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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SUMMARY OF ARGUMENT

In our opening brief, we demonstrated why the intervening decision in *Transpacific* requires reversal of the trial court's judgment. Appellees' response brief fails to rebut our argument that Proclamation 9980 is a lawful exercise of authority under section 232. We briefly summarize the relevant facts below.

At bottom, this is a case about the extent of the President's authority to impose trade restrictions (and to subsequently adjust those restrictions) when addressing "circumstances" that "threaten to impair the national security" under Section 232 of the Trade Expansion Act. 19 U.S.C. § 1862(c).

In January 2018, after the culmination of a months-long investigation, the Secretary of Commerce submitted a Section 232 report to the President concerning the impact of steel imports on national security. Appx227. The Secretary's ultimate finding was that "the present quantities and circumstance of steel imports are 'weakening our internal economy'" and undermining our "ability to meet national security requirements in a national emergency." Appx235, Appx279. The Secretary first explained that steel was essential to our national security because steel products are required for our national defense and to supply industries that are essential to the economy and the Government more broadly. Appx253-257. Over the prior decade, however, many domestic steel facilities had shuttered due to declining steel prices, global overcapacity, and unfairly traded steel. Appx258-

270. Foreign steel imports were, in large part, jeopardizing the domestic steel industry. *See id*. The Secretary told the President that "the only effective means of removing the threat of impairment [to national security] is to reduce imports to a level that should, in combination with good management, enable U.S. steel mills to operate at 80 percent or more of their rated production capacity,"[1] Appx235, and thereby restore health and long-term viability to this critical industry, Appx289.

The President agreed with the Secretary's core findings. In March 2018, the President (utilizing authority conferred to him under Section 232) issued Proclamation 9705, which broadly imposed a 25 percent tariff on most foreign steel article imports. Appx162-167. While specifically highlighting the stated need for an 80 percent average domestic capacity utilization rate, Appx162, ¶ 4, the President said that the principal purpose of his measure was "to revive idled [domestic] facilities, open closed mills, preserve necessary skills by hiring new steel workers, and maintain or increase production" so that the U.S. steel industry could "supply all the steel necessary for critical industries and national defense[,]" Appx163, ¶ 8.

The President included an important caveat, however. He made clear that this single tariff pronouncement should not be mistaken as constituting the entirety

[1] The report explained that steel mills, to remain viable and profitable "over the long-term," generally need to operate at a utilization rate of 80 percent or greater. Appx289.

of his trade action in response to the Secretary's report. He specifically referred to the tariff as an "important *first step* in ensuring the economic viability of the domestic steel industry." Appx163, ¶ 11 (emphasis added). He then ordered the Secretary "to continue to monitor imports of steel articles," and reserved for himself the right to further assess the effectiveness of his measure and to modify his approach as needed. Appx165, ¶ 11(5)(b) (ordering the Secretary of Commerce to "inform [him] of any circumstances that . . . might indicate the need for further action [] under section 232").

About 21 months later, in January 2020, the President received updated information from the Secretary and adjusted his trade measure, Appx168-180, just as Proclamation 9705 had contemplated. That adjustment was embodied in Proclamation 9980. *Id*. Through this subsequent pronouncement, the President modified his tariff on steel articles by further including derivatives of those items. *Id*. In explaining why the adjustment was necessary, the President stated that "domestic steel producers' capacity utilization ha[d still] not stabilized for an extended period of time at or above the 80 percent capacity utilization level identified in [the Secretary's] report as necessary to remove the threatened impairment of the national security." Appx168, ¶ 5. The Secretary's monitoring efforts had revealed the possible cause. Statistical data signified that between 2018 and 2019, "foreign producers of [steel] derivative articles" had substantially

"increased shipments of such [derivative] articles to the United States to circumvent the duties on [] steel articles imposed in . . . Proclamation 9705." Appx169, ¶ 8. That "circumvention," the President explained, "threaten[ed] to undermine the actions taken to address the risk to the national security" described in his original measure. Appx169-170, ¶¶ 8-9. Recognizing the central importance of "[s]tabilizing [domestic capacity utilization] at th[e 80 percent] level," Appx168, ¶ 5, the President explained that it was "necessary and appropriate" to extend his tariff to include derivative steel articles, and thereby remove an exploited loophole in his trade measure, Appx170, ¶ 9.

These are the facts relevant to this appeal, and they raise a single question: whether the President is legally permitted to make the trade adjustment in Proclamation 9980 that we have just described. According to appellees—importers of these foreign derivative steel products—the answer is no. They claim that Section 232 does not permit it. They accept that the continuing course of action the President announced in Proclamation 9705 may be legal. They further accept that Section 232, thus allows the President to modify Proclamation 9705.[2] But according to them, despite the clear ties between the two relevant

[2] They accept these two premises somewhat begrudgingly for purposes of their arguments because these premises were foundational to this Court's majority decision in *Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021). These premises were just recently reconfirmed by *USP Holdings, Inc. v. United States*, No. 21-1726, ECF No. 62, at *18-20 (Fed. Cir. Jun. 9, 2022).

pronouncements, Proclamation 9980 should not be viewed as a modification to Proclamation 9705 at all. It is instead an independent statutory "action" under Section 232, meaning the President was statutorily required as a matter of procedure to recommence all the steps of a new investigation by the Secretary to adjust his tariff in the way that he did here. Appellees further argue, as a side point, that this Court's governing interpretation of Section 232 (which squarely undermines their strained statutory argument) renders the statute unconstitutional under the nondelegation doctrine.

None of these arguments are persuasive. Appellees' contentions rely on a "categorical narrow reading" of the statutory text that "obstructs the statut[e's overarching] purpose," which is precisely the kind of statutory reading of Section 232 that this Court has already rejected. *Transpacific*, 4 F.4th at 1323. Section 232, both in its text and purpose, affords the President "broad discretion" to craft and impose trade restrictions to address the threatened impairment of the national security, *id*. at 1326, and courts have unanimously held that this broad reading of the statute does not render it unconstitutional, *id*. at 1332 ("Under governing precedent, there is no substantial constitutional doubt" (citing *Fed. Energy Admin. v. Algonquin SNG*, 426 U.S. 548, 550-70 (1976) (hereafter, *Algongquin*); *American Inst. for Int'l Steel v. United States*, 806 F. App'x 982, 983-91 (Fed. Cir. 2020) (hereafter, *AIIS*)). Despite appellees' contentions, any sensible assessment of the

issue establishes that Proclamation 9980 is firmly rooted in its originating action, Proclamation 9705. It is on its face (and in effect) a proper adjustment to the "continuing course of action" laid out in Proclamation 9705, *see id*. at 1319, thus making it a valid and lawful exercise of the President's power.

ARGUMENT

I. Relevant Law

Section 232 is a national security statute. As it relates to this case, it has two important subparts. First, subpart (b) of the statute directs the Secretary to investigate the national security effects of imports of an "article," and thereafter, issue a report to the President that indicates whether imports of that "article" "threaten[] to impair the national security." 19 U.S.C. § 1862(b). Second, if the Secretary concludes that there is a threat, subpart (c) of the statute tells the President to determine whether he "concurs with [the threat] findings of the Secretary," and if so, to take "action" to adjust the imports "of the article *and its derivatives*." *Id*. § 1862(c)(1)(A)(i)-(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). The statutory text thus embodies two parallel, but distinct, obligations between these executive actors. The Secretary is to investigate and report on the imports of "the article." *Id*. § 1862(b). And if the Secretary makes the necessary threat-finding,

the President (upon receiving that report as a statutory precondition) is then authorized to act upon that "article" as well as "its derivatives." *Id*. § 1862(c)(1).

The statute also lists certain timing provisions as they relate to the President. For instance, if the President agrees with the Secretary's finding of threat, subpart (c) of the statute states that the President "shall" within 90 days of receiving the Secretary's report "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). The President is then afforded an additional 15 days to "implement that action." *Id*. § 1862(c)(1)(B). Although some have argued that these timing provisions require the President to implement the *entirety* of his "action" within those specified time periods, this Court in *Transpacific* rejected that view, explaining that:

> the best reading of the statutory text of [Section 232] understood in context and in light of the evident purpose of the statute and the history of predecessor enactments and their implementation, is that the authority of the President includes authority to adopt and carry out a plan of action that allows adjustments of specific measures, including by increasing import restrictions, in carrying out the plan over time.

4 F.4th at 1319. Accordingly, Section 232 "permits the President to announce a continuing course of action within the statutory time period and then modify the initial implementing steps in line with the announced plan of action by adding

impositions on imports to achieve the stated implementation objective." *Id*. at 1318-19.

II. Proclamation 9980 Is, Both On Its Face And In Its Execution, A Further Lawful Implementation Of Proclamation 9705

Before proceeding further, we first identify an undisputed baseline. There is no dispute that Proclamation 9705, which announces a "continuing course of action," is a perfectly valid way for the President to exercise his statutory authority under Section 232. That premise is foundational to this Court's decision in *Transpacific*, *e.g*., 4 F.4th at 1318, and appellees cannot contest the point. *See USP Holdings*, No. 21-1726, ECF No. 62 at *18-20 (confirming *Transpacific*).

The statutory question here is related, but slightly different. The question before this Court is whether Proclamation 9980, which on its face arises out of the President's lawful pronouncement in Proclamation 9705, is a "continu[ation]" of Proclamation 9705's "course of action." *Id*. at 1319. Or to use the exact language in *Transpacific*, the question is whether Proclamation 9980 is a "modif[ication of] the initial implementing steps in line with the announced plan of action by adding impositions on imports to achieve the stated implementation objective." *Id*. If the answer to the question is yes, then Proclamation 9980 is lawful.

There is no serious question that Proclamation 9980 is a "modif[ication]" ". . . in-line with the announced plan of action" in Proclamation 9705. *Transpacific*, 4 F.4th at 1319. The text of Proclamation 9980—which refers to the text,

framework, and purpose of Proclamation 9705 no less than *nine* times—squarely supports that view. Appx168-180. For example, the President starts Proclamation 9980 by explaining how, in Proclamation 9705, he had ordered "the Secretary to monitor imports of . . . steel articles" and "inform [him] of any circumstances that . . . might indicate the need for further action under Section 232…." Appx168, ¶ 4. He then explains that, by virtue of this previously announced monitoring plan, the Secretary had informed him that between 2018 and 2019, "imports of certain derivatives of steel articles have significantly increased," *i.e.*, 23 to 33 percent. Appx169, ¶ 7. "Foreign producers," he was told, were "circumvent[ing] the duties on . . . steel articles imposed in . . . Proclamation 9705, and" thus "undermin[ing] the actions taken to address the risk to the national security of the United States" articulated within that Proclamation. Appx168-169, ¶¶ 5-8.

Having identified this problem, the President then establishes a clear link between Proclamation 9980 and the "implementation objective" he had presented in Proclamation 9705, *Transpacific*, 4 F.4th at 1319, which was to achieve an 80 percent average domestic capacity utilization rate, Appx162-163, ¶¶ 4, 8. While he had previously explained that domestic capacity conditions had greatly improved as a result of his trade measure, *Proclamation 9886*, 84 Fed. Reg. 23,421, 23,421-22, ¶ 6 (May 21, 2019) (explaining that domestic capacity utilization had "approximately" reached "target level"), the President states that improvement

levels still had "not stabilized for an extended period of time at or above [] 80 percent…." Appx168, ¶ 5. Improved conditions had not lasted "long enough" to "ramp up [domestic] production to a sustainable and profitable level." Appx169, ¶ 5. The President attributed this shortfall to the "net effect of the increase of imports of these derivatives" which had "erode[d] the customer base for U.S. producers of . . . steel." *Id*. To better reach the objective anticipated by Proclamation 9705 (and to close an exploited loophole in his prior measure), the President concluded that it was "necessary and appropriate" to adjust his tariff to cover the exact set of steel derivative articles that "foreign producers" were using as an off-ramp to sidestep his measure. Appx168-170, ¶¶ 5-9.

Without belaboring the point, these facts show that Proclamation 9980 is a "continu[ation]" of the "course of action" laid out in Proclamation 9705. *Transpacific*, 4 F.4th at 1319. Despite what appellees claim, Proclamation 9980 directly supports (and benefits) Proclamation 9705 and is inextricably linked to that Proclamation's stated objective. It is, by all practical accounts, a modification "in line with the announced plan of action by adding impositions on imports to achieve [Proclamation 9705's] stated implementation objective." *Id*.

Accordingly, *Transpacific* speaks squarely to these facts. That case involved a statutory challenge to a closely-related trade adjustment, Proclamation 9772, that also originated from Proclamation 9705. In *Transpacific*, this Court

affirmed the validity of Proclamation 9772, concluding that the disputed trade measure was nothing more than "a further implementation of Proclamation 9705," and thus did not constitute an independent "action" pursuant to Section 232. 4 F. 4th at 1318. *Transpacific* found it significant that the Proclamation "adhered to the basis of the threat finding" in the Secretary's report, "namely, the need for a particular domestic-plant utilization level," thereby signifying that it was simply one piece of a larger plan of action. *Id*. The Court was further persuaded by the fact that the President expressly kept open the possibility that he might "remove or modify" his action "and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require." *Id*. at 1314 (citing Proclamation 9705). These were the features in Proclamation 9772 that this Court found decisive in *Transpacific*, and they should be decisive here as well.

III. Appellees' Argument That Proclamation 9980—Either On "Staleness" Grounds Or "For Other Reasons"[3]—Is A Discrete And Independent Trade Action, Ignores The Facts And Law Undermining That View

Despite *Transpacific* and the clear connections between Proclamations 9705 and 9980, appellees insist that Proclamation 9980 is not actually a further

[3] Appellees base these arguments on essentially one sentence in the majority opinion in *Transpacific*. *Transpacific* confirmed the legal validity of Proclamation 9772 on the ground that it supported "achievement of the [domestic capacity utilization] goal defined by the Secretary's finding." 4 F.4th at 1323. But it further added that:

implementation of Proclamation 9705. PrimeSource Br. 12-32; Oman Br. 29-40. They seek to sever the relationship between the pronouncements in two ways. *First*, they claim that the two-year gap between Proclamations 9705 and 9980 (or perhaps the Secretary's report and Proclamation 9980) is far too great. They contend that the President issued Proclamation 9980 based upon "stale" information, thereby converting Proclamation 9980 into a justification-deficient, independent act. PrimeSource Br. 14-27; Oman Br. 35-40. *Second*, they attack the expanded coverage of Proclamation 9980 itself. Whereas Proclamation 9705 imposed tariffs on steel *articles* only, appellees complain that Proclamation 9980 expanded tariff coverage to *derivative* steel products, thereby making it a new action rather than (as in *Transpacific*) the continuation of an existing one. PrimeSource Br. 27-32; Oman Br. 29-36.

Neither argument is persuasive.

As to appellees' "staleness" argument, a simple examination of the facts demonstrates that their argument is incorrect. Broadly speaking, appellees portray

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> This does not mean that the statutory purpose is furthered by permitting *any* presidential imposition after the 15-day period, even an imposition that makes no sense except on premises that depart from the Secretary's finding, whether because the finding is simply too stale to be a basis for the new imposition or for other reasons.

Id. (emphasis in original).

Proclamations 9705 and 9980 as discrete pronouncements rather than viewing them for what they are: incremental steps in pursuit of a constant, well-defined, and oft-repeated objective that the President first laid out in Proclamation 9705. The foremost problem with their view is that it does not align with the public record. The history leading up to Proclamation 9980 shows that Proclamation 9980 is firmly rooted in "the announced plan of action" that the President articulated in Proclamation 9705.

As we previously explained, when the President issued Proclamation 9705, he indicated the need for an 80 percent average domestic capacity utilization rate. He implemented tariffs, and he also ordered the Secretary to "continue to monitor imports of steel articles," and reserved for himself the right to further assess the effectiveness of his actions and to modify his approach as needed. Appx165, ¶ 11(5)(b).

The public record shows that the President took this "plan of action" seriously. In Proclamation 9772, for instance, we find that the President doubled the existing tariff rate on imports of Turkish steel, and in disclosing why the trade adjustment was necessary, he referred to the monitoring and adjustment process he had outlined in Proclamation 9705. The President explained that through that process he had learned "that while capacity utilization in the domestic steel industry ha[d] improved, it [wa]s still below the target capacity utilization level"

and that imports were "still several percentage points greater than the level of imports that would allow domestic capacity utilization to reach the target level." *Proclamation 9772*, 83 Fed. Reg. 40,429, ¶¶ 3-4 (Aug. 15, 2018). To be clear, this is the same adjustment process that *Transpacific* found to support its conclusion that Proclamation 9772 constituted a valid exercise of Presidential authority. *See* 4 F.4th at 1314 (giving weight to the fact that Proclamation 9705 reserved for the President the right to "remove or modify" the action "and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require").

That is not the only example, however. The President thereafter issued Proclamation 9886, which preceded Proclamation 9980 by just eight months, and is another adjustment measure arising out of the monitoring and adjustment process described in Proclamation 9705. 84 Fed. Reg. 23,421. There, the President lifted his previously applied trade adjustment on Turkish steel exports upon receiving updated information from the Secretary showing that he was substantially closer to achieving his objective of an 80 percent domestic capacity utilization rate. *Id*. at 23,421-22, ¶ 6 ("imports of steel articles have declined by 12 percent in 2018 compared to 2017 . . . with the result that the domestic industry's capacity utilization has improved at this point…."). In fact, the President announced that he had been informed that the domestic capacity utilization rate

had finally reached "approximately the target level recommended in the Secretary's report," *id*., showing that the President was exercising his judgment in response to evolving circumstances. And in closing that Proclamation, the President expressed hope that "[t]his target level, if maintained for an appropriate period of time, w[ould] improve the financial viability of the domestic steel industry over the long term," *id*., consistent with what the President said he hoped to accomplish in Proclamation 9705, *see* Appx162-163, ¶¶ 4, 8.

Proclamation 9980, which comes eight months later, arises out of these facts. As Proclamation 9886 explains, although the President had hoped that the domestic steel industry would maintain "target level[s]" "for an appropriate period of time" to "improve the financial viability of [that] industry over the longer term," 84 Fed. Reg. at 23,421-22, ¶ 6, Proclamation 9980 tells us that that is not what happened. Instead, the Secretary's continued monitoring found 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." Appx168, ¶ 5. The purported cause, according to the Secretary, was an exploited loophole in Proclamation 9705. Appx169, ¶ 8. Notably, "foreign producers" had "circumvent[ed]" the tariff imposed in Proclamation 9705 by shifting heavier export volumes to derivatives of those same products. *Id*. That "circumvention," the Secretary explained, undermined the purpose Proclamation 9705 and in "net

effect" prevented domestic steel producers from reliably reaching a stable 80 percent capacity utilization rate. Appx168, ¶ 5. The President roundly agreed with the Secretary's assessment, and found it "necessary and appropriate" to adjust his tariff yet again—this time to close that loophole. Appx170, ¶ 9. Those factual findings, and the President's exercise of judgment in response to the Secretary's monitoring of the situation, are not subject to judicial review. *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018) (explaining that judicial review of Presidential action is limited and can be set aside only where there has been "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority"); *USP Holdings*, No. 21-1726, ECF No. 62 at *9, n.3 (same).

In light of these facts, appellees cannot seriously argue that the President acted upon "stale" information. The public record demonstrates that the President, through the "plan of action" he had outlined in Proclamation 9705, listened to the Secretary, whom he had tasked with monitoring the effectiveness of his approach. And where "necessary and appropriate," *e.g.*, Appx170, ¶ 9, the President regularly adjusted his approach to ensure that the measures selected were effective in averting the identified threat of impairment to national security. That adjustment process was part of the President's originally implemented action in Proclamation 9705, Appx165, ¶ 11(5)(b), and found, by this Court in *Transpacific*, to be a valid

use of the President's authority when he issued Proclamation 9772. *See* 4 F. 4th at 1318. The same result should follow here.

As a side point, appellees also contend that the Court must assume that the President relied on stale information because derivative imports—unlike article imports themselves—account for such a small portion of overall domestic steel imports. PrimeSource Br. 30-31; Oman Br. 10-11, 38 n. 15. In their view, the President's adjustment has no grounding because Proclamation 9980 has such a fractional effect on domestic capacity utilization as compared to other (and more consequential) adjustments the President could have taken. *See id*. And relatedly, they further contest the President's reference to the statistical surge in derivative imports, insisting that there is a purported lack of record data supporting those numbers. PrimeSource Br. 22-25; Oman Br. 37-38 (arguing that the numbers upon which the President relied are insufficiently supported by *other* record information).

First, neither argument is a proper basis upon which to challenge the President's pronouncement. The wisdom, efficacy, or rationale of the President's measure—and thereby the demand to see more information supporting the President's fact-finding—is not a proper basis for judicial review. *Florsheim Shoe Co., Div. of Interco, Inc. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984) (citing, among others, *George S. Bush v. United States*, 310 U.S. 371, 379-80

(1940)); *see also Chang v. United States*, 859 F.2d 893, 896 n.3 (Fed. Cir. 1988) (observing that any inquiry into the "true facts" on the ground that underlie a President's decision to declare a national emergency "would likely present a nonjusticiable political question"). Here, the Proclamation itself signifies what monitoring efforts revealed and explains why the President adjusted tariffs in the way that he did.[4] That information is more than what is necessary to determine whether the President complied with the statute. *Silfab Solar*, 892 F.3d at 1346; *see also Sneaker Circus, Inc. v. Carter*, 457 F. Supp. 771, 793 (E.D.N.Y. 1979) (holding that the Court "must assume that if the President said he considered the [statutory factors] then he in fact considered them"). Appellees cannot elude limitations on judicial review by characterizing their challenge as one of the President exceeding his statutory authority when all they are attempting to do is undermine the President's factfinding, and thereby have this Court substitute its judgment for that of the President.

Second, even putting aside these clear review limitations, appellees' observation about the fractional effect of derivative imports on domestic capacity

[4] As a reference point, *Transpacific* did not require the President to provide purported back-up data or executive communications to reach its conclusion that the trade adjustment in Proclamation 9772 was proper. In *Transpacific*, it was sufficient that the adjustment itself was "in-line" with the capacity utilization goal outlined in Proclamation 9705. The same is true here.

utilization actually supports our central point. The public record shows that Proclamations 9705 and 9772 were blunt-force trade measures, designed to help domestic producers to quickly ramp-up their capacity utilization in furtherance of the President's capacity utilization goal. Those measures worked for the most part. *See* 84 Fed. Reg. at 23,421-22, ¶ 6 (announcing having reached "approximately the target level [capacity utilization] recommended in the Secretary's report"). Having gotten to that point, it is not at all surprising that the President would subsequently choose to impose a much more limited adjustment after these broader trade measures had their effect. The President described Proclamation 9980 as a "stabiliz[ation]" measure, *see* Appx168, ¶ 5, and that aim fits what the President said he hoped to accomplish in Proclamation 9705, Appx162-163, ¶¶ 4, 8.

We next address appellees' second statutory argument. Appellees claim that Proclamation 9980's broadening effect, *i.e.*, its expansion of tariff coverage over previously uncovered derivative items, provides "[an]other reason[]" why Proclamation 9980 should constitute a separate action for purposes of Section 232. PrimeSource Br. 27-32; Oman Br. 29-37. In support, they observe that the Secretary's report to the President discussed steel articles only, and was silent on the effect of those articles' derivatives. PrimeSource Br. 27-32; Oman Br. 33-37. Based upon the Secretary's silence as to derivative products, appellees claim that the President cannot act upon them. *See id*.

But this secondary argument founders upon the language of the statute. As we said before, section 232 denotes different sets of rights and obligations between the Secretary and the President. Subpart (b) of the statute explains that the Secretary should investigate the national security effects of imports of an "article," and thereafter, issue a report concerning that "article" to the President. 19 U.S.C. § 1862(b). Then, if the Secretary makes a threat-finding and the President concurs with that finding, subpart (c) authorizes the President to determine "the nature and duration" of what "action" to take, and this "action" may include both the "article" as well as "its derivatives." *Id*. § 1862(c)(1)(A)(ii); *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). Section 232 thus, by its terms, confers upon the President the authority to adjust of derivative articles, whether or not they are mentioned in the Secretary's report.

Appellees' argument further defies commonsense. The Secretary's investigation *predated* the President's action, which *predated* (and likely caused) the surge in derivative article imports. It is illogical to expect the Secretary to report on some consequence of the President's action, *i.e*., the size and scope of surge in derivative imports, when the Secretary had no clue what action the President might take. *See* 19 U.S.C. § 1862(c)(1)(A) (explaining that, upon receiving the Secretary's report, the President (not the Secretary) is authorized to

determine "the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports" at issue to address the threat). Appellees fail to understand that, when the Secretary completed the investigation, derivative articles were not necessarily the problem. They *became* part of the problem, however, when (after the President had implemented his measure) foreign producers looked for ways to sidestep the President's action and thereby undermine the President's clearly stated, and oft-repeated, bottom-line.[5]

Unwilling to cede the point, however, appellees also attempt to raise a different iteration of this same argument. They contend that the President's power to modify should be limited to the specific universe of merchandise mentioned in

[5] Indeed, Congress recognized the potential for this very scenario when it authorized the President to adjust imports of derivatives. The Committee Report accompanying the 1958 legislation 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.

the President's first, or *original*, Section 232 proclamation, which they say sets an outer boundary on all future subsequent implementations of that action. Oman Br. 30-35. Applying that principle to the present case, appellees contend that because the President's initial proclamation (*i.e.*, Proclamation 9705) applied to steel articles only, the President is barred from further implementing that action by subsequently expanding that restriction to include steel derivatives (*i.e.*, Proclamation 9980) absent a new formal investigation and report by the Secretary. *See id*.

But this argument suffers from at least three clear flaws. First, it has no textual support. Appellees cite nothing in the statute suggesting that the President's power to modify is narrower than his power to act under the statute in the first instance. *See generally id*. Nothing in the statute says, for instance, that the President's first implementation of his action will establish the outer limits for all future subsequent implementations of that action. *See generally* 19 U.S.C. § 1862. In fact, *Transpacific* explained that subpart (c)(1) of the statute, which authorizes "the President to determine 'the nature and duration of the action,'" is a textual phrase that "supports, rather than excludes, coverage of a plan implemented over time, including options *for contingency-dependent choices* that are a commonplace feature of plans of action." 4 F. 4th at 1321 (quoting 19 U.S.C. § 1862(c)(1)(A)(ii)) (emphasis added). Adjusting a measure to extinguish efforts by

foreign producers to sidestep the President's lawfully implemented trade measure is precisely the kind of "contingency-dependent choice" that Proclamation 9705 contemplates.

Second, appellees' view also relies on a fundamental misunderstanding of the statute more generally. The "manifest purpose of [Section 232] is to enable and obligate the President . . . to effectively alleviate the threat to national security identified in a finding by the Secretary…." *Transpacific*, 4 F.4th at 1323. Accordingly, this Court expressly cautioned against reading Section 232 in a way that "obstructs the statutory purpose" and "impede[s] the President's ability to be effective in solving the specific problem found by the Secretary." *Id*. That rationale formed part of the basis as to why the Court concluded that Section 232 confers upon the President the power to modify or adjust timely implemented Section 232 action—within or outside subpart (c)'s 105 day timing provisions—without another formal investigation and report by the Secretary. *Id*. at 1319; *see USP Holdings*, No. 21-1726, ECF No. 62 at *19 (confirming that the President has the authority to "undertake a plan of action that includes imposing a tariff indefinitely and removing it at a later time once the President determines that it is no longer necessary").

Section 232's purpose should carry great weight in this case. Here, there is no meaningful dispute that the reason why the President issued Proclamation 9980

was to *supplement* Proclamation 9705. In fact, that supporting role is the only reason why Proclamation 9980 exists. It was a tailored adjustment to Proclamation 9705, and its purpose was to address clear "circumvention" efforts by foreign producers and help better achieve Proclamation 9705's stated objective. Appx168-180. Requiring the President to recommence "the cumbersome initial machinery of the formal investigative and reporting process" when the Secretary "has already determined the existence of a national security threat," *PrimeSource Bldg. Prods., Inc. v. United States*, 497 F. Supp. 3d 1333, 1383 (Ct. Int'l Trade 2021) (Baker, J., concurring in part and dissenting in part), just to institute a complementary "stabilization" measure and close an exploited loophole is not a sensible answer. Requiring the President to do so does exactly what this Court in *Transpacific* warned against: it "impede[s] the President's ability to be effective in solving the specific problem found the by Secretary." 4 F.4th at 1323 (instructing one to read Section 232 in accordance with its "evident purpose"). *See also PrimeSource*, 497 F. Supp. 3d at 1383 ("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.'" (quoting Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 63 (2012)) (Baker, J., concurring in part and dissenting in part).

Third, appellees' argument is textually irrational. To read the statute "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.*" *PrimeSource*, 497 F. Supp. 3d at 1386 (emphasis in original) (Baker, J., concurring in part and dissenting in part). The appellees' view relegates the Secretary's report to a mere formality with no real purpose other than to prevent the President from quickly making necessary adjustments. As Judge Baker rightly noted in dissent: "[w]hat 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?" *Id*.

Appellees contest the President's adjustment, but none of their statutory arguments present a close question. They miss the point of *Transpacific*, and cling to a narrow interpretation of Section 232 that would undermine the statute's overall purpose. Appellees have offered no basis upon which this Court could depart from this Court's binding decision in *Transpacific*.

IV. Appellees' Constitutional Non-Delegation Concerns Are Unwarranted

As a final point, appellees contend that their statutory case raises constitutional implications. They say that unless this Court disagrees with the central holding in *Transpacific*, that Section 232 permits the President to modify timely implemented actions beyond the timing provisions listed in subpart (c)(1), the statute would amount to "an unconstitutional delegation of legislative power" because "[t]he President would have virtually unbounded power to tax and regulate imports[.]" Oman Br. 24.

That is a clear overstatement. In *Algonquin*, the Supreme Court rejected the view that Section 232 raised "'a serious question of un-constitutional delegation of legislative power,'" and concluded the statute "easily fulfills" the intelligible-principle requirement of the Constitution. 426 U.S. at 558-60. The *Algonquin* court explained that Section 232 "establishes clear preconditions to Presidential action," including a finding by the Secretary 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.'" *Id.* at 559. It also "[a]rticulates a series of specific factors to be considered by the President in exercising his authority[.]" *Id.* And while it affords the President great "leeway" "in deciding what action to take in the event the preconditions are fulfilled," that authority is "far from unbounded[,]" since "[t]he President can act only to the extent '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.'" *Id.* Based on these statutory features, the Supreme Court declared that it "s[aw] no looming problem of improper delegation" under Section 232. *Id*. at 560.

Appellees contend, however, that "*Algonquin* does not fix the nondelegation problem," Oman Br. 28, insisting that time and practice now give this Court more to consider. They claim that, since *Algonquin*, Congress has amended the statute by adding timing provisions contained in subpart (c)(1), which they say changes the calculus. Oman Br. 25-28. In their view, unless Section 232's timing provisions are treated as strict, mandatory, and consequentially coercive, *i.e*., divesting the President of authority to adjust timely implemented actions after those time periods lapse, the statute basically "allow[s] presidential action at any time" and "untethers presidential action" from the statutory "preconditions" in the statute. Oman Br. 27.

But this Court just recently considered and rejected these exact arguments, and those decisions are binding in this case. *Transpacific*, 4 F.4th at 1332 ("[u]nder governing precedent, there is no substantial constitutional doubt" as to the validity of Section 232 (citing, in part, *Algonquin*, 426 U.S. at 550-70)); *AIIS*, 806 F. App'x at 983-91. Nor were those decisions surprising given that every one of the statutory features that *Algonquin* found meaningful still remain embodied in

Section 232 today.[6] *See AIIS*, 806 F. App'x at 982 (rejecting nondelegation challenge to the current version of the statute).

At bottom, this argument is merely another attempt by importers to elevate their statutory cases to a level of constitutional significance. *E.g.*, *Transpacific*, 4 F.4th at 1332 (rejecting Constitutional nondelegation challenge), *cert. denied*, 142 S. Ct. 1414 (2021); *AIIS*, 806 F. App'x at 989 (same), *cert. denied*, 141 S. Ct. 133 (2020). These nondelegation claims are misguided, and this Court repeatedly has rejected them. *See id*. The lack of a strict and coercive time-limit on the President to take action under Section 232 did not raise nondelegation concerns when the Supreme Court in *Algongquin* reviewed the statute in 1976, nor does it now. The law on the matter is clear, well-established, and decisive. Appellees have no constitutional case.

[6] In fact, the version of the Section 232 statute the Supreme Court reviewed in *Algonquin* imposed no time limits on the President at all, yet *Algonquin* still concluded that that version of the statute, which broadly authorized the President to "take such action, and for such time, as he deems necessary" without any time-limitation, did not present a close question. *Algonquin*, 426 U.S. at 559. Even that version of the statute "easily fulfill[ed]" the intelligible principle test. *Id.*

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with Federal Rule of Appellate Procedure 32(a)(7), in that it contains 6,166 words.

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