus the 25% duties, there is an inherent risk to the revenue, codified by statute and effectuated by regulation, because one of the two parties that contractually could have been bound to pay the duties—the surety—has liability limited by the face amount of the bond. In short, Congress contemplated in 19 U.S.C. § 1623 that the government should have resort to two parties for assessed duty liability, the importer of record and the surety.

We do not base our decision to grant the requested stay on a factual determination that **PrimeSource** will be unable to satisfy its potential duty obligation. Rather, we base it on the loss of the ability of the United States to exercise, as it would in the ordinary course of administering import transactions, the statutory authority of 19 U.S.C. § 1623(a) to secure this potential duty liability. That loss, absent the requested stay, itself will constitute an irreparable harm to the United States. [2] But for the judgment entered in ***PrimeSource*** *II*, the government would maintain, and continue into the future, the requirement of bonding adequate to secure the revenue potentially owing on the entries affected by this case. In summary, were we to deny the government's motion to stay the effect of that judgment as to these entries, we would be interfering with the exercise of the government's statutory authority under 19 U.S.C. § 1623(a). Based on the intent Congress expressed in enacting that provision, we conclude that any such interference is best avoided.

In addition to enhanced bonding, the government's stay motion seeks a stay of our order to liquidate without Section 232 liability the entries subject to this litigation and a suspension of the liquidation of those entries pending the appeal. We agree that these steps are warranted. The court notes the possibility that finality of liquidation, should it attach to all entries associated with a particular continuous bond, could result in the cancellation of such a bond and the resultant extinguishing of the liability of the surety. Such a prospect would pose irreparable harm to the United States for the reasons the court has discussed. Because avoiding irreparable harm requires that the government have the authority not only to require, but to maintain, sufficient bonding for potential duty liability on all entries at issue in this case, we conclude that avoiding such harm requires that the affected entries remain in an unliquidated state during the pendency of the appeal.

C. Balance of the Hardships

***6** The government also prevails on the third factor. Defendants seek narrow relief that would not substantially prejudice **PrimeSource**. They do not seek cash deposits; rather, under their proposed stay order **PrimeSource** will incur instead the costs of maintaining enhanced bonding for the potential Section 232 duty liability, i.e., the cost of the bond premiums. Although this will require that **PrimeSource** "pay a new premium with its surety every time it must put in place a new bond to cover its estimated Section 232 deposits," Pl.'s Resp. 20, these are conditions **PrimeSource** found acceptable in agreeing to the initial preliminary injunction order and the amended preliminary injunction orders, implicitly acknowledging they were necessary and appropriate under 19 U.S.C. § 1623(a). *See* Pl.'s Resp. 21; Prelim. Inj. Order 2–3; Am. Prelim. Inj. Order 1–2. The government's request for a stay essentially maintains the balance struck by the parties in their agreement for a consent injunction that maintained enhanced bonding while the outcome of this case was not yet determined by this Court. In comparison, denying the government the authority to require such bonding on current and future entries poses a hardship on the United States that, under the statutory scheme designed to ensure adequate protection of the revenue, is unwarranted now that such duty liability is likely to be incurred.

D. The Public Interest

Unquestionably, the public interest favors allowing the government to exercise its lawful authority to protect the revenue, and potential revenue, of the United States, which in this case involves a significant amount of potential duty liability. *See* Defs.' Mot. for Stay 12–13. **PrimeSource** has a continuous bond that secures the 25% additional duty liability for all entries between February 1, 2020 until April 5, 2021, the date judgment was entered in favor of **PrimeSource**. The court will order the parties to consult with a view to reaching an agreement under which the entries occurring on and after April 5, 2021, and going forward throughout the appeal (with a superseding bond, if necessary), will be covered by bonding reasonably necessary to secure the potential Section 232 duties.

Prior to the decision of the Court of Appeals in *Transpacific II*, **PrimeSource** argued that "[a]ny concerns over protecting the revenue of the United States are rendered moot if the government never had a claim to that revenue in the first instance." Pl.'s Resp. 26. But the government now has a potential claim to the revenue, to which the court must give due consideration.

III. CONCLUSION AND ORDER

All four factors necessitate granting the governments' motion to stay. Upon the court's consideration of the parties' motions, including defendants' motion to stay and plaintiff's response, and all other filings herein, and upon due deliberation, it is hereby

ORDERED that Defs.' Mot. for Partial Stay of J. to Maintain the *Status Quo* Pending Appeal (June 4, 2021), ECF No. 113 (conf.); (June 9, 2021), ECF No. 114 (public) be, and hereby is, granted; it is further

ORDERED that the order of this Court to liquidate the entries subject to this litigation, as stated in the Judgment entered on April 5, 2021 be, and hereby is, stayed pending the appeal of that judgment before the United States Court of Appeals for the Federal Circuit; it is further

ORDERED that defendants be, and hereby are, enjoined, through the pendency of the appeal, from liquidating the entries affected by this litigation; it is further

ORDERED that plaintiff and defendants shall confer to seek to reach agreement on **PrimeSource's** monitoring and continuous bonding for entries of merchandise within the scope of Proclamation 9980 that have occurred, and will occur, on and after April 5, 2021, to secure potential liability for duties and fees, including potential liability for duties under Proclamation 9980; should the parties be unable to reach such an agreement, the parties shall file a joint status report with the court by no later than by August 16, 2021; and it is further

ORDERED that this Order shall remain in effect until issuance of a mandate of the Court of Appeals for the Federal Circuit in the pending appeal of the judgment entered by this Court.

/s/ Timothy C. Stanceu, Judge

/s/ Jennifer Choe-Groves, Judge

/s/ M. Miller Baker, Judge

All Citations

Not Reported in Fed. Supp., 2021 WL 3293567

Footnotes

1 Citations to the United States Code herein are to the 2012 edition. Citations to the Code of Federal Regulations are to the 2020 edition.

2 Because we find irreparable harm for the reasons noted, we need not, and do not, consider whether finality of liquidation itself constitutes potential irreparable harm to the United States. Defendants claim they may be unable to collect duties on entries for which liquidation has become final under 19 U.S.C. § 1514(a), *see* Defs.' Mot. for Partial Stay of J. to Maintain the *Status Quo* Pending Appeal 12 (June 4, 2021), ECF No. 113 (conf.); (June 9, 2021), ECF No. 114 (public). Their argument is brought into question by precedent recognizing the authority of this Court, in a case brought according to 28 U.S.C. § 1581(i), to enforce its own judgments by ordering the reliquidation of the entries. *See* *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1311–12 (Fed. Cir. 2004). The opinion in *Shinyei* reasoned that finality of liquidation under 19 U.S.C. § 1514 does not "preclude judicial enforcement of court orders after liquidation," as "the Court of **International** **Trade** has been granted broad remedial powers." *Id.* at 1312.

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Slip Op. No. 21-72

UNITED STATES COURT OF INTERNATIONAL TRADE

OMAN FASTENERS, LLC, et al., Plaintiffs, v. **UNITED STATES, et al.,** Defendants.	**Before: Jennifer Choe-Groves, Judge** **M. Miller Baker, Judge** **Timothy C. Stanceu, Judge** **Consolidated Court No. 20-00037**

OPINION

[Denying defendants' motion to dismiss, awarding summary judgment to plaintiffs on Count I of their respective complaints, and dismissing the remaining counts of each of plaintiffs' complaints. Judge Baker files a separate opinion concurring in part and dissenting in part.]

Dated: June 10, 2021

Michael P. House, Perkins Coie, LLP, of Washington, D.C., for plaintiffs Oman Fasteners LLC and Huttig, Inc., and Huttig Building Products, Inc. With him on the submissions were *Andrew Caridas* and *Shuaiqi Yuan*.

Tara K. Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendants. With her on the submissions were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Aimee Lee*, Assistant Director, and *Meen Geu Oh*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C.

Stanceu, Judge: Plaintiffs Oman Fasteners LLC ("Oman"), Huttig Building Products, Inc., and Huttig Inc. (collectively, "Huttig"), U.S. importers of steel fasteners,

brought actions, now consolidated, to contest a proclamation issued by the President of the United States ("Proclamation 9980") in January 2020. *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Exec. Office of the President Jan. 29, 2020).

Before the court is a Joint Status Report, submitted by all parties, responding to a request by the court. Also before the court is a motion by plaintiffs for entry of final judgment, which defendants do not oppose, subject to their right to appeal. In response to statements of the parties in the Joint Status Report and the unopposed motion, and for the reasons discussed herein, the court denies a motion by defendants to dismiss Count I of each plaintiff's complaint, enters summary judgment in favor of each plaintiff on their respective Count I claims, and dismisses the remaining counts in each plaintiff's complaint without prejudice.

I. BACKGROUND

A. Proclamation 9980

On January 24, 2020, President Donald Trump issued Proclamation 9980, which imposed a 25% duty on certain imported articles made of steel, including nails and other fasteners, and a 10% duty on certain imported articles made of aluminum. As authority for its imposition of duties on the articles, identified as "derivative aluminum

articles" and "derivative steel articles," Proclamation 9980 cited Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 ("Section 232").[1]

B. Procedural History of this Consolidated Action

On February 7, 2020, Oman commenced an action to contest Proclamation 9980, naming the United States, et al., as defendants and asserting claims in three counts. Summons, ECF No. 1; Compl., ECF No. 2. Huttig commenced its action on February 18, 2020, on a complaint consisting of the same three counts. Summons, ECF No. 1 (Ct. No. 20-00045); Compl., ECF No. 5 (Ct. No. 20-00045).

On joint motions, the court consolidated the two actions, with Court Number 20-00037 serving as the lead case. Order (Mar. 16, 2020), ECF No. 54. In the same order, the court, again with the consent of the parties, stayed Counts II and III of each of the two complaints pending the court's decision on Count I of those complaints. *Id.* Stated in brief summary, Count I of each complaint claimed that Proclamation 9980 was invalid because it was not based on a determination the President made within the 90-day period provided in Section 232(c)(1)(A) and was not implemented within the 15-day period set forth in Section 232(c)(1)(B). Compl. ¶¶ 86–106.[2]

[1] All citations to the United States Code are to the 2012 edition.

[2] For convenience of reference, citations are made to the complaint in Court No. 20-00037. The complaint in Court No. 20-00045 contains the same claims in the corresponding paragraphs.

Defendants moved under USCIT Rule 12(b)(6) to dismiss Count I of each of the plaintiffs' complaints on March 20, 2020, for failure to state a claim on which relief can be granted. Mot. to Dismiss Count I for Failure to State a Claim, ECF No. 57. On April 14, 2020, plaintiffs opposed the motion to dismiss and moved for summary judgment on Count I of each complaint. Mot. for Summ. J. with Respect to Count I of Pls.' Compl., ECF No. 65. Defendants opposed plaintiffs' motion for summary judgment and replied in support of their motion to dismiss Count I on May 15, 2020. Defs.' Reply in Supp. of Mot. to Dismiss and Resp. to Pls.' Mot. for Summ. J., ECF No. 78. Plaintiffs replied in support of their summary judgment motion on June 1, 2020. Reply Mem. in Supp. of Pls.' Mot. for Summ. J., ECF No. 79.

Defendants' motion to dismiss Count I of each of the two complaints and plaintiffs' motion for summary judgment are pending before the court, as is the Joint Status Report and plaintiffs' motion for entry of final judgment.

II. DISCUSSION

A. Jurisdiction and Standards of Review

The court exercises subject matter jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(1)(B), which grants this Court exclusive jurisdiction of a civil action commenced against the United States "that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue."

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations in the complaint to be true (even if doubtful in fact) and draws all reasonable inferences in a plaintiff's favor. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint does not need to contain detailed factual allegations, but it must state enough facts "to raise a right to relief above the speculative level." *Id.* Rule 8(a)(2) of this Court requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a).

B. Plaintiffs' Challenges to Proclamation 9980

In Count I of each of their respective complaints, plaintiffs claim that Proclamation 9980 was untimely issued because: (1) it was not issued within 90 days of the date the President received a report from the Secretary of Commerce meeting the requirements of Section 232(b)(3)(A), as required by Section 232(c)(1)(A), Compl. ¶ 103; and (2) it was not implemented within 15 days of a timely decision by the President under Section 232(c)(1)(A), as required by Section 232(c)(1)(B), Compl. ¶ 105.

In Count II, plaintiffs assert that Proclamation 9980 also is invalid because Section 232 is an unconstitutional delegation of power from the Congress to the President that is "devoid of an intelligible principle." Compl. ¶¶ 120, 121. In Count III,

plaintiffs argue that Proclamation 9980 violates the constitutional guarantee of equal protection by imposing additional tariffs on some derivative articles of steel and not others, and by excluding from those tariffs identical derivative articles manufactured in some foreign countries but not others, without a legitimate government purpose for the disparate treatment. Compl. ¶¶ 127–131.

C. Our Decision in *PrimeSource I*

In *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT __, 497 F. Supp. 3d 1333 (2021) ("*PrimeSource I*"), we dismissed under USCIT Rule 12(b)(6) all claims of plaintiff PrimeSource Building Products, Inc. ("PrimeSource") except the claim that Proclamation 9980 was untimely because it was issued beyond the 90-day and 15-day time limitations set forth in Section 232(c)(1)(A) and (B), respectively. *PrimeSource I*, 45 CIT at __, 497 F. Supp. 3d at 1361. As do the plaintiffs in this consolidated case, the plaintiff in *PrimeSource* argued that Proclamation 9980 was issued after the expiration of the combined 105-day time period of Section 232(c)(1). *See id.* at __, 497 F. Supp. 3d at 1344; Compl. ¶ 105. PrimeSource argued that the only report that could have qualified as a predicate for Proclamation 9980, and issued under Section 232(b)(3)(A), was one the Secretary of Commerce issued in January 2018 on the effect of certain steel articles on the national security of the United States (the "2018 Steel Report"). *PrimeSource I*, 45 CIT at __, 497 F. Supp. 3d at 1341. That report culminated in the President's issuance of Proclamation 9705 in March 2018, which imposed 25% duties on various steel articles,

see Adjusting Imports of Steel Into the United States ¶¶ 1–2, 83 Fed. Reg. 11,625 (Exec. Office of the President Mar. 15, 2018), but not on the "derivative" articles of steel affected by Proclamation 9980 in January 2020.

We stated in *PrimeSource I* that "[d]efendants do not dispute that the 2018 Steel Report is, for purposes of Section 232(c), 19 U.S.C. § 1862(c), the report issued according to Section 232(b)(3)(A), 19 U.S.C. § 1862(b)(3)(A), upon which the President based his adjustment to imports of steel derivatives, including steel nails." *PrimeSource I*, 45 CIT at __, 497 F. Supp. 3d at 1345 (citing Defs.' Mot. 24–29). In denying defendants' motion to dismiss PrimeSource's "untimeliness" claim, we concluded that Proclamation 9980 does not comply with the limitations on the President's authority imposed by the 90- and 15-day time limitations of Section 232(c)(1) if the combined 105-day time period is considered to have commenced upon the President's receipt of the 2018 Steel Report. *Id.* at __, 497 F. Supp. 3d at 1356. We held that in this circumstance PrimeSource had stated a plausible claim for relief, and therefore we declined to dismiss it. *Id.* at __, 497 F. Supp. 3d at 1359.

After denying defendants' motion to dismiss as to PrimeSource's timeliness claim, we denied the motion of plaintiff PrimeSource for summary judgment on that claim, determining that there existed one or more genuine issues of material fact. *Id.* at __, 497 F. Supp. 3d at 1361. Although concluding that Proclamation 9980 was untimely under Section 232(c)(1) when viewed solely as an action taken in response to the 2018

Steel Report, we also concluded that there were genuine issues of material fact that bore on the extent to which the subsequent "assessment" or "assessments" of the Commerce Secretary, as identified in Proclamation 9980, validly could be held to have served a function analogous to that of a Section 232(b)(3)(A) report. *Id.* at __, 497 F. Supp. 3d at 1360–61. We also noted that we did not know what form of inquiry or investigation the Commerce Secretary conducted prior to his submission of these communications to the President and whether, or to what extent, that inquiry or investigation satisfied the essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(b)(2)(A). *Id.* at __, 497 F. Supp. 3d at 1360–61.

In summary, we concluded in *PrimeSource I* that factual information pertaining to the Secretary's inquiry on, and his reporting to the President on, the derivative articles would be required in order for us to examine whether and to what extent there was compliance by the President with the procedural requirements of Section 232 and whether any noncompliance that occurred was a "significant procedural violation." *Id.* at __, 497 F. Supp. 3d at 1361 (quoting *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) (requiring that a procedural violation be "significant" in order to serve as a ground for judicial invalidation of a Presidential action)). We added that "at this early stage of the litigation, we lack a basis to presume that these unresolved factual issues are unrelated to the issue of whether the President clearly misconstrued the statute or the issue of whether the President took action outside of his delegated

authority." *Id*. at __, 497 F. Supp. 3d at 1361. We noted that the "filing of a complete administrative record could be a means of resolving, or helping to resolve, these factual issues" and directed the parties to consult on this matter and file a scheduling order to govern the subsequent litigation. *Id*. at __, 497 F. Supp. 3d at 1361.

D. Our Decision in *PrimeSource II*

On March 5, 2021, the parties in the *PrimeSource* litigation submitted a joint status report in lieu of a scheduling order. In it, defendants expressly waived "the opportunity to provide additional factual information that might show that the 'essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(b)(2)(A)' were met," adding that "[d]efendants do not intend to pursue that argument." Joint Status Rep. 2, ECF No. 108 (Ct. No. 20-00032) (quoting *PrimeSource I*, 45 CIT at __, 497 F. Supp. 3d at 1361). Defendants informed the court that their "position continues to be that procedural preconditions for the issuance of Proclamation 9980 were met by the Secretary's 2018 Steel Report and the timely issuance of Proclamation 9705, a position that the majority has already rejected." *Id.* at 2–3. The *PrimeSource* joint status report concluded by stating that "the parties agree and respectfully submit that there is no reason for this Court to delay entry of final judgment. In so representing, the parties fully reserve all rights to appeal any adverse judgment." *Id*. at 3.

In *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT __, Slip Op. 21-36 (Apr. 5, 2021) ("*PrimeSource II*"), we concluded that defendants, through their statements in the

parties' joint status report, had waived "any defense that the assessments of the Commerce Secretary, as described in Proclamation 9980, were the functional equivalent of a Section 232(b)(3)(A) report." 45 CIT __, Slip Op. 21-36 at 8. "In particular, defendants have waived any defense grounded in a factual circumstance other than one in which the 2018 Steel Report is the only submission made by the Commerce Secretary that could satisfy the requirements of Section 232(b)(3)(A) and upon which Proclamation 9980 could have been based." *Id.* at __, Slip Op. 21-36 at 9–10. We concluded that "PrimeSource is now entitled to judgment as a matter of law," *id.* at __, Slip Op. 21-36 at 10, and we entered summary judgment in favor of plaintiff PrimeSource on its remaining claim.

E. The Joint Status Report and Unopposed Motion for Entry of Judgment

The Joint Status Report (Apr. 30, 2021), ECF No. 105 ("Joint Status Report"), submitted by counsel for all parties in this case, states, *inter alia*, that "the parties agree that, in light of *PrimeSource I and II*, there is no reason for this Court not to grant Plaintiffs' Motion for Summary Judgment on Count I of the Complaints, ECF No. 65, and deny Defendant's Motion to Dismiss Count I of Plaintiffs' Complaints." Joint Status Report 1–2. The Joint Status Report states further:

> As was true in the *PrimeSource* litigation prior to the Court's entry of judgment, Defendants in this case do not intend to introduce any additional evidence related to potential factual disputes or additional factual information showing that Proclamation 9980 satisfied the requirements of 19 U.S.C. § 1862(b)(2)(A). Defendants' position remains that the procedural preconditions for the issuance of Proclamation 9980

> were met by the Secretary's 2018 Steel Report and the timely issuance of Proclamation 9705, but this Court has already rejected that position. . . . Defendants fully reserve all rights to appeal any adverse judgment.

Id. at 2.

In an unopposed motion for entry of final judgment, "[p]laintiffs respectfully move the Court for entry of an order fully adjudicating the claims alleged in Count I of Plaintiffs' Complaints" and "move the Court to dismiss Counts II and III of Plaintiffs' Complaints, without prejudice, resulting in a complete and final adjudication of this action." Unopposed Mot. for Entry of Final J. and Disposition of this Action 1 (Apr. 30, 2021), ECF No. 106. The motion states that counsel for plaintiffs consulted with counsel for defendants, who indicated that defendants do not oppose this motion. Plaintiffs accompany their unopposed motion with a draft order that, *inter alia*, denies defendants' motion to dismiss Count I of plaintiffs' complaints and awards summary judgment to plaintiffs on their Count I claims. *See* [Proposed] Order (Apr. 30, 2021), ECF No. 106-1.

F. Award of Summary Judgment in Favor of Plaintiffs on Count I

As discussed above, each plaintiff's Count I claim is that Proclamation 9980 is invalid as untimely because it neither was issued within the 90-day time period allowed by Section 232(c)(1)(A) nor implemented within the 15-day time period allowed by

Section 232(c)(1)(B).[3] Compl. ¶¶ 102–106. This claim is indistinguishable from the claim upon which this Court granted summary judgment in favor of the plaintiff in *PrimeSource II*, as the parties to this case acknowledge. Joint Status Report 1 ("The parties have conferred and now agree that the Court's decisions in *Primesource I* and *Primesource II* are decisive as to Count I of Plaintiffs' Complaints.").

We conclude that, as to Count I of plaintiffs' complaints, there is no longer a genuine issue of material fact as a result of the representations the parties have made in the Joint Status Report and in plaintiffs' unopposed motion for entry of judgment. In particular, defendants have waived any defense grounded in a factual circumstance other than one in which the 2018 Steel Report is the only submission made by the Commerce Secretary that could satisfy the requirements of Section 232(b)(3)(A) and upon which Proclamation 9980 could have been based.

As we concluded in *PrimeSource I*, "the action taken by Proclamation 9980 to adjust imports of derivatives was not implemented during the 105-day time period set forth in § 1862(c)(1), if that time period is considered to have commenced upon the President's receipt of the Steel Report." 45 CIT at __, 497 F. Supp. 3d at 1356. Due to the parties' joint and unopposed representations, there is no genuine issue of material fact

[3] Although both complaints, in their Count I titles, refer to "*ultra vires*" acts of the Secretary of Commerce, Compl. 23 (Feb. 7, 2020), ECF No. 2, no claim against a decision of the Commerce Department actually is stated, and therefore we interpret each plaintiff's Count I claim as a challenge to Proclamation 9980 and not as a challenge to an agency action.

as to when that time period began, and defendants have waived any defense based on a contention that the time period began on any date other than the President's receipt of the 2018 Steel Report.

To declare Proclamation 9980 invalid, we must find "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Maple Leaf Fish Co.*, 762 F.2d at 89. Because the President issued Proclamation 9980 after the congressionally-delegated authority to adjust imports of the products addressed in that proclamation had expired, Proclamation 9980 was action outside of delegated authority. For the reasons we stated in *PrimeSource I*, 45 CIT at __, 497 F. Supp. 3d at 1356–58, we find in the untimeliness of Proclamation 9980 a significant procedural violation. Plaintiffs, therefore, are now entitled to judgment as a matter of law on their motions for summary judgment on the claims stated in Count I of their respective complaints.

III. CONCLUSION

In summary, defendants have waived any defense that the procedural requirements of Section 232 were met based on a procedure other than one reliant upon the 2018 Steel Report. Summary judgment in favor of plaintiffs on Count I of their respective complaints therefore is warranted, Proclamation 9980 having been issued after the President's delegated authority to impose duties on derivatives of steel products had expired.

Further to the parties' Joint Status Report and plaintiffs' unopposed motion for entry of judgment, we deny defendants' motion to dismiss the claims stated in Count I of plaintiffs' respective complaints, grant plaintiffs' motions for summary judgment on the claims stated in Count I of their complaints, dismiss without prejudice Counts II and III of their complaints, and order certain other relief as requested in the unopposed draft order accompanying plaintiffs' motion for entry of final judgment. We will enter judgment in substantially the form as set forth in plaintiffs' unopposed draft order.[4]

/s/ *Jennifer Choe-Groves*
/s/ *Timothy C. Stanceu*
Jennifer Choe-Groves, Judge
Timothy C. Stanceu, Judge

Dated: June 10, 2021
New York, New York

[4] Further to the agreement of all parties, we are dismissing Counts II and III of plaintiffs' respective complaints "without prejudice." Even had the parties not requested dismissal, we would not have reached the issues raised in these two counts. Reaching those issues would not have been necessary because of our entry of summary judgment on Count I of the complaints (which also would have lifted the stay of Counts II and III). In acceding to the request of the parties that we dismiss Counts II and III without prejudice, we do not opine on the question of whether or not either plaintiff would be in a position to bring a future action that could reach the merits of any argument against Proclamation 9980 that is made in Count II or Count III of plaintiffs' complaints.

Baker, Judge, concurring in part and dissenting in part:

For the reasons explained in *PrimeSource Building Products, Inc. v. United States*, 497 F. Supp. 3d 1333, 1361 (CIT 2021) (Baker, J., dissenting), I respectfully dissent from our exercise of subject-matter jurisdiction as to Plaintiffs' claims against the President, the entry of summary judgment in favor of Plaintiffs as to Count I of their respective complaints, and the denial of the government's motion to dismiss Count I of those complaints.

I concur in our dismissal of Counts II and III without prejudice as requested by the parties, but I write separately to explain that in so doing we are not impermissibly "manufacturing" finality for the purpose of securing—if not manipulating—appellate jurisdiction, a controversial practice that is the subject of a long-festering circuit split. *See generally* Mayer Brown LLP, *Federal Appellate Practice* § 2.2(b)(1) (3d ed. 2018); *see also Doe v. United States*, 513 F.3d 1348, 1352–55 (Fed. Cir. 2008).[1]

[1] Because the majority grants equitable relief in its entry of judgment accompanying today's decision, the existence of finality here for purposes of 28 U.S.C. § 1295(a)(5) (conferring appellate jurisdiction in the Federal Circuit over "final decision[s]" of the CIT) may be academic. The equitable relief granted by the majority today—ordering the refund of duties previously paid—arguably constitutes an injunction for purposes of 28 U.S.C. § 1292(c)(1) & (a)(1), which together confer appellate jurisdiction in the Federal Circuit over interlocutory orders of the CIT granting injunctions (whether preliminary or, as here, permanent).

Although Plaintiffs' materially identical complaints nominally allege three separate counts, for purposes of Federal Rule of Civil Procedure 54(b)—and by extension our own Rule 54(b), *see* USCIT R. 54(b)—all three counts are, in substance, simply alternative legal theories asserted to support "*one* claim for relief." USCIT R. 54(b) (emphasis added). Count I alleges that the President violated Section 232's procedural requirements in issuing Proclamation 9980, *see* Case 20-37, ECF 2, ¶¶ 95–106, and Case 20-45, ECF 5, ¶¶ 95–106; Count II alleges that Proclamation 9980 was unlawful because Section 232 represents an unconstitutional delegation of power by Congress to the Executive, *see* Case 20-37, ECF 2, ¶¶ 117–121, and Case 20-45, ECF 5, ¶¶ 177–121; and Count III alleges that Proclamation 9980 violated the equal protection component of the Due Process Clause of the Constitution's Fifth Amendment by imposing tariffs on steel derivative imports from some countries but not others, *see* Case 20-37, ECF 2, ¶¶ 128–131, and Case 20-45, ECF 5, ¶¶ 126–129.

For all three counts, Plaintiffs seek the same relief: a judgment declaring Proclamation 9980 void and an injunction restraining its enforcement and compelling refunds of Section 232 duties previously collected. *See* Case 20-37, ECF 2, at 31; Case 20-45, ECF 5, at 30. Because Plaintiffs could—and with the majority's decision today, do—obtain only one recovery, their separate counts are but variations on legal theories supporting one claim. *See Local P-171,*

Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Thompson Farms Co., 642 F.2d 1065, 1070–71 (7th Cir. 1981) (Wisdom, J.) ("At a minimum, claims cannot be separate unless separate recovery is possible on each. Hence, mere variations of legal theory do not constitute separate claims.") (cleaned up). Therefore, in dismissing Counts II and III without prejudice, we do not improperly manufacture finality by dismissing nonfinal separate claims.

Nevertheless, even where, as here, a plaintiff only asserts one claim for Rule 54(b) purposes, a district court or the CIT impermissibly "homebrews" appellate jurisdiction when it rejects one legal theory in support of that claim and thereafter dismisses the plaintiff's remaining theories without prejudice to facilitate an immediate appeal of what the parties agree is the most important theory. *See, e.g.*, *First Health Grp. Corp. v. BCE Emergis Corp.*, 269 F.3d 800, 801 (7th Cir. 2001) (Easterbrook, J.). In such a situation, the case is nonfinal because the trial court has not finally adjudicated the plaintiff's claim for relief.

But where, as here, a plaintiff asserts multiple theories in support of only a single claim for relief and the district court or the CIT *grants* all the requested relief based on only one of the plaintiff's asserted theories, attaining finality does not require the court to *also* adjudicate the plaintiff's alternative theories for recovery on the same claim. By granting the plaintiff all the relief

that it could possibly obtain in this action, the majority "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Weed v. Soc. Sec. Admin.*, 571 F.3d 1359, 1361 (Fed. Cir. 2009) (cleaned up and quoting *Cabot Corp. v. United States*, 788 F.2d 1539, 1542 (Fed. Cir. 1986)); *see also Electro-Methods, Inc. v. United States*, 728 F.2d 1471, 1474 (Fed. Cir. 1984) (decision granting "the most important relief [plaintiff] sought" and "address[ing] (by denying) the other relief [plaintiff] sought" was a "final decision . . . for all practical purposes"); *cf. Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 860 F.2d 1441, 1446 (7th Cir. 1988) (Cudahy, J., dissenting) (in a case with only a single claim for purposes of Rule 54(b), "to 'win' a plaintiff need prevail on only one theory, while to 'win' a defendant must prevail on all the theories proposed by the plaintiff").[2]

For purposes of 28 U.S.C § 1291—and by extension 28 U.S.C. § 1295(a)(5)—"[f]inality is to be given a practical rather than a technical

[2] I note that the majority's decision granting Plaintiffs' motion for summary judgment as to Count I does not moot Counts II and III. This is because "cases rather than reasons . . . become moot." *Air Line Pilots Ass'n, Int'l v. UAL Corp.*, 897 F.2d 1394, 1397 (7th Cir. 1990) (Posner, J.). And of course, if a case consists of multiple claims for Rule 54(b) purposes, one or more of such claims might become moot, even if other claims in the case do not. But this case consists of only one claim—Plaintiffs' challenge to Proclamation 9980 based on three alternative legal theories—and the majority's decision in favor of Plaintiffs as to one of their theories (Count I) does not render the other two theories (Counts II and III) moot, but rather simply unnecessary to decide as a matter of judicial discretion. If Counts II and III were moot, we would not have Article III jurisdiction to decide them.

construction." *Keith Mfg. Co. v. Butterfield*, 955 F.3d 936, 939 (Fed. Cir. 2020) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974)). There is no practical reason to "impose totally redundant and indefensible burdens on . . . trial courts" by requiring them to adjudicate "multiple theories . . . where one would suffice." *Am. Cyanamid*, 860 F.2d at 1448 (Cudahy, J., dissenting). Like Judge Cudahy, I see no practical purpose in construing the finality requirement to require "the plaintiff to fire additional bullets into the corpse of a defendant he has already killed." *Id.*

/s/ *M. Miller Baker*
M. Miller Baker, Judge

Slip Op. No. 21-144

UNITED STATES COURT OF INTERNATIONAL TRADE

OMAN FASTENERS, LLC, et al., Plaintiffs, v. **UNITED STATES, et al.,** Defendants.	**Before: Jennifer Choe-Groves, Judge** **M. Miller Baker, Judge** **Timothy C. Stanceu, Judge** **Consolidated Court No. 20-00037**

OPINION AND ORDER

[Ordering a stay pending appeal and related measures.]

Dated: October 15, 2021

Michael P. House, Perkins Coie, LLP, of Washington, D.C., for plaintiffs Oman Fasteners LLC, Huttig Building Products, Inc., and Huttig Inc. With him on the submissions were *Andrew Caridas*, *Shuaiqi Yuan*, *Jon B. Jacobs*, and *Brenna D. Duncan*.

Tara K. Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendants. With her on the submissions were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Aimee Lee*, Assistant Director, *Meen Geu Oh*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C.

Stanceu, Judge. Defendants move for a partial stay pending their appeal of the judgment this Court entered in *Oman Fasteners, LLC v. United States*, Judgment (June 10, 2021), ECF No. 108 ("Judgment"), and for certain other measures related to protection of

potential government revenue. In the Judgment, the court awarded remedies for plaintiff Oman Fasteners, LLC ("Oman") and plaintiffs Huttig Building Products, Inc. and Huttig, Inc. (collectively, "Huttig"), importers of steel nails, in a challenge to a Presidential action taken under Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 ("Section 232"), imposing additional duties of 25% *ad valorem* on certain imported products made of steel, including steel nails.[1] *See* Proclamation 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Exec. Office of the President Jan. 29, 2020) ("Proclamation 9980"). Plaintiffs oppose defendants' motion.

The court orders a stay of the Judgment, orders suspension of liquidation of the entries affected by this litigation, and requires defendants to confer with Oman and with Huttig to obtain agreements on bonding of entries made on and after June 10, 2021, for protection of the revenue potentially owing due to Proclamation 9980.

I. BACKGROUND

The background of this action is set forth in our previous opinion and supplemented herein. *See Oman Fasteners, LLC v. United States*, 45 CIT __, 520 F. Supp. 3d 1332 (2021) ("*Oman*"). Other pertinent background is presented in decisions of this Court adjudicating a claim substantially the same as the one adjudicated in this

[1] Citations to the United States Code herein are to the 2012 edition. Citations to the Code of Federal Regulations are to the 2020 edition.

litigation. *See PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT __, 497 F. Supp. 3d 1333 (2021) ("*PrimeSource I*"), *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT __, 505 F. Supp. 3d 1352 (2021) ("*PrimeSource II*").

Oman and Huttig brought actions, now consolidated, challenging the lawfulness of Proclamation 9980 on February 7, 2020, [Oman's] Compl. (Ct. No. 20-00037), ECF No. 2; and February 18, 2020, [Huttig's] Compl. (Ct. No. 20-00045), ECF No. 5. Shortly thereafter, upon the consent of all parties, this Court entered preliminary injunctions prohibiting defendants from collecting 25% cash deposits on Oman and Huttig's entries of merchandise within the scope of Proclamation 9980 and also prohibiting the liquidation of the affected entries. Order (Ct. No. 20-00037) (Feb. 21, 2020), ECF Nos. 34 (conf.), 35 (public) ("Oman Prelim. Inj. Order"); Order (Ct. No. 20-00045) (Mar. 4, 2020), ECF Nos. 29 (conf.), 30 (public) ("Huttig Prelim. Inj. Order"). The preliminary injunctions also required plaintiffs to terminate their existing continuous bonds and replace them with continuous bonds having a higher limit of liability to reflect the additional duties Oman and Huttig otherwise would have been required to deposit. Oman Prelim. Inj. Order 2; Huttig Prelim. Inj. Order 2.

On March 9, 2020, in response to Oman's and defendants' Joint Notice of Proposed Scheduling Order and Amended Injunction Order, the court ordered a stay of Counts II and III of Oman's complaint "pending the Court's decision on the parties' motions on Count I of the complaint." Order 1 (Ct. No. 20-00037), ECF No. 46. The

court amended the preliminary injunctive order to provide that the order would continue in effect until the court entered judgment on Count I of Oman's complaint. *Id.* at 2. On March 16, 2020, the court consolidated Ct. No. 20-00045 with Ct. No. 20-00037 *sub nom. Oman Fasteners, LLC v. United States*, stayed Counts II and III of Huttig's complaint pending the resolution of Count I, and modified the preliminary injunction entered in Ct. No. 20-00045 to provide for the order to continue in effect until judgment was entered on Count I. Order, ECF No. 54.

On September 11, 2020, and January 20, 2021, with the consent of the parties, the court amended Oman and Huttig's preliminary injunctions, respectively, to require plaintiffs to "monitor [their] subject imports and foregone duty deposits" instead of conferring with defendants prior to the expiry of their continuous bonds, and to terminate and replace each continuous bond once the amount of foregone duty deposits reached the amount of the bond, minus the baseline bond amount as calculated pursuant to the general continuous bonding formula of U.S. Customs and Border Protection ("Customs" or "CBP"). [Oman Prelim. Inj.] Order 2 (Sept. 11, 2020), ECF Nos. 94 (conf.), 95 (public); [Huttig Prelim. Inj.] Order 2 (Jan. 20, 2021), ECF Nos. 100 (public), 101 (conf.).

In the *PrimeSource* litigation, this Court awarded summary judgment to plaintiff PrimeSource Building Products, Inc., holding that Proclamation 9980 was issued beyond the statutory time limits set forth in Section 232. *PrimeSource II*, 45 CIT at __,

505 F. Supp. 3d at 1357. Thereafter, the parties in the instant litigation filed a Joint Status Report, in which the defendants agreed that the decisions in *PrimeSource* were "decisive as to Count I of Plaintiffs' Complaints" and that as a result there was "no reason for this Court not to grant Plaintiffs' Motion for Summary Judgment on Count I of the Complaints . . . and deny Defendant[s'] Motion to Dismiss Count I of Plaintiffs' Complaints." Joint Status Report 1–2 (Apr. 30, 2021), ECF No. 105. Further, plaintiffs agreed to move the court to lift the stay and dismiss Counts II and III of their complaints. *Id.* Accordingly, in *Oman*, the court granted summary judgment in favor of plaintiffs on Count I of their complaints and dismissed without prejudice Counts II and III. 45 CIT at __, 520 F. Supp. 3d at 1339.

The amended preliminary injunctions dissolved upon the entry of judgment on June 10, 2021. *See* Judgment 1–2. In the Judgment, this Court ordered, *inter alia*, that defendants liquidate the duties affected by this litigation without the assessment of the 25% additional duties provided for in Proclamation 9980. *Id.*

Defendants filed a notice of appeal of the Judgment, Notice of Appeal (Aug. 7, 2021), ECF No. 110, and shortly thereafter their motion for a stay pending appeal and other measures, Defs.' Mot. for Stay of J. to Maintain the *Status Quo Ante* Pending Appeal (Aug. 9, 2021), ECF No. 111 (conf.), (Oct. 14, 2021), ECF No. 119 (public) ("Defs.' Mot. for Stay"). Defendants requested that, for the pendency of the appeal, the court: (1) stay the requirement to liquidate Oman's and Huttig's entries without the

assessment of the 25% additional duties and reinstate the order to suspend liquidation; (2) stay the requirement to refund with interest any deposits of estimated duties under Proclamation 9980 made by Oman and Huttig; and (3) reinstate the requirements that plaintiffs monitor their imports of merchandise covered by Proclamation 9980 and maintain a sufficient continuous bond for the duty liability on these imports. Defs.' Mot. for Stay 1–2. Plaintiffs filed their opposition to defendants' stay motion on August 30, 2021. Pls.' Opp'n to Defs.' Mot. for Stay of J. Pending Appeal, ECF Nos. 116 (conf.), 117 (public) ("Pls.' Opp'n").

II. DISCUSSION

In exercising its traditional powers to further the administration of justice, a federal court may stay enforcement of a judgment pending the outcome of an appeal. *Nken v. Holder*, 556 U.S. 418, 421 (2009). "While an appeal is pending from . . . [a] final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights." USCIT R. 62(d). When that judgment was rendered by a three-judge panel, "the order must be made . . . by the assent of all its judges, as evidenced by their signatures." *Id.*

The party seeking a stay pending appeal has the burden of demonstrating that the stay is justified by the circumstances. *Nken*, 556 U.S. at 433–34. We consider four factors in deciding whether defendants have met that burden: (1) whether defendants

have made a strong showing that they will succeed on the merits; (2) whether they will be irreparably harmed absent the stay; (3) whether issuance of the stay will substantially injure plaintiffs; and (4) where the public interest lies. *See Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). "There is substantial overlap between these and the factors governing preliminary injunctions." *Nken*, 556 U.S. at 434 (citing *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)). The "likelihood of success" and "irreparable harm" factors, working together, are the most critical, and where the United States is a party, the balance of equities and the public interest factors "merge." *Id.* at 434–35. We conclude that all four factors support our granting defendants' motion.

A. Success on the Merits

The decision of the Court of Appeals for the Federal Circuit ("Court of Appeals") in *Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021) ("*Transpacific II*"), causes us to conclude that defendants have made a sufficiently strong showing that they will succeed on the merits on appeal. In *Transpacific II*, the Court of Appeals vacated a judgment of this Court in *Transpacific Steel LLC v. United States*, 44 CIT __, 466 F. Supp. 3d 1246 (2020) ("*Transpacific I*"), rejecting a claim similar in some respects to a claim this Court found meritorious in *Oman, PrimeSource I*, and *PrimeSource II*.

The subject of the *Transpacific* litigation is a Presidential proclamation that increased to 50% the then-existing 25% Section 232 duties on imports of steel products

from Turkey. *See* Proclamation 9772, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 40,429 (Exec. Office of the President Aug. 15, 2018) ("Proclamation 9772"). In *Transpacific I*, this Court held the proclamation invalid as untimely and as a violation of equal protection. Regarding the former, *Transpacific I* held that Proclamation 9772 was issued after the close of the combined 105-day time period Congress established in the 1988 amendments to Section 232 (the time period codified as Section 232(c)(1), 19 U.S.C. § 1862(c)(1)), that commenced upon President Trump's receipt, on January 11, 2018, of a report by the Secretary of Commerce issued under the authority of 19 U.S.C. § 1862(b)(3)(A) (the "2018 Steel Report"). The President's receipt of the 2018 Steel Report was the procedural predicate for the issuance of a previously issued proclamation, Proclamation 9705, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Exec. Office of the President Mar. 15, 2018) ("Proclamation 9705").

In *Transpacific II*, the Court of Appeals reversed the decision of this Court in *Transpacific I*. On the issue of the time limits added by the 1988 amendments to Section 232, the Court of Appeals reasoned that "[n]one of the new language in the statute, on its own or by comparison to what came before, implies a withdrawal of previously existing presidential power to take a continuing series of affirmative steps deemed necessary by the President to counteract the very threat found by the Secretary." *Transpacific II*, 4 F.4th at 1329. The Court of Appeals stated that "[i]n this context, the directive to the President to act by a specified time is not fairly understood as implicitly

meaning 'by then or not at all' as to each discrete imposition that might be needed, as judged over time." *Id*. at 1329–30.

The instant litigation arose from somewhat different facts than did the *Transpacific* litigation. Instead of an upward adjustment to the tariffs imposed by a previous Section 232 proclamation, the action contested here imposed, for the first time, tariffs of 25% on a previously unaffected group of products. These products, identified in Proclamation 9980 as "Derivative Steel Articles," Proclamation 9980, 85 Fed. Reg. at 5,281, were different than the steel articles affected by the earlier Presidential proclamation, Proclamation 9705. As in *PrimeSource*, defendants here relied upon the President's receipt of the 2018 Steel Report as the procedural basis upon which the President issued Proclamation 9980, arguing that the President retained "modification" authority over the previous Section 232 action. *See* Defs.' Mot. to Dismiss Count I for Failure to State a Claim 29–31 (Mar. 20, 2020), ECF No. 57; Joint Status Report 2 ("As was true in the *PrimeSource* litigation . . . [d]efendants' position remains that the procedural preconditions for the issuance of Proclamation 9980 were met by the Secretary's 2018 Steel Report and the timely issuance of Proclamation 9705 . . . ."). Proclamation 9980 was signed by the President on January 24, 2020 (and published in the Federal Register on January 29, 2020), long after the President's receipt, on January 11, 2018, of the 2018 Steel Report. In *PrimeSource I*, this Court held that, due to the combined 105-day time limitation set forth in 19 U.S.C. § 1862(c)(1), the President's

authority to adjust tariffs on the "derivative" articles of steel had expired by the time Proclamation 9980 was issued, if that time period were presumed to commence upon the receipt of the 2018 Steel Report. 45 CIT at __, 497 F. Supp. 3d at 1356. We concluded, later, that defendants had waived any defense that the procedural requirements of Section 232 were met based on any procedure other than one reliant upon the 2018 Steel Report. *Oman*, 45 CIT at __, 520 F. Supp. 3d at 1338.

Our decision in *Oman* is also distinguishable from *Transpacific II* with respect to the time period that elapsed between the receipt of a Section 232(b)(3)(A) report from the Secretary of Commerce and the President's taking implementing action. In issuing Proclamation 9980, the President acted more than two years after receiving the 2018 Steel Report. In the *Transpacific* litigation, the analogous time period was approximately seven months. In *Transpacific II*, the Court of Appeals rejected the appellee's argument that Congress sought, through the time limits, to ensure that the President will have timely information on which to act. 4 F.4th at 1332 ("Concerns about staleness of findings are better treated in individual applications of the statute, where they can be given their due after a focused analysis of the proper role of those concerns and the particular finding of threat at issue."). That all said, we express no view on whether the factual distinction between this case and *Transpacific II* is material.

Even though *Transpacific II* and this case arose from somewhat different facts, we nevertheless conclude that the opinion of the Court of Appeals potentially affects the

outcome of this litigation. In reaching this conclusion, we do not opine on whether *Transpacific II* necessarily controls that outcome, i.e., whether the President's adjusting of tariffs on derivatives of steel products falls within what the Court of Appeals termed, in a different factual setting, "a continuing series of affirmative steps deemed necessary by the President to counteract the very threat found by the Secretary," *id.* at 1329. But for purposes of ruling on the instant stay motion, it suffices that the discussion in *Transpacific II* of the "continuing" nature of Presidential Section 232 authority is expressed in broad terms.

Citing their petition in *Transpacific II* for panel rehearing and rehearing *en banc,* plaintiffs argued that *Transpacific II* does not demonstrate defendants' likelihood of success on the merits because it "is not final." Pls.' Opp'n 5 (citing Combined Pet. for Panel Reh'g and Reh'g *En Banc* of Pls.-Appellees (Ct. No. 2020-2157) (Aug. 23, 2021), ECF No. 68). Oman and Huttig rely on the "strong dissenting opinion" in *Transpacific II* and "the fact that two panels of this Court . . . previously held presidential action outside the statutory deadlines unlawful." *Id.* More recently, on September 24, 2021, the Court of Appeals denied the petition for panel rehearing and the petition for rehearing *en banc,* and the mandate has now been issued. Order (Ct. No. 2020-2157), ECF No. 76; *see* Mandate (Ct. No. 2020-2157) (Oct. 1, 2021), ECF No. 78. We conclude that defendants have made a showing that they will succeed on the merits on appeal that is sufficient to satisfy the first factor in our analysis.

B. Irreparable Harm in the Absence of the Requested Stay

In their motion for a stay, defendants request that, for the pendency of the appeal, the court: (1) stay the requirement to liquidate Oman and Huttig's entries without the assessment of the 25% additional duties and reinstate the order to suspend liquidation; (2) stay the requirement to refund with interest any deposits of estimated duties under Proclamation 9980 made by Oman and Huttig; and (3) reinstate the requirement that plaintiffs monitor their imports of merchandise covered by Proclamation 9980 and maintain a sufficient continuous bond for the duty liability on these imports. Defs.' Mot. for Stay 1–2. The court concludes that all three of these requested measures are necessary to prevent a form of irreparable harm to the United States. As we discuss below, that harm is the loss of the authority, provided for by statute and routinely exercised by Customs in every import transaction, to require and maintain such bonding as it determines is reasonably necessary to protect the revenue of the United States. Without the requested stay, the judgment entered in *Oman* would interfere with the exercise of that authority.

In Section 623(a) of the Tariff Act of 1930, Congress explicitly recognized the importance of security, such as bonding, to protect the revenue. In pertinent part, the relevant provision reads as follows:

> In any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or authorize customs officers to require, such

> bonds or other security as he, or they, may deem necessary for the protection of the revenue . . . .

19 U.S.C. § 1623(a). This authority is effectuated in the Customs Regulations and applies generally to all import transactions. *See* 19 C.F.R. § 113. Due to the decision of the Court of Appeals in *Transpacific II*, the government has established a likelihood that ultimately it will assess Section 232 duties of 25% *ad valorem* on all entries at issue in this litigation. In any ordinary import transaction, i.e., one not affected by litigation such as this, Customs would exercise its statutory and regulatory authority to ensure that the basic importer's bond (be it a continuous or single transaction bond) has a sufficient limit of liability to secure the liability for all potential duties, such as the Section 232 duties that potentially will be owed by Oman and Huttig.

Importers' bonds are the ordinary means by which the government ensures that the joint and several liability of the importer of record, and of its surety (up to the limit of liability on the bond), will attach for the payment of all duties and other charges eventually determined to be owed. Notably, in the situation posed by this litigation, Oman and Huttig, due to the preliminary injunction that dissolved upon the entry of judgment in this litigation, have made no cash deposits of estimated duties to cover potential duty liability from Proclamation 9980. The continuous bond required by the consent preliminary injunction was a substitute for these estimated duty deposits.

If an importer's bond has a limit of liability that is too low to cover the ordinary duties plus the 25% duties, there is an inherent risk to the revenue, codified by statute

and effectuated by regulation, because one of the two parties that contractually could have been bound to pay the duties—the surety—has liability limited by the face amount of the bond. In short, Congress contemplated in 19 U.S.C. § 1623 that the government should have resort to two parties for assessed duty liability, the importer of record and the surety.

We do not base our decision to grant defendants' motion on a factual determination that plaintiffs will be unable to satisfy their potential duty obligation. Rather, we base it on the loss of the ability of the United States to exercise, as it would in the ordinary course of administering import transactions, the statutory authority of 19 U.S.C. § 1623(a) to secure this potential duty liability. That loss, absent the requested stay, itself will constitute an irreparable harm to the United States.[2] But for the Judgment entered in *Oman*, the government would maintain, and continue into the future, the requirement of bonding adequate to secure the revenue potentially owing on

[2] Because we find irreparable harm for the reasons noted, we need not, and do not, consider whether finality of liquidation itself constitutes potential irreparable harm to the United States. Defendants claim they may be unable to collect duties on entries for which liquidation has become final under 19 U.S.C. § 1514(a). *See* Defs.' Mot. for Stay of J. to Maintain the *Status Quo Ante* Pending Appeal 14–15 (Aug. 9, 2021), ECF No. 111 (conf.), (Oct. 14, 2021), ECF No. 119 (public). Their argument is brought into question by precedent recognizing the authority of this Court, in a case brought according to 28 U.S.C. § 1581(i), to enforce its own judgments by ordering the reliquidation of the entries. *See Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1311–12 (Fed. Cir. 2004). The opinion in *Shinyei* reasoned that finality of liquidation under 19 U.S.C. § 1514 does not "preclude judicial enforcement of court orders after liquidation," as "the Court of International Trade has been granted broad remedial powers." *Id.* at 1312.

the entries affected by this case. In summary, were we to deny the government's motion to stay the effect of the Judgment as to these entries, we would be interfering with the exercise of the government's statutory authority under 19 U.S.C. § 1623(a). Based on the intent Congress expressed in enacting that provision, we conclude that any such interference is best avoided.

In addition to enhanced bonding, the government's motion seeks a stay of our order to liquidate without Section 232 liability the entries subject to this litigation and a suspension of the liquidation of those entries pending the appeal. We agree that these steps are warranted. The court notes the possibility that finality of liquidation, should it attach to all entries associated with a particular continuous bond, could result in the cancellation of such a bond and the resultant extinguishing of the liability of the surety. Such a prospect would pose irreparable harm to the United States for the reasons the court has discussed. Because avoiding irreparable harm requires that the government have the authority not only to require, but to maintain, sufficient bonding for potential duty liability on all entries at issue in this case, we conclude that avoiding such harm requires that the affected entries remain in an unliquidated state during the pendency of the appeal.

C. Balance of the Hardships

The government also prevails on the third factor. As the court has pointed out, bonding that is inadequate to secure potential duties is deleterious to the interest of the

United States in the protection of the revenue, an interest protected by statute. Defendants do not seek an order requiring cash deposits. Instead, under the government's motion, plaintiffs will incur the costs of maintaining enhanced bonding for the potential Section 232 duty liability, i.e., the cost of the bond premiums.

As a result of the previous agreements, Oman and Huttig have bonding that secures the estimated duty liability for all entries between February 8, 2020, until June 10, 2021, the date judgment was entered in favor of these plaintiffs. To address bonding for entries after that time period, defendants request that the court directly order reinstatement of the previous requirements for monitoring and "sufficient bonding." Defs.' Mot. for Stay 1–2. Defendants' proposed order would impose specific bonding requirements for each plaintiff. [Proposed] Order 1–3 (Aug. 9, 2021), ECF No. 111-1.

Oman argues that, in its particular circumstance, it will incur a substantial harm if it must incur the cost of maintaining bonding for entries after June 10, 2021. Pls.' Opp'n 7. Rather than impose the bonding and monitoring requirements directly, the court considers it preferable that the plaintiffs be involved in negotiations of the arrangements for the continuation of bonding on their respective entries. Accordingly, the court will direct defendants to consult with Oman and with Huttig with the objective of reaching, and implementing, agreements under which the entries occurring on and after June 10, 2021, and going forward throughout the appeal, will be covered by

bonding, but only such bonding as is reasonably necessary to secure the potential revenue, including the Section 232 duties. The court will direct, further, that should defendants be unable to reach, and enter into, an agreement with a plaintiff or plaintiffs, the involved parties shall file with the court a joint status report on the negotiations.

Oman argues, further, that the harm is magnified due to the same entries subject to the stay being subject to "the as-yet uninitiated seventh administrative review (covering entries between July 1, 2021 and June 30, 2022) and very likely eighth administrative review (covering entries between July 1, 2022 and June 30, 2023)" in *Certain Steel Nails From the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam: Antidumping Duty Orders*, 80 Fed. Reg. 39,994 (Int'l Trade Admin. July 13, 2015) ("*Oman Nails*"). *Id*. at 7–8. Further, Oman states that if Commerce follows its "normal regulatory schedule for conducting administrative reviews, the final results of the seventh and eighth *Oman Nails* reviews would not be published until the end of 2023 and 2024, respectively" with suspension of liquidation "lifted thereafter, with actual liquidation of the entries occurring well into the following year[s]." *Id.* at 8.

That Oman's merchandise at issue is subject to separate administrative proceedings, and any potential duties, separate from Section 232, stemming from those proceedings, does not create a present burden sufficient to alter our analysis of the balance of the hardships related to this litigation.

Characterizing its agreement to continued bonding at the time of the initial preliminary injunction order as the "lesser of two extreme burdens," Oman submits that "to ask Plaintiffs to accept the same bonding—for an even longer period—when this Court has already held that Proclamation 9980 is unlawful and void . . . is an entirely different matter." *Id.* at 9. Plaintiffs also oppose the court's entering a stay that applies retroactively to entries prior to the imposition of the stay because doing so would "grant Defendants a bonding windfall for merchandise that entered the United States at a time when the Court had declared Proclamation 9980 unlawful and void." *Id.* at 10. Oman's argument is unconvincing. As we have explained, our conclusion that the government potentially will have a claim to Section 232 revenue is based on certain language in *Transpacific II*, to which we give due consideration. The government's proposed motion essentially would continue the balance struck by the parties in their agreements for a consent injunction that maintained enhanced bonding while the outcome of this case was not yet determined by this Court. In comparison, denying the government the authority to require such bonding on current and future entries poses a hardship on the United States that, under the statutory scheme designed to ensure adequate protection of the revenue, is unwarranted now that such potential duty liability exists.

D. The Public Interest

The public interest favors allowing the government to exercise its lawful authority to protect the revenue, and potential revenue, of the United States, which in this case involves a significant amount of potential duty liability. *See* Defs.' Mot. for Stay 20.

III. CONCLUSION AND ORDER

All four factors necessitate granting the government's motion to stay. Upon the court's consideration of the parties' motions, including defendants' motion to stay and plaintiffs' response, and all other filings herein, and upon due deliberation, it is hereby

ORDERED that Defs.' Mot. for Stay of J. to Maintain the *Status Quo Ante* Pending Appeal (Aug. 9, 2021), ECF No. 111 (conf.), (Oct. 14, 2021), ECF No. 119 (public), be, and hereby is, granted in part and denied in part; it is further

ORDERED that the order of this Court to liquidate the entries subject to this litigation and to refund with interest any deposits of estimated duties under Proclamation 9980 made by Oman and Huttig, as stated in the Judgment entered on June 10, 2021, be, and hereby is, stayed pending the appeal of that Judgment before the United States Court of Appeals for the Federal Circuit; it is further

ORDERED that defendants be, and hereby are, enjoined, through the pendency of the appeal, from liquidating the entries affected by this litigation; it is further

ORDERED that defendants shall confer with Oman and Huttig with the objective of reaching, and entering into, an agreement with Oman and an agreement with Huttig on monitoring and such bonding for entries of merchandise within the scope of Proclamation 9980 that have occurred, and will occur, on or after June 10, 2021, as is reasonably necessary to secure potential liability for duties and fees, including potential liability for duties under Proclamation 9980; in the event of failure to reach agreement, the involved parties shall file a joint status report with the court no later than November 1, 2021; and it is further

ORDERED that this Order shall remain in effect until issuance of a mandate of the United States Court of Appeals for the Federal Circuit in the pending appeal of the Judgment entered by the court in this litigation.

/s/ Jennifer Choe-Groves
Jennifer Choe-Groves, Judge

/s/ M. Miller Baker
M. Miller Baker, Judge

/s/ Timothy C. Stanceu
Timothy C. Stanceu, Judge

Dated: October 15, 2021
New York, New York