IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE TIMOTHY C. STANCEU, CHIEF JUDGE
THE HONORABLE JENNIFER CHOE-GROVES, JUDGE
THE HONORABLE M. MILLER BAKER, JUDGE

OMAN FASTENERS, LLC, *et al*.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Consol. Ct No. 20-0037
	)	
THE UNITED STATES, *et al*.,	)	
	)	
Defendants.	)	
	)	

DEFENDANTS' MOTION TO DISMISS
COUNT I FOR FAILURE TO STATE A CLAIM

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THE UNITED STATES, *et al*.,	)	
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DEFENDANTS' MOTION TO DISMISS
COUNT I FOR FAILURE TO STATE A CLAIM

Pursuant to United States Court of International Trade Rule 12(b)(6), defendants respectfully move to dismiss count I of the complaints of consolidated plaintiffs Oman Fasteners, LLC (Oman Fasteners) and Huttig Building Products, Inc. and Huttig, Inc. (Huttig), for failure to state a claim upon which relief may be granted. Plaintiffs, importers of steel derivative articles, challenge the tariffs imposed by Presidential Proclamation 9980 pursuant to Section 232 of the Trade Expansion Act of 1962.[1]

[1] Pursuant to the Court's scheduling orders, Counts II and III of each complaint are stayed. ECF Docket Nos. 46; 54. This motion to dismiss addresses only Count I of each complaint in the consolidated case. Because the legal claim and the related factual allegations are identical in both complaints, citations to "Compl." refer to the Oman Fasteners complaint, unless otherwise indicated.

The President complied with all applicable statutory procedures when he extended the Section 232 tariffs to steel derivative articles, to address circumvention of the measures implemented to avert the threat of impairment to our national security. The statute grants broad power to the President to take continuing and modifying action beyond the 15-day time limit set forth for initial action in 19 U.S.C. § 1862(c)(1)(B). Reading the statutory time periods as a strict outer limit on the President's authority is contrary to congressional intent and the purpose of the statute.

The President was not required to receive another investigation report and recommendation from the Secretary of Commerce in order to fine tune the measures he selected, to ensure that they accomplish the statutory objective. Nor did the President violate any statute or law by seeking advice from his counselors or by asking the Secretary to monitor the effectiveness of his selected measures. Section 232(b) does not require the Secretary to provide notice, opportunity for comment, or publication of the Secretary's further advice and recommendations to the President in his adjustment and monitoring of his selected measures.

QUESTIONS PRESENTED

1. Whether plaintiffs fail to state a claim that, when extending the tariffs imposed on imports of certain steel articles to derivatives of those articles, the

President did not follow the procedures set forth in Section 232 of the Trade Expansion Act of 1962, *as amended*, 19 U.S.C. § 1862.

2. Whether plaintiffs fail to state a claim that the Secretary violated the provisions of Section 232 applicable to the Secretary's investigation responsibilities, or any other law, when providing subsequent advice and recommendations to assist the President in the administration of the measures the President selected.

STATEMENT OF FACTS

I. Section 232 Authorizes The President To Adjust Imports Of Articles And Their Derivatives

Section 232 of the Trade Expansion Act of 1962 establishes a procedure through which the President may "adjust the imports" of articles in order to safeguard national security. 19 U.S.C. § 1862(c)(1)(A)(ii). The Secretary of Commerce is authorized to conduct an investigation "to determine the effects on the national security of [an] article," *id*. § 1862(b)(1)(A), and is directed to consult with specific officials. The Secretary must then submit a report with his findings to the President within 270 days of investigation of any article and offer "recommendations . . . for action or inaction." *Id*. § 1862(b)(3)(A).

If the Secretary finds that an article is being imported in such quantity or under such circumstances as to threaten to impair the national security, the President must, within 90 days after receiving the report, determine whether he

concurs with the Secretary's finding. 19 U.S.C. § 1862(c)(1)(A)(i). If the President concurs, he 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 of the article and its derivatives so that such imports will not threaten to impair the national security." *Id*. § 1862(c)(1)(A). If the President determines to take action, the statute instructs him to take initial action within 15 days following that determination. *Id*. § 1862(c)(1)(B).

Section 232(d) identifies a non-exclusive list of factors that the Secretary and the President must consider. These factors include the "domestic production needed for projected national defense requirements" and "the capacity of domestic industries to meet such [national defense] requirements," as well as "the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth." *Id.* § 1862(d). Section 232(d) further requires the Secretary and the President to recognize "the close relation of the economic welfare of the Nation to our national security."

II. Commerce's Investigation Into The Effect Of Imports Of Steel Articles On Our National Security And Recommendations To The President

On April 19, 2017, the Secretary of Commerce initiated a Section 232 investigation to determine the effect of steel imports on national security. *See generally* U.S. DEPARTMENT OF COMMERCE, THE EFFECT OF IMPORTS OF STEEL ON

THE NATIONAL SECURITY (Jan. 11, 2018) (Steel Rep.) (Compl. Exh. 2). The same day, the Secretary notified the Secretary of Defense, as required by 19 U.S.C. § 1862(b). Steel Rep. at 18. In compliance with 19 U.S.C. § 1862(b)(3)(A), the Secretary issued his report and recommendation to the President on January 11, 2018, within 270 days of initiation of the investigation. *Id.*

In the Steel Report, the Secretary found that the availability of steel manufactured by a healthy domestic industry is important to national defense. *Id*. at 23-27, App. H. In assessing the domestic production needed for projected national defense requirements, the Secretary explained that the Department of Defense "has a large and ongoing need for a range of steel products that are used in fabricating weapons and related systems for the nation's defense. Defense requirements are met by steel companies which also support the requirements for critical infrastructure and commercial industries." *Id*., App. H at 1. "[I]n many cases, the U.S. military relies on special types of steel and the U.S. steel industry's ability to support critical defense needs." *Id.* at App. H at 2. Likewise, the Secretary explained that steel is necessary for critical infrastructure. *Id*. at 23.

Second, the Secretary determined that steel "imports in such quantities as are presently found adversely impact the economic welfare of the U.S. steel industry." *Id*. at 27-41. In reaching this finding, the Secretary concluded that, "[i]n the steel

sector, foreign competition is characterized by substantial and sustained global overcapacity and production in excess of foreign domestic demand." *Id*. at 27.

Third, the Secretary found that displacement of domestic steel by excessive quantities of imports has the serious effect of weakening our internal economy. *Id.* at 41. The Secretary found that domestic steel production capacity is "stagnant and concentrated" and that capacity for production in integrated facilities has fallen precipitously over the last two decades. *Id*. at 43. As a result, "a further reduction in basic oxygen furnace capacity, which is especially important to the ability of domestic industry to meet national security needs, is inevitable if the present imports continue or increase." *Id.* at 43; *see also id.* at 45. This displacement of domestic production would place the United States in a position where it may be unable to meet demands for national defense and critical industries in a national emergency. *Id*. at 43-44. The Secretary further found that the internal economy was weakened because domestic production is far below demand, whereas domestic utilization rates are well below a sustainable level. *Id.* at 45-47. Given the domestic industry's contraction, the Secretary found that, "[i]f the U.S. requires a similar increase in steel production as it did during previous national emergencies, domestic steel production capacity may be insufficient to satisfy national security needs." *Id*. at 50.

Fourth, the Secretary found that global excess steel capacity is weakening the domestic economy. *Id*. at 51. The Secretary explained that there is "substantial chronic global excess steel production led by China," *id.*, and that several other countries also continue to add production capacity. *Id*. at 53.

In light of these findings, the Secretary recommended that "the President take immediate action by adjusting the level of imports through quotas or tariffs on steel imported into the United States [so as to] keep the U.S. steel industry financially viable and able to meet U.S. national security needs." *Id*. at 58. The Secretary recommended two alternative approaches, each expected to increase the domestic industry's capacity utilization rate to 80 percent. *Id*.

The Secretary proposed that any final proclamation should allow the President to exempt certain countries from any measures based on overriding economic or security interests but that if a country is exempted, corresponding adjustments to the tariff or quotas involving un-exempted countries should be considered, to ensure that the overall imports of steel were sufficiently adjusted to achieve a sustainable capacity utilization. Finally, the Secretary recommended that Commerce be allowed to exclude particular products based on lack of sufficient

U.S. production capacity of comparable products or specific national security considerations. *Id*. at 61.

III. To Address The Threatened Impairment To National Security, The President Issued Multiple Proclamations Adjusting Imports Of Steel

A. Proclamation 9705

After considering the Secretary's report and recommendations, the President issued a proclamation announcing measures on "adjusting imports of steel into the United States." *Proclamation 9705 of March 8, 2018, Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Mar. 15, 2018)(Compl. Exh. 5). Exercising his constitutional and statutory authority, the President established a 25 percent tariff on imports of steel articles, effective March 23, 2018. *Id.* Clauses (1)-(2).

The President acknowledged the Secretary's findings that the present quantities of steel imports and the circumstances of global excess capacity are "weakening our internal economy," resulting in the persistent threat of further closures of domestic steel production facilities and the "shrinking [of our] ability to meet national security production requirements in a national emergency." *Id.* ¶ 2. The President further noted the Secretary's conclusion that, because of these risks and the findings that the United States may be unable to "meet [steel] demands for national defense and critical industries in a national emergency," the present quantities and circumstances of steel imports threaten to impair national security,

as defined in Section 232. *Id.* The President "concur[red] 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 of the United States[.]" *Id.* ¶ 5.

The President considered the Secretary's recommendations regarding the adjustment of steel imports. *Id.* In selecting a tariff as the appropriate measure, the President recognized that the United States "has important security relationships with some countries whose exports of steel articles to the United States weaken our internal economy and thereby threaten to impair the national security," and that there is a "shared concern about global excess capacity, a circumstance that is contributing to the threatened impairment of the national security." *Id.* ¶ 9. He proclaimed that "any country with which [the United States has] a security relationship" could discuss alternative ways to address the threatened impairment of our national security caused by imports from that country. *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 authorized the Secretary to exclude from the tariff "any steel article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality," and further authorized

the Secretary "to provide such relief based upon specific national security considerations." *Id.* Clause (3).

Finally, the President directed the Secretary to monitor imports of steel articles and to inform him of any circumstances "that in the Secretary's opinion might indicate the need for further action" or "that in the Secretary's opinion might indicate that the increase in duty rate provided for in this proclamation is no longer necessary." *Id.* Clause 5(b). In doing so, the President recognized that the measures set forth in the proclamation were "an important first step in ensuring the economic viability of our domestic steel industry." *Id*. Clause 11.

B. Further Adjustments To The Measures Set Forth In Proclamation 9705

After issuance of Proclamation 9705, the President took a number of continuing measures to ensure that the actions taken to adjust imports would achieve the objective of averting the threat of impairment to our national security.

A number of countries, including allies who share our country's concerns about global steel overcapacity, entered discussions with the President, the Secretary and the U.S. Trade Representative (USTR) to provide appropriate assurances concerning steel exports to the United States. The President deferred imposition of measures on Canada, Mexico, Australia, Argentina, South Korea, Brazil, and the countries of the European Union (EU), in the hope of reaching agreement to address the threat to national security posed by steel article imports

from those countries. *Proclamation 9711 of March 22, 2018, Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 13,361 ¶¶ 6-9 (Mar. 28, 2018). The President also welcomed "any country with which we have a security relationship" "to discuss alternate ways to address the threatened impairment of national security." *Id*. ¶ 3. If the United States and that country were able to reach "satisfactory alternative means," the President determined that he might remove or modify import restrictions on that country and "if necessary, adjust the tariff as it applies to other countries as the national security interests of the United States require." *Id*.

The President next announced that the United States had reached agreement in principle with Argentina, Australia, and Brazil concerning alternative means to address the threatened impairment to the national security posed by steel imports from those countries and extended the temporary exemption for products of those countries. *Proclamation 9740 of April 30, 2018, Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 20,683 (May 7, 2018), ¶ 5, Clause (1). The President extended the temporary exemption for products of Canada, Mexico, and the countries of the EU until June 1, 2018. In addition, Proclamation 9740 exempted products of South Korea, based on an agreement between the United States and South Korea regarding a range of alternative measures. *Id*. ¶ 4, Clause (1). After the United States finalized its agreements with Argentina, Australia, and

Brazil concerning alternative measures, the President exempted products from Argentina, Australia, and Brazil from the tariffs on a long-term basis. *Proclamation 9759 of May 31, 2018, Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 25,857 (June 5, 2018).[2]

On August 10, 2018, the President issued another proclamation. *Proclamation 9772 of August 10, 2018, Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 40,429 (Aug. 15, 2018). The President explained that he had received information from the Secretary showing that capacity utilization in the domestic steel industry, while improving, remained below the target capacity utilization level recommended in the Secretary's report. The President explained that the Republic of Turkey, a major steel exporter, was among the countries identified in the Secretary's report that should be subject to a higher tariff in the event the President chose to impose tariffs on only a subset of countries. *Id*. at ¶ 6. "To further reduce imports of steel articles and increase domestic capacity utilization," the President imposed a 50 percent *ad valorem* tariff on steel articles imported from Turkey. *Id.*

[2] The United States did not reach agreement regarding alternative means to address the impairment to national security posed by steel imports with Canada, Mexico, and the EU by June 1, 2018, and the tariff took effect with respect to those countries on that date.

On August 29, 2018, the President issued a sixth proclamation to provide additional potential relief to steel importers. *Proclamation 9777 of August 29, 2018, Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 45,025 (Sept. 4, 2018). Among other things, the President expanded the exclusion process to also allow requests to import steel articles from those countries subject to quotas. *Id.* ¶¶ 3-4, Clauses (1)-(2). The President also authorized the Secretary, in consultation with other officials, to provide relief from the quantitative limitations imposed for certain steel articles exempted from the Section 232 tariff in specific circumstances. *Id.*

C. Proclamation 9980 On Derivative Articles

The President then issued another proclamation to ensure increased domestic capacity utilization. Because the earlier actions had not increased domestic capacity utilization to a sufficient level to protect national security, as identified in the Secretary's report, the President applied the tariffs to apply to certain steel article derivatives. *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) (Compl. Exh. 1). Specifically, the President explained that the "Secretary has informed me that domestic steel producers' capacity utilization has not stabilized for an extended period of time at or above the 80 percent capacity utilization level identified in his report as necessary to remove the

threatened impairment of the national security." *Id.* ¶ 5. The President further noted that "[s]tabilizing at that [80 percent] 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.*

The President explained that, "[a]lthough imports of . . . steel articles have declined since the imposition of the tariffs and quotas, the Secretary has informed me that imports of certain derivatives of aluminum articles and imports of certain derivatives of steel articles have significantly increased since the imposition of the tariffs and quotas." *Id.* The President cited a 33 percent increase of import volumes of steel nails, tacks, drawing pins, corrugated nails, staples and similar derivative articles between June 2018 and May 2019. *Id.* ¶ 7.

Upon review of the Secretary's recommendation, the President found that the "net effect of the increase of imports of these derivatives has been to erode the customer base for U.S. producers of aluminum and steel and undermine the purpose of the proclamations adjusting imports of aluminum and steel articles to remove the threatened impairment of the national security." *Id.*

The President explained that the Secretary had identified derivative articles whose importations undermined the purpose of the Section 232 duties based on three objective criteria, *id.* ¶ 6:

> (a) the aluminum article or steel article represents, on average, two-thirds or more of the total cost of materials of the derivative article;
>
> (b) import volumes of such derivative article increased year-to-year since June 1, 2018, following the imposition of the tariffs in Proclamation 9704 and Proclamation 9705, as amended by Proclamation 9739 and Proclamation 9740, respectively, in comparison to import volumes of such derivative article during the 2 preceding years; and
>
> (c) import volumes of such derivative article following the imposition of the tariffs exceeded the 4 percent average increase in the total volume of goods imported into the United States during the same period since June 1, 2018.

Id.

The President concurred with the Secretary's recommendation that the Section 232 remedy include "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." *Id*. ¶ 7. Specifically, the President agreed 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 . . . and that imports of these derivative articles threaten to undermine the actions taken to address the risk to the national security of the United States." *Id*. ¶ 8.

Consequently, the President "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 . . . steel articles." *Id*. ¶ 9. The President reasoned that this "action is necessary and appropriate to address circumvention that is undermining the effectiveness of the adjustment of imports [under Section 232], and to remove the threatened impairment of the national security of the United States." *Id*.

IV. Plaintiffs' Suits

Plaintiffs allege that they are manufacturers and importers of steel nails and staples, which are derivative products subject to Proclamation 9980. Oman Fastener Compl. ¶¶ 2; 11; Huttig Compl. ¶¶ 2; 11. In Count I of their complaints, they allege that both the President and the Secretary have acted unlawfully by: (1) Commerce providing information and "assessments" to the President without following the investigative and consultative procedures set forth in 15 C.F.R. 705 *et seq*., and by not providing notice and an opportunity to comment on the Secretary's advice to the President, Compl. ¶¶ 96; 98; 101, and (2) that the President violated Section 232 when he issued Proclamation 9980 outside of the 90-day and 15-day time frames set forth in 19 U.SC. § 1862(c)(1), Compl. ¶¶ 94; 104. Plaintiffs allege that Proclamation 9980 "is contrary to Section 232 and therefore void." Compl. ¶ 106.

Plaintiffs seek to enjoin further enforcement of Proclamation 9980 and a refund of any duties paid as a result of Proclamation 9980. Compls. Prayer for Relief.

ARGUMENT

I. Standard Of Review

The Court must dismiss a complaint that does not plausibly give rise to an entitlement to relief. USCIT Rule 12(b)(6); *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A Rule 12(b)(6) motion to dismiss "tests the legal sufficiency of a complaint," *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002), which must be dismissed if it fails to present a "legally cognizable right of action," *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

"In deciding a motion to dismiss, the court must accept well-pleaded factual allegations as true and must draw all reasonable inferences in favor of the claimant," *Kellogg Brown & Root Servs., Inc. v. United States*, 728 F.3d 1348, 1365 (Fed. Cir. 2013), but need not accept legal conclusions contained in the same allegations, *Twombly*, 550 U.S. at 555. Nor is this Court bound to "accept as true allegations that contradict matters properly subject to judicial notice or by exhibit" in ruling on a 12(b)(6) motion. *Secured Mail Sols., LLC v. Universal Wilde, Inc.*, 873 F.3d 905, 913 (Fed. Cir. 2017) (citation omitted).

The Court's review of the actions of the President pursuant to a statute is limited. *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018). "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." *Id*. (citing *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985)).

II. The President Complied With Section 232 When He Applied The Section 232 Tariffs To Steel Derivative Articles

Count I must be dismissed because the President acted within his Section 232 authority by adjusting imports of steel derivatives beyond the 90-day and 15-day time frames set forth in 19 U.S.C. 1862(c). Compl. ¶¶ 103; 105. The language, legislative history, purpose, and long-standing congressional interpretation of the statute require the Court to conclude that the President acted lawfully in issuing Proclamation 9980.

A. The Text Of Section 232 Delegates Broad Continuing Authority To The President

First and foremost, section 232 delegates broad authority to the President to make adjustments to actions taken pursuant to the statute. It requires the President, within 90 days after receiving Commerce's report, to determine the "nature and duration" of the action to be taken. 19 U.S.C. § 1862(c)(1)(A)(ii). If 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." 19 U.S.C. § 1862(c)(1)(A)(ii) (emphasis added).

The statutory terms "nature and duration" are necessarily flexible and broad. Depending on factual circumstances, the President could determine that the "nature and duration" of the import-adjusting action is contingent upon any number of conditions or external events. And the President could determine that the "nature and duration" of the action is dynamic and must be modified as conditions change, as he did here to prevent circumvention of Proclamation 9705.

Similarly, the President is directed to "implement" his selected action within 15 days, should not be read with the finality that plaintiffs appear to ascribe to it. *See* Compl. ¶ 71. Implement means "to provide a definite plan or procedure to ensure the fulfillment" of something. AM. HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, p. 680. The requirement to "implement" action within 15 days does not foreclose the President's authority to modify the action selected, as the President determines is necessary to protect national security. Indeed, the tense of the operative verb – "implement" – is best construed to apply "not only to situations existing and known at the time of enactment, but also prospectively to

things and conditions that come into existence thereafter." *Satey v. JPMorgan Chase & Co*., 521 F.3d 1087, 1092 (9th Cir. 2008) (citation omitted).

The statute contemplates continued monitoring and adjustments to section 232(c) actions, as circumstances change. Section "232([d]) [a]rticulates a series of specific factors to be considered by the President in exercising his authority under [§] 232([c])." *FEA v. Algonquin SNG, Inc.*, 426 U.S. 548, 559 (1976). Many 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.

The legislative history confirms that the President's authority to determine the "nature and duration" of the action is subject to future modification. Representative Cooper, the floor manager for the bill that became the Trade Agreements Extension Act of 1955, explained that "[t]he President would not only retain flexibility as to the particular measure which he deems appropriate to take, but, having taken an action, he would retain flexibility with respect to the continuation, modification, or suspension of any decision that had been made." 101 Cong. Rec. 8160-61 (1955) (comments of Rep. Cooper). The conference report on the same bill stated, with reference to what is now Section 232(c), that

"[i]t is the understanding of all the conferees 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).[3]

The President's historical exercise of Section 232 authority is consistent with that delegation of continuing authority to modify action as circumstances require. Such "long-continued action of the Executive Department" is useful "in determining the meaning of a statute or the existence of a power." *See United States v. Midwest Oil Co*., 236 U.S. 459, 472-73 (1915). In Proclamation 3279, President Eisenhower established the Mandatory Oil Import Program (MOIP), a system of restrictions or quotas on imports of petroleum and petroleum products administered by the Secretary of the Interior. *Presidential Proclamation 3279, Adjusting Imports of Petroleum and Petroleum Products into the United States*, 24 Fed. Reg. 1781 (Mar. 12, 1959). That quota system was modified numerous times as Presidents sought to address growing domestic demand for oil. "From the beginning of the MOIP in 1959 until the removal of quotas in 1973, 24 proclamations were issued, making numerous modifications in the original restrictions." United States Tariff Commission, WORLD OIL DEVELOPMENTS AND

[3] Conference reports are "the most persuasive evidence of congressional intent" because they represent "the final statement of terms agreed to by both houses, next to the statute itself." *Demby v. Schweiker*, 671 F.2d 507, 510 (D.C. Cir. 1981).

U.S. OIL IMPORT POLICIES, T.C. Publication 632 at 44 (1973). And in 1973, President Nixon invoked his Section 232 authority to drastically alter the remedial actions taken on imports of petroleum products. He suspended existing quotas on oil imports and provided for a "gradual transition from the existing quota method of adjusting imports" to a "system of fees" to be paid by oil importers for import licenses. *Proclamation 4210, Modifying Proclamation 3279 Relating to Imports of Petroleum and Petroleum Products Through a System of License Fees and Providing for Gradual Reduction of Levels of Imports of Crude Oil, Unfinished Oils and Finished Products*, 38 Fed. Reg. 9,645 (Apr. 19, 1973).

The President's application of the tariffs to derivative steel articles, as a response to changing circumstances of imports threatening to impair our national security, is consistent with the statutory language, the legislative history of Section 232, and this long-standing practice.

B. The 1988 Amendments Did Not Withdraw This Long-Standing Delegation Of Authority To Modify Action

Although their complaints do not reference the interlocutory opinion in *Transpacific Steel, LLC v. United States*, Slip op. 19-142, we explain why that opinion does not support plaintiffs' claim that the President violated the statute by extending the tariffs to steel and aluminum article derivatives. In that decision, a three-judge panel of this Court preliminarily determined that the 90-day and 15-day windows in Section 1862(c)(1)(B) operated as temporal limits on the

President's authority to take action to adjust imports and that the President could not make a further adjustment by temporarily increasing the tariff on steel articles from Turkey. That decision is neither final nor binding on this Court. *See Algoma Steel Corp. v. United States*, 865 F.2d 240, 243 (Fed. Cir. 1989). Further, as we demonstrate below, the opinion rested on an erroneous understanding of the 1988 statutory amendments.

In preliminarily concluding that section 1862(c)(1) cabins the President's authority to act to a 15-day window, the *Transpacific* panel relied on the amendments to Section 232 imposed by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418. Slip op. 19-145 at 10-11. That legislation amended Section 232 to, among other things, shorten the time period for the investigation and to set time frames for presidential concurrence and implementation. Nothing in the 1988 amendments' text or legislative history, however, suggests that Congress intended to alter, let alone withdraw, its long-standing delegation of authority to take continuing action. This Court should not infer that Congress did so *sub silentio.* Any contrary understanding of the deadlines imposed by the 1988 act conflates *when* the President must take action with the *nature and duration of action* that the President is authorized to take.

The circumstances leading to passage of the 1988 amendments make clear Congress' desire to prevent *inaction,* not to curtail further action. Following a

March 1983 petition, the Secretary found, in February 1984, that imports of machine tools threatened to impair the national security. President Reagan took no action until May 1986, when he announced that the United States would seek to enter into voluntary restraint agreements. Over six months later, in December 1986, the President announced that the United States had entered agreements with Japan and Taiwan. *See generally* U.S. General Accounting Office, INTERNATIONAL TRADE: REVITALIZING THE U.S. MACHINE TOOL INDUSTRY (July 1990).

Congressional testimony reflects frustration by members of Congress and the public about what they perceived as undue delay by President Reagan in taking action. Speaker of the House Wright commented that "[m]any of our trade problems can be directly traced to the delays, the abuses of discretion, and ill-considered policy decisions by those officially appointed to carry out American policy. One of the worst delays was the machine tools case." Hearings Before the Committee on Ways and Means on H.R. 3 Trade and International Economic Policy Other Proposals Reform Act, 100th Congr. (1987). The Honorable Barbara Kennelly further testified to the concern that, absent a deadline for initial action, the President would "leave these cases to languish indefinitely," citing the "very real" problem of the machine tool case. *See* Hearings Before the Subcommittee on Trade of H. Comm. On Ways & Means, 99th Cong., 2d Sess. 1282 (1986).

Against this backdrop, Congress enacted new requirements to prevent the President from indefinitely delaying action. Section 1862(c)(1)'s 90-day and 15-day time frames are ways in which Congress exerted this pressure. Other amendments reflect a similar objective. For example, the President must present a written report of his reasons for action or inaction to Congress. H.R. Conf. Rep. 100-576, 1988 U.S.C.C.A.N. 1547, 1745 (1988). In these and other ways, Congress was focused on prompting the President to begin to undertake any necessary steps required to protect national security.

In light of the foregoing, there is no basis to find that the 1988 amendments withdrew the President's ability to modify measures taken to address the threat of impairment. *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). Congress' overall desire was for the President to be proactive in addressing threats of impairment to the national security, and it recognized that the President was best positioned to determine the "nature and duration" of the measure required to address the threat. Given there is no indication that Congress intended to do so, the 15-day timeframe should not be

read to withdraw the President's authority to modify action once identified. *See* Compl. ¶¶ 72; 103-105.

C. A Narrow Construction Of Section 1862(c)(1)'s 90-Day And 15-Day Windows Are Inconsistent With The Statute's National Security Purpose

Construing Section 232 to preclude continuing action would prevent the President from achieving the very purpose of the statute. The Court must interpret the statutory text "in light of the purposes Congress sought to serve," *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979), and it must avoid interpretations that "cannot be rationalized with the language, purpose, and legislative history" of the statute. *Pitsker v. Office of Pers. Mgmt*, 234 F.3d 1378, 1383-84 (Fed. Cir. 2000).

Section 232 is a congressional mandate to ensure ongoing and appropriate adjustments to imports to protect national security. *Algonquin*, 426 U.S. at 561. Indeed, the Supreme Court has cautioned that Section 232 should not be construed in a way that would cabin the President's ability to address the identified threat to national security. *Id*. at 561-62 ("Unless one assumes, and we do not, that quotas will always be a feasible method of dealing directly with national security threats posed by the 'circumstances' under which imports are entering the country, limiting the President to the use of quotas would effectively and artificially prohibit him from directly dealing with some of the very problems against which [the statute] is directed.")

That the statute also involves foreign affairs and national security cautions against an inflexible reading of these provisions. "Statutes granting the President authority to act in matters touching on foreign affairs are to be broadly construed . . . ." *B-West Imps., Inc. v. United States*, 75 F.3d 633, 636 (Fed. Cir. 1996). The Federal Circuit has advised that statutes of this nature, which delegate authority to the President in matters of international affairs should not be "hemmed in or cabined, cribbed, confined by anxious judicial blinders." *Florsheim Shoe Corp.*, 744 F.2d 787, 793 (Fed. Cir. 1984) (citation and internal quotation omitted). A broad construction of the statute is owed in no small part because "legislation conferring upon the President discretion to regulate foreign commerce invokes, and is reinforced and augmented by, the President's constitutional power to oversee the political side of foreign affairs." *Am. Ass'n of Exps. & Importers-Textile & Apparel Grp.*, 751 F.2d 1239, 1248 (Fed. Cir. 1985). Reading section 1862(c)(1)(B)'s 15-day window to preclude the President from addressing, through additional or modified action, the threat to the national security that he has *already determined* exists would prevent the President from both achieving the statutory objective and exercising his independent authority in matters of foreign affairs and national security. Absent evidence that Congress intended this result (and there is none), the Court should not adopt this interpretation.

D. The Court Should Avoid An Interpretation That Converts The Time-Deadlines Into Impermissible Sanctions

Plaintiffs contend that the President is "not authorized under Section 232" to take action outside of the 90-day and 15-day time frames in Section 1862(c)(1)(A) and (B). Compl. ¶ 72. In *Transpacific*, the panel appeared to adopt this interpretation of Section 1862(c)(1) because, it claimed, the deadlines would otherwise be "meaningless" "if the President has the power to continue to act, to modify his actions, beyond those deadlines." Slip. Op. 19-145 at 11 n. 13. This assumes that the only possible purpose of the time periods is to extinguish the President's power to act. On the contrary, all evidence demonstrates that the time limits were intended to motivate the President to take initial action quickly. Such an interpretation gives meaning to these time-related provisions without inappropriately foreclosing further action as the President may deem necessary.

Indeed, the Court may not assume that the time limits preclude the President from continuing to take action beyond those deadlines. The United States Code is replete with deadlines requiring officials to act within a specified time frame. The Supreme Court has long held that statutory deadlines, while directory, do not necessarily operate to deprive the official of the power to act under the statute: "If a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *Barnhart v. Peabody Coal Co*., 537 U.S. 149, 159 (2003)

(citing *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993)).

The Federal Circuit has consistently held that statutory deadlines are directory, not mandatory, unless Congress imposes consequences for failing to meet the deadlines. *E.g.*, *Hitachi Home Elecs., Inc. v. United States*, 661 F.3d 1343, 1345-46 (Fed. Cir. 2011); *Gilda Indus., Inc. v. United States*, 622 F.3d 1358, 1365 (Fed. Cir. 2010) ("[A]bsence of a consequence [in the statute] indicates . . . that [the relevant subsection] is a directory provision and not 'mandatory.'"); *Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563, 566 (Fed. Cir. 1989) ("Even though the statute includes a 90 day time frame for the Customs Service to act, the lack of consequential language in the latter part of section (d) if the Customs Service does not meet that time frame leads us to conclude that Congress intended this part of section (d) to be only directory"). Section 1862(c)(1)(B) directs the President to implement action. If the Court were to conclude that the timelines in Section 1862(c)(1) act as a bar to modifying action, the Court would inappropriately convert the time deadlines into a coercive sanction on the President, without any evidence that Congress intended that as a consequence.

E. In Light Of The Broad Construction Owed To The Statute, The President Complied With All Procedural Requirements

In sum, the President complied with all procedural requirements. He concurred with the Secretary's finding and proclaimed the action to be taken

within 90 days and he implemented that action within 15 days. *Proclamation 9705*, 83 Fed. Reg. at 11,626, ¶ 5. He explained that the "nature" of his chosen action was a tariff on imports of steel articles. The President announced that this was "an important first step in ensuring the economic viability of our domestic steel industry." *Id.* ¶ 11. At the outset, given the shifting nature of the threat, the President anticipated that circumstances might require adjustment of the measures he selected in order to ensure that they adequately addressed the threat to our national security. To that end, the President directed the Secretary to monitor imports of steel articles and to review the status of such imports with respect to the national security, as well as to inform him of any circumstances "that in the Secretary's opinion might indicate the need for further action by the President under Section 232." *Proclamation 9705*, 83 Fed. Reg. at 11,628, Clause 5(b).

The Secretary complied with the President's direction by providing him with updated information showing that imports volumes of steel nails, tacks, drawing pins, corrugated nails, staples and similar derivatives increased over the prior year. *Proclamation 9980*, 85 Fed. Reg. at 5,282, ¶ 7. The Secretary further offered his expert assessment that foreign producers of derivative articles were increasing shipments to "circumvent the duties on . . . steel articles imposed" through Proclamation 9705. *Id.* ¶ 8.

Based upon these evolving circumstances, the President adjusted the initial action – tariffs – to extend to imports of certain derivatives of steel articles. The statute authorizes the President to modify the measures he has selected to ensure that they thoroughly address the threatened impairment of national security. It is no defect that the Secretary's investigations covered steel and aluminum articles and not derivatives of steel or aluminum articles, or that Proclamation 9705 did not cover derivative steel articles. Compl. ¶¶ 40; 66-67. The President is authorized to adjust imports of derivatives of articles, even when the Secretary's investigation and report addressed only the article itself. The President must determine the nature and duration of the action that must be taken "to adjust the imports of the articles *and its derivatives*." 19 U.S.C. § 1862(c)(1)(A)(ii) (emphasis added). The entirety of the President's actions is consistent with the procedures set forth in Section 232.

III. The Secretary Was Not Required To Conduct Another Investigation, Or Follow Statutory Procedures For Investigations, In Order For The President To Adjust Imports Of Steel Article Derivatives

Plaintiffs further fail to state a claim that the Secretary failed to comply with the requirements of Section 232. Compl. ¶ 100. As we explain, the Secretary's provision of facts and recommendations to the President, for the purpose of assisting the President in determining whether the measures the President selected and implemented under Section 232 should be modified or adjusted, is not subject

to judicial review. Further, that the Secretary did not initiate and conduct a new investigation into steel article derivatives in no way invalidates or voids the President's lawful exercise of discretion to adjust the measures he selected in Proclamation 9705. *See* Compl. ¶¶ 68; 100.

Plaintiffs do not claim that Commerce's "information" or "assessments" are final agency action that is independently subject to judicial review; nor could they. For agency action to be "final," two conditions must be satisfied: (1) "the action must mark the 'consummation' of the agency's decision-making process -- it must not be of a merely tentative or interlocutory nature;" and (2) "the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997).

By contrast, an agency action is not "final" if it is "purely advisory" and does not "affect[] the legal rights of the parties." *Franklin v. Massachusetts*, 505 U.S. 788, 798 (1992). It is well-settled that "actions taken to provide information and data to aid in the making of a presidential decision do not qualify as 'final agency action.'" *Int'l Refugee Assistance Project v. Trump*, 373 F. Supp. 3d 650, 663 (D. Md. 2019). The Secretary's provision of information and "assessments" concerning the impact of shipments of steel derivative articles on the national security, shared with the President, fall squarely into this category. Compl. ¶¶ 95; 96.

Agency action is "purely advisory" when it does not "contain terms or conditions that circumscribe the President's authority to act." *Michael Simon Design v. United States*, 609 F.3d 1335, 1340 (Fed. Cir. 2010); *see also Motions Systems, Corp. v. Bush*, 437 F.3d 1358, 1362 (Fed. Cir. 2006) (*en banc*) (explaining that the United States Trade Representative's "actions were analogous to those of the Secretary in *Franklin*, a case in which the Secretary's report was 'like a tentative recommendation' or 'the ruling of a subordinate official' because it was the President who carried the responsibility of transmitting the final report to Congress."); *United States Ass'n of Imps. of Textiles & Apparel v. United States*, 413 F.3d 1344, 1349 (Fed. Cir. 2005) (finding an agency's recommendation whether to pursue further negotiations with a foreign country was not final agency action).

Instead, plaintiffs allege that, without conducting another investigation into derivatives, the Secretary's act of providing information and assessments to the President "cannot form the basis of an action taken by the President under Section 232." Compl. ¶ 101. But, as we explained in Section II, this misunderstands the scope of the President's authority. The statute places the responsibility to determine the "nature and duration" of the relief to be provided on the President, "in his judgment." 19 U.S.C. § 1862(c). Aside from their contention that the President lacks authority to act outside of the 90-day and 15-day windows,

plaintiffs identify no law that requires the Secretary to conduct another investigation, or follow the statutory procedures relating to an investigation, before it may provide the President with advice and assessments of the efficacy of ongoing measures or for the President to act to ensure that his selected measures are not being circumvented. Section 232 contains no such requirement.

Plaintiffs do not dispute that the Secretary complied with Section 1862(b) and its implementing regulations when it conducted its investigation into imports of steel articles. Compl. ¶¶ 28-34. Section 1862(b)(2)(A) requires notice of an investigation, which the Secretary provided. *Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel*, 82 Fed. Reg. 19,205 (Dep't of Commerce Apr. 26, 2018). "[I]f it is appropriate," Commerce shall "hold public hearings or otherwise afford interested parties an opportunity to submit information and advice relevant to [the] investigation." 19 U.S.C. § 1862(b)(2)(A) (emphasis added). Commerce did that as well. *See* Compl. ¶ 29. Neither the statute nor Commerce's implementing regulations require an opportunity for public comment on the President's actions or require holding a public hearing before the President may impose additional measures to protect national security.

Section 1862(b)'s requirements do not apply to advice and information subsequently provided to the President. Nonetheless, plaintiffs contend that the

Secretary failed to comply with statute when the Secretary provided factual assessments and advice to the President in administering the measures selected. *See* Compl. ¶¶ 95-98.[4] The statutory requirements for an investigation report, consultations with other officials, and the opportunity for public comment all fall under the statutory subsection governing the "investigation by [the] Secretary of Commerce to determine effects on national security of imports of articles." 19 U.S.C. § 1862(b). By its own terms, Section 1862(b) does not govern actions taken by the Secretary (whether characterized as advice, recommendations, or assessments) concerning circumvention of the measures selected by the President after the conclusion of the Secretary's investigation.

Although the statute is not susceptible to the reading that plaintiffs propose, there are good reasons why conducting another investigation into steel article derivatives would not further the statutory purpose. As we previously explained, *supra* p. 18-31, the President possesses authority to take continuing action to ensure that the remedies he selected are effective. Congress recognized that imports of derivatives might circumvent measures on imports of articles and authorized the President, in his sole judgment, to determine the nature and duration

[4] Part 705 of Commerce's implementing "set forth the procedures by which the Department shall commence and conduct an investigation to determine the effect on the national security of the imports of any article." 15 C.F.R. § 705.2. The regulations mirror the statutory requirements set forth in 19 U.S.C. § 1862(b).

of the action needed to address the threat, including the inclusion of imports of derivatives in the selected measures. Given this understanding, reading into the statute a requirement that the Secretary must undertake another investigation on steel article derivatives would prevent the President from monitoring the effect of his selected remedies and ensuring that they have their intended effect; that frustrates the statutory purpose.

Contrary to the plaintiffs' implicit assumption, the statute does not require the Secretary to notify the public that imports of steel article derivatives could be subject to adjustment under Section 232. Compl. ¶¶ 30; 98-99. This claim fails for two reasons. First, the statute notifies the public that the President may adjust the imports of derivatives, even if derivatives themselves are not the article subject to investigation. 19 U.S.C. § 1862(c)(1)(A). Citizens are "charged with knowledge of the law." *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 384-85 (1947); *Sandel v. Office of Pers. Mgmt.*, 28 F.3d 1184, 1187-88 (Fed. Cir. 1994). Here, Section 232 authorizes the President to adjust imports of derivatives of an article, including when the Secretary's report of investigation covers only the article itself.

Indeed, the term "derivatives of articles" appears only in sections 1862(c)(1)(A)(ii) and (c)(1)(B), which relate to the President's acts and responsibilities; the term does not appear in section 1862(b), the provision governing the Secretary's role and responsibilities. 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 (1955).

In subsequent statutory amendments, Congress retained this language authorizing the President to adjust imports of "such article and its derivatives." Thus, the Secretary's investigation into steel articles was not required to encompass derivatives in order for the President to adjust the imports of steel article derivatives. The Secretary was not required to notify the public of the possibility that steel article derivatives might be included in the President's measures, nor was it required to hold a hearing or receive comments specifically on derivatives. The focus of the Secretary's investigation and report is the national security effects "of imports of articles." 19 U.S.C. § 1862(b).

For these reasons, plaintiffs' contention that the Secretary, in providing updated information to the President that imports of steel article derivatives were

having the effect of circumventing the measures selected by the President, did not comply with the statutory procedures for an investigation into an article, fails as a matter of law.

CONCLUSION

For these reasons, we respectfully request that the Court dismiss Count I of the plaintiffs' complaints.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Standard Chambers Procedure ¶ 2(B)(2), I hereby certify that this brief complies with the word-count limitation set forth in Standard Chambers Procedure ¶ 2(B)(1). In making this certification, I have relied upon the word count function of the Microsoft Word processing system used to prepare this brief. According to the word count, this brief contains 8,293 words.

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