NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, KURT ORBAN PARTNERS, LLC,
Plaintiffs-Appellants

v.

UNITED STATES, MARK A. MORGAN, ACTING COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION,
Defendants-Appellees

2019-1727

Appeal from the United States Court of International Trade in No. 1:18-cv-00152-CRK-JCG-GSK, Judge Claire R. Kelly, Judge Gary S. Katzmann, Judge Jennifer Choe-Groves.

Decided: February 28, 2020

ALAN MORRISON, George Washington University Law School, Washington, DC, argued for plaintiffs-appellants. Also represented by STEVE CHARNOVITZ; DONALD CAMERON, JR., JULIE MENDOZA, BRADY MILLS,

R. WILL PLANERT, Morris, Manning & Martin, LLP, Washington, DC; GARY N. HORLICK, Law Offices of Gary N. Horlick, Washington, DC; TIMOTHY MEYER, Vanderbilt Law School, Nashville, TN.

TARA K. HOGAN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendants-appellees. Also represented by JOSEPH H. HUNT, JEANNE DAVIDSON, STEPHEN CARL TOSINI, JOSHUA E. KURLAND.

ILYA SHAPIRO, Cato Institute, Washington, DC, for amicus curiae Cato Institute.

JEFFREY S. GRIMSON, Mowry & Grimson, PLLC, Washington, DC, for amicus curiae Basrai Farms. Also represented by BRYAN CENKO, JILL CRAMER, KRISTIN HEIM MOWRY; PEGGY CLARKE, Law Offices of Peggy A. Clarke, Washington, DC.

CHARLES ALAN ROTHFELD, Mayer Brown LLP, Washington, DC, for amicus curiae United States Steel Corporation. Also represented by MATTHEW MCCONKEY.

ALAN H. PRICE, Wiley Rein, LLP, Washington, DC, for amici curiae American Iron and Steel Institute, Steel Manufacturers Association. Also represented by MAUREEN E. THORSON, JOSHUA S. TURNER, CHRISTOPHER B. WELD.

Before TARANTO, SCHALL, and STOLL, *Circuit Judges.*

TARANTO, *Circuit Judge.*

On March 8, 2018, the President of the United States imposed a 25-percent tariff on certain imported steel products, exercising authority granted to the President by section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862, a provision that traces its lineage to 1955. *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 552 (1976). The American Institute for International Steel, Inc.; Sim-Tex, LP; and Kurt Orban Partners, LLC (collectively, AIIS) sued the United States in the United States Court of International Trade, arguing that the statute is unconstitutional on its face because the authority it confers is so unconstrained as to constitute legislative power that is Congress's alone under Article I of the Constitution and so cannot be delegated. The Court of International Trade rejected the challenge, concluding that the issue is controlled by the portion of the Supreme Court's *Algonquin* decision that declares section 232 not to violate the nondelegation doctrine. *American Inst. for Int'l Steel, Inc. v. United States*, 376 F. Supp. 3d 1335, 1339–45 (Ct. Int'l Trade 2019). We agree, and we therefore affirm.

I

A

Section 232 begins with mention of two other statutory provisions, codified at 19 U.S.C. §§ 1821, 1351, that grant the President certain discretionary

authority regarding tariffs on goods from foreign nations with which the President might enter into executive agreements. *See American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414–15 (2003) (noting longstanding use and approval of such agreements). Section 1821 states that the President "may," for any of the broad trade-related purposes identified in 19 U.S.C. § 1801, enter into trade agreements and, among other things, raise or lower duties (within limits) to carry out such agreements. 19 U.S.C. § 1821. Section 1351, which dates to 1934, *see* Tariff Act of 1934, ch. 474, 48 Stat. 943, confers similar authority. 19 U.S.C. § 1351. This court's predecessor, the Court of Customs and Patent Appeals, upheld section 1351 against a delegation-doctrine challenge in *Ernest E. Marks Co. v. United States*, 117 F.2d 542 (CCPA 1941).[1]

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[1] Congress also conferred discretionary tariff authority on the President in 19 U.S.C. §§ 2251–2254, providing for action based on a wide range of considerations, including national security, *id.*, § 2253(a)(2)(I). *See Silfab Solar, Inc. v. United States*, 892 F.3d 1340 (Fed. Cir. 2018) (holding that certain presidential determinations under that authority, the so-called "escape clause," are not judicially reviewable). The Supreme Court has pointed to other grants of authority to the President (some of it discretionary), from the earliest Congresses, involving import or other measures involving foreign commerce or exactions. *See*, *e.g.*, *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 322–24 (1936) (historical recitation); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 422 (1935); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 402 (1928); *B. Altman & Co. v. United States*, 224 U.S. 583 (1912) (applying Tariff Act of 1897, § 3, 30 Stat. 151, 203); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 683–92 (1892). We do not rule on what legal significance those grants, and Supreme Court rulings about them, would have in the absence of *Algonquin*.

The statute at issue in the present case, section 232, both restricts and adds to the authority granted in 19 U.S.C. §§ 1821 and 1351. It bars any reduction or elimination of duties under those provisions "if the President determines that such reduction or elimination would threaten to impair the national security." 19 U.S.C. § 1862(a). And, in subsections (b) through (d), section 232 provides the President with authority to "adjust the imports" of an article if the Secretary of Commerce, after a process of consultation and information-seeking, "finds that [the] article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A).

The statutory process for an adjustment based on national security begins with the Secretary of Commerce performing an "appropriate investigation to determine the effects on the national security of imports of the article." *Id.*, § 1862(b)(1)(A). The statute requires consultation with the Secretary of Defense and other appropriate officers of the United States and, if appropriate, public hearings or receipt of comments from interested persons. *Id.*, § 1862(b)(2)(A). When the investigation is completed, the Secretary of Commerce must provide the President with findings and recommendations for action or inaction. *Id.*, § 1862(b)(3)(A). If the Secretary finds that importation of the article threatens to impair the national security, the President then must determine whether he concurs with the Secretary's findings and, if so, what action to adjust

imports, in nature and duration, is necessary to avoid the threat to the national security. *Id.*, § 1862(c)(1)(A).

One possible action is "the negotiation of an agreement which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security." *Id.*, § 1862(c)(3)(A). If an agreement is not negotiated within 180 days, however, or if an agreement that is reached is not being carried or is ineffective in eliminating the threat, the President "shall" take other actions he deems necessary. *Id.* The statute thus provides leverage, in the form of tariff adjustments, for the President to use in negotiating international executive agreements, much as do 19 U.S.C. §§ 1821 and 1351, though with a specific focus on national security.

Subsection (d) sets forth a number of "relevant factors" to which Secretary and the President shall "give consideration" in making their determinations regarding national security. *Id.*, § 1862(d). These factors include the "domestic production needed for projected national defense requirements," the "capacity of domestic industries to meet such requirements," and the "requirements of growth of such domestic industries." *Id.* They include, as well, "the impact of foreign competition on the economic welfare of individual domestic industries" and whether the "weakening of our internal economy may impair the national security." *Id.* The statute enumerates other considerations as well, but

the enumeration is set forth "without excluding other relevant factors." *Id.*[2]

B

1

On April 19, 2017, pursuant to section 1862, the Secretary of Commerce opened an investigation into the impact of steel imports on the national security. On April 26, 2017, the Commerce Department published a notice in the Federal Register soliciting public comments and setting a public hearing for May 24, 2017. 82 Fed. Reg. 19,205 (Apr. 26, 2017). On January 11, 2018, the Secretary provided the President with a report of findings and recommendations. U.S. Dep't of Commerce, Bureau of Industry and Security, *The Effect of Imports of Steel on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended* (2018) *(Steel Report).*

The Secretary examined a variety of steel mill products: carbon and alloy flat products, carbon and

[2] Congress has elsewhere recognized connections between economic interests and national security. *See*, *e.g.*, 50 U.S.C. § 3043(b) (annual "national security strategy report" must address "economic . . . elements of the national power of the United States"); 8 U.S.C. § 1189(d)(2) (" '[N]ational security' means the national defense, foreign relations, or economic interests of the United States.") (quoted in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 9 (2010)); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 375–76 (2000) (holding State's measure preempted by federal statute that conferred on the President "discretion to exercise economic leverage . . . with an eye toward national security").

alloy long products, carbon and alloy pipe and tube products, carbon and alloy semi-finished products, and stainless products. *Id.* at 21–22. He found that steel is important to "national security" because a variety of steel products are needed to support the country's defense and to supply industries that are critical to minimum operations of the economy and government. *Id.* at 23.[3]

The Secretary took account of a conclusion the Secretary of Defense communicated during the investigation and stated as follows in a post-report letter: "[T]he U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production. Therefore, DoD [the Department of Defense] does not believe that the findings in the reports impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements." Letter from James Mattis, Secretary of Defense, to Secretary of Commerce (Feb. 22, 2018); J.A.

[3] The Secretary noted that, while neither section 232 nor its implementing regulations, 15 C.F.R. Part 705, defines "national security," the term includes, at least, "national defense." *Steel Report* at 13. He also cited the conclusion of an October 2001 Commerce report prepared under section 232 that " 'national defense' includes both defense of the United States directly and the 'ability to project military capabilities globally' " and encompasses the general security and welfare of certain industries critical to the minimum operations of the economy and government. *Id.* (citing U.S. Dep't of Commerce, Bureau of Export Administration, *The Effect of Imports of Iron Ore and Semi-Finished Steel on the National Security* (2001) (*2001 Report*)). The 2001 Report, for its part, notes that earlier section 232 investigations did not include critical industries within the scope of "national security." *2001 Report* at 5.

3056. That statement does not expressly refer to future DoD steel needs or to the total demand needed for domestic steel plants to sustain, over time, operations that might be needed for future national-security (including defense) needs. The Secretary of Commerce broadened the economic analysis. He found that no company could profitably run a steel mill to supply only defense needs and that there were already no domestic suppliers for some kinds of steel products needed by DoD. *Steel Report* at 23, 45–46. To meet DoD's varied needs, including possible future needs, the Secretary determined, domestic steel mills must attract sufficient commercial business. *Id.* at 23, 46.

The Secretary found that many domestic steel mills had been driven out of business due to declining steel prices, global overcapacity, and unfairly traded steel, *id.* at 33, and that remaining steel mills were financially distressed, *id.* at 37–48. Relying on industry analysts, the Secretary found that, to remain profitable, steel mills generally need to operate at a utilization rate—the amount of production expressed as a percentage of the maximum production capacity—of 80 percent or greater. *Id.* at 47–48. The Secretary found that the average utilization rate was 74 percent for the most recent six-year period and that in 2016 the utilization rate was only 69.4 percent. *Id.* at 47.

The Secretary concluded that the then-current importation of steel threatened the national security by jeopardizing domestic steel production. *Id.* at 56–57. To alleviate this threat, the Secretary recommended immediately implementing tariffs or quotas in an amount

sufficient to enable domestic steel plants to operate at utilization levels of at least 80 percent. *Id.* at 58. The Secretary determined that such a utilization rate could be achieved by reducing steel imports from 36 million to 23 million metric tons. *Id.* The Secretary presented several alternatives to achieve that reduction: an import quota limiting imports of steel to 63 percent of 2017 levels; a tariff of 24 percent on all steel imports, no matter the country of origin (on top of already-applicable antidumping or countervailing duties); or a tariff of 53 percent for steel imports from twelve countries (again, on top of already-applicable antidumping or countervailing duties). *Id.* at 59–60.

2

On March 8, 2018, the President issued Proclamation 9705, in which he concurred with the Secretary's findings and imposed a 25-percent tariff, effective March 23, 2018, on all steel articles from all countries—except for Canada and Mexico, which involved recited special circumstances and were already engaged in negotiations with the United States. 83 Fed. Reg. 11,625, 11,626–27 (Mar. 15, 2018). The President determined that the tariff was "necessary and appropriate" and would help "ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense." *Id.* at 11,626. The President also welcomed any country with which the United States has a security relationship to "discuss . . . alternative ways to address the threatened impairment of the national security caused by imports

from that country." *Id.* The President stated that, upon reaching an alternative arrangement with a country, he may "remove or modify the restriction on steel articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries." *Id.*

On March 22, 2018, the President issued Proclamation 9711, temporarily exempting Australia, Argentina, South Korea, Brazil, and the European Union from the tariff. 83 Fed. Reg. 13,361 (Mar. 28, 2018). The President determined that the United States has an important security interest with each of the exempted sovereigns and that—in light of ongoing negotiations with each—the appropriate way to address the threat to the national security was to continue discussions and increase strategic partnerships, "including those with respect to reducing global excess capacity." *Id.* at 13,362. The exemption was to last only until May 1, 2018, thereby encouraging the conclusion of satisfactory agreements. *Id.* at 13,362–63.

On April 30, 2018, the President issued Proclamation 9740, reporting that the United States had successfully concluded negotiations with South Korea on an alternative means to address the threat to the national security. 83 Fed. Reg. 20,683 (May 7, 2018). The countries agreed to a "range of measures," including a quota restricting the quantity of articles imported from South Korea. *Id.* The President therefore excluded South Korea from the tariff. *Id.* at 20,684. In the same Proclamation, the President exempted Argentina, Australia, and Brazil, which had reached an agreement in

principle with the United States, and postponed until June 1, 2018, the effective date of applicability to Canada, Mexico, and the EU, which were engaged in negotiations sufficiently promising to warrant that postponement. *Id.* at 20,684–85.

On May 31, 2018, the President issued Proclamation 9759, announcing that the United States had agreed with Argentina, Australia, and Brazil on alternative means to reduce excess steel production and capacity. 83 Fed. Reg. 25,857 (June 5, 2018). In light of those agreements, the President determined that steel imports from those countries no longer threaten the national security and, therefore, imports from those countries would be excluded from the tariff. *Id.* at 25,858.

On August 10, 2018, the President issued Proclamation 9772, stating that imports of steel had not declined as much as anticipated and that capacity utilization had not increased to the target level. 158 Fed. Reg. 40,429 (Aug. 15, 2018). Noting that the Secretary's January report recommended applying higher tariffs to a set of countries that includes Turkey (one of the twelve identified by the Secretary, *Steel Report* at 60), the President determined that it was necessary and appropriate to increase the tariff rate to 50 percent for steel articles imported from Turkey. 158 Fed. Reg. at 40,429–30.

C

On June 27, 2018, AIIS filed a complaint with the Court of International Trade, asserting—without contradiction from the United States—that the Institute's members (including the two other plaintiffs) are adversely affected by the tariffs on imported steel imposed pursuant to section 232. AIIS did not allege a failure to adhere to required procedures or action beyond the statutory constraints. AIIS stated a single claim: that section 232, on its face, is an unconstitutional delegation of legislative power to the President. AIIS sought an injunction against enforcement of the tariff increase imposed under the section. The Court of International Trade had jurisdiction under 28 U.S.C. § 1581(i)(2), (4), and a three-judge panel was designated to hear AIIS's constitutional challenge under 28 U.S.C. § 255.

AIIS filed a motion for summary judgment, and the government moved for judgment on the pleadings. The Court of International Trade held that the Supreme Court's decision in *Algonquin* requires rejection of the constitutional challenge, and it therefore granted the government's motion. *American Institute for Int'l Steel*, 376 F. Supp. 3d at 1339–45. Judge Katzmann, while agreeing that *Algonquin* is controlling, expressed doubt that section 232 should be deemed constitutional in the absence of *Algonquin*. *American Institute for Int'l Steel*, 376 F. Supp. 3d at 1345–52. The court entered final judgment on March 25, 2019.

AIIS filed a timely notice of appeal that same day. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

II

On appeal, AIIS urges that *Algonquin* does not control this case and that section 232 is facially unconstitutional because it improperly delegates legislative authority to the President. We review questions of law de novo. *Princess Cruises, Inc. v. United States*, 201 F.3d 1352, 1357 (Fed. Cir. 2000). Agreeing with the Court of International Trade that *Algonquin* controls, we affirm without deciding what ruling on the constitutional challenge would be proper in the absence of *Algonquin*.

A

In *Algonquin*, the Court considered a challenge to the President's authority to adjust imports using license fees. Pursuant to section 232, the President had issued a proclamation increasing license fees imposed on certain petroleum products. *Algonquin*, 426 U.S. at 553–55. Several states, along with other complainants, sued the Secretary of the Treasury, alleging that section 232 did not give the President authority to adjust imports using license fees and that, if so read, the provision would be an unconstitutional delegation of legislative authority.[4] *Id.* at 556. The Court upheld the license fees. *Id.* at 558–71.

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[4] At the time of *Algonquin*, section 232 gave the Secretary of the Treasury the responsibilities now given to the Secretary of

Decisively for current purposes, the Court began by rejecting the "suggestion that [it] must construe § 232(b) narrowly in order to avoid a serious question of unconstitutional delegation of legislative power." *Id.* at 558–59 (internal quotation marks omitted). The Court ruled: "Even if § 232(b) is read to authorize the imposition of a license fee system, the standards that it provides the President in its implementation are clearly sufficient to meet any delegation doctrine attack." *Id.* at 559.

Specifically, the Court quoted its ruling in *J. W. Hampton, Jr., & Co. v. United States* that there is no forbidden delegation if "Congress shall lay down by legislative act an intelligible principle to which the [President] is directed to conform," 276 U.S. 394, 409 (1928), and concluded that "[s]ection 232(b) easily fulfills that test." 426 U.S. at 559. The Court explained that section 232 "establishes clear preconditions to Presidential action"—the Secretary's finding that an article is being imported in such quantities and under such circumstances as to threaten the national security—and that "the leeway that the statute gives the President in deciding what action to take in the event the preconditions are fulfilled is far from unbounded." *Id.* The Court added that the President "can act only to the extent 'he deems necessary to adjust the imports

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Commerce—to whom Congress transferred the responsibilities effective January 2, 1980, as part of an Executive Branch reorganization. *See* Reorganization Plan No. 3 of 1979—Reorganization of Functions Relating to International Trade, § 5(a)(1)(B), 93 Stat. 1381, 1383.

. . . so that such imports will not threaten to impair the national security'" and that the statute "articulates a series of specific factors to be considered by the President." *Id.* (quoting 19 U.S.C. § 1862(b) (1975)); *see also* Trade Act of 1974, Pub. L. No. 93-618, § 127(d), 88 Stat. 1978, 1993 (1975). For those reasons, the Court held that there was "no looming problem of improper delegation." *Id.* at 560.

B

The Court's ruling in *Algonquin* answers the question of the constitutionality of section 232 presented here. The Court's rejection of the nondelegation-doctrine challenge to section 232 was a necessary step in the Court's rationale for ultimately construing the statute as it did, and the constitutional ruling is therefore binding precedent. *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 67 (1996) ("When an opinion issues for the Court, it is not only the result but also those portions of the opinion necessary to that result by which we are bound."). Moreover, the rationale of the Court's rejection of the nondelegation-doctrine challenge rests on the determination that the standards governing the President's and Secretary's determinations under section 232 are constitutionally adequate. The same standards are at issue here.

The court did not limit its reasoning in the delegation-doctrine portion of its opinion to the license-fee authority in dispute in *Algonquin*. When the Court said at the end of its opinion that its "holding . . . is a

limited one," *Algonquin*, 426 U.S. at 571, it was not curtailing its nondelegation holding. Rather, it was referring to its statutory-construction ruling. The Court explained what it meant by "limited": the conclusion that "the imposition of a license fee is authorized by § 232(b) in no way compels the further conclusion that *any* action the President might take, as long as it has even a remote impact on imports, is also so authorized." *Id.* That caution about what actions might be outside section 232's authorization does not narrow the Court's conclusion that section 232 is not an unconstitutional delegation of legislative authority.

In any event, we see no basis on which *Algonquin* can be properly distinguished for purposes of the question presented here. For one thing, the tariffs at issue here are "monetary exactions," like the "license fees" that were at issue, and contrasted with "quotas," in *Algonquin*. *Id.* at 552. Even if *Algonquin's* nondelegation ruling were viewed as tied to the form of presidential action authorized, AIIS has presented no persuasive explanation for distinguishing the tariffs at issue here from the license fees at issue there. For another, AIIS's claim is a claim of unconstitutionality of the statutory provision on its face, that is, in all its applications. *See Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019) ("A facial challenge is really just a claim that the law or policy at issue is unconstitutional in all its applications."). *Algonquin* necessarily rejected that claim when it held that there was no constitutional problem with the grant of authority in section 232.

C

MIS argues that later decisions of the Supreme Court have undermined at least one crucial premise of *Algonquin*, making it no longer binding. But the Supreme Court has ruled: "If a precedent of [the Supreme Court] has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme Court] the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). If there are cases justifying an exception to that principle, this case is not one of them.

We will not project an overruling of the delegation-doctrine standard stated in *Hampton* on which *Algonquin* rested. Five members of the Court have recently expressed interest in at least exploring a reconsideration of that standard. *See Gundy v. United States*, 139 S. Ct. 2116, 2131–42 (2019) (Gorsuch, J., dissenting, joined by Roberts, C.J., and Thomas, J.); *id.* at 2130–31 (Alito, J., concurring in the judgment); *Paul v. United States*, 140 S. Ct. 342 (2019) (mem.) (Kavanaugh, J., statement respecting the denial of certiorari) (stating that the issues raised in the *Gundy* dissent "may warrant further consideration in future cases"). But such expressions give us neither a license to disregard the currently governing precedent nor a substitute standard to apply.

We do not have full briefing on issues that might demand exploration under a standard different from

the one stated in *Hampton*. Such issues might include the significance of text, history, and precedent bearing on circumstances in which Congress, exercising its constitutional power, strengthens authority within the President's "independent" constitutional power. *See Loving v. United States*, 517 U.S. 748, 772 (1996) (explaining that the delegation doctrine is less restrictive in such circumstances, citing *United States v. Mazurie*, 419 U.S. 544, 556–57 (1975), and *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319–22 (1936)); *see also Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting); *cf. Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083–84 (2015) (stating that the Court uses "Justice Jackson's familiar tripartite framework" from *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635–38 (1952) (concurring opinion), under which the President's authority is greatest when supported by Congress. The Supreme Court has recognized that the President has some independent constitutional authority over national security and dealings with foreign nations, including in the form of executive agreements. *See*, *e.g.*, *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1861 (2017) (national security); *American Ins. Ass'n*, 539 U.S. at 414–15 (executive agreements); *see also Trump v. Hawaii*, 138 S. Ct. 2392, 2419–20 (2018) ("The upshot of our cases in this context is clear: 'Any rule of constitutional law that would inhibit the flexibility' of the President 'to respond to changing world conditions should be adopted only with the greatest caution,' and our inquiry into matters of entry and national security is highly constrained." (quoting *Mathews v. Diaz*, 426 U.S. 67, 81 (1976)). We will not guess at

precisely what analysis might be needed in the absence of *Algonquin* or conduct such an analysis without the parties' briefing developed under any new standard.

AIIS argues that one pertinent change of law has already occurred. It argues that decisions of the Supreme Court after Algonquin—particularly *Franklin v. Massachusetts*, 505 U.S. 788 (1992), and *Dalton v. Specter*, 511 U.S. 462 (1994)—foreclose judicial review that would have been available at the time *Algonquin* was decided. We see no basis in this argument for declaring *Algonquin* to be no longer binding. Nothing in *Algonquin's* analysis rests on a premise about judicial review that later Supreme Court decisions have changed.

In *Franklin*, the Court ruled that the President's actions are not reviewable under the Administrative Procedure Act (APA) because the President is not an "agency." *Franklin*, 505 U.S. at 800–01. In *Dalton*, the Court ruled that recommendations and reports submitted to the President are not reviewable under the APA—because they are not final agency actions—when the President has discretion whether to act pursuant to such recommendations and reports. *Dalton*, 511 U.S. at 469–70; *see Franklin*, 505 U.S. at 796–98. But the Court's analysis in *Algonquin* does not turn on APA review of the President's action, or of the Secretary's findings and recommendations, under section 232.

To the extent that AIIS suggests that the Court in *Algonquin* presupposed the availability of judicial

review of the factual or discretionary presidential determinations under section 232, there is no basis for such a suggestion. Nor has AIIS established that, at the time of *Algonquin*, such judicial review was available. *See United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940) ("For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains. Under the Constitution it is exclusively for Congress, or those to whom it delegates authority, to determine what tariffs shall be imposed."); *Dalton*, 511 U.S. at 474 (indicating that discretionary presidential decisions were already unreviewable under longstanding case law); *American Inst. for Int'l Steel*, 376 F. Supp. 3d at 1341–42 (citing authorities).

At the same time, in *Algonquin* the Court did rule on the statutory issue of whether section 232 authorized license fees (not just quotas) as well as on the constitutional challenge. But AIIS has not identified any material change in the availability of judicial review in those respects. It is enough to say that some non-APA review remains available for constitutional issues, questions about the scope of statutory authority, and compliance with procedural requirements. *See Dalton*, 511 U.S. at 474; *Franklin*, 505 U.S. at 801; *Dames & Moore v. Regan*, 453 U.S. 654, 669–74 (1981); *Silfab Solar*, 892 F.3d at 1346 (citing *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) ("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.")). The

government has agreed, in its brief, Appellee Br. at 24, and at oral argument, Oral Arg. at 16:25-17:06, http://oralarguments.cafc.uscourts.gov/default.aspx?f1=2019-1727.mp3. In short, there has been no material change to the judicial review of presidential action pursuant to section 232 that undermines the controlling force of *Algonquin*.

III

For the foregoing reasons, we affirm the judgment of the Court of International Trade.

AFFIRMED

United States Court of Appeals
for the Federal Circuit

February 28, 2020

ERRATA

Appeal No. 2019-17827

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, KURT ORBAN PARTNERS, LLC,
Plaintiffs-Appellants

v.

UNITED STATES, MARK A. MORGAN, ACTING COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION,
Defendants-Appellees

Decided: February 29, 2020
Non-Precedential Opinion

Please make the following changes:

On page 16, line 12: change "Congress." to "Congress).".

On page 16, line 25: change "(1976))." to "(1976))).".

Slip Op. 19-37

UNITED STATES COURT OF INTERNATIONAL TRADE

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, and KURT ORBAN PARTNERS, LLC, **Plaintiffs,** **v.** **UNITED STATES and KEVIN K. MCALEENAN, Commissioner, United States Customs and Border Protection,** **Defendants.**	**Before: Claire R. Kelly, Jennifer Choe-Groves & Gary S. Katzmann, Judges** **Court No. 18-00152**

OPINION

[Denying Plaintiffs' motion for summary judgment seeking a declaration that section 232 of the Trade Expansion Act of 1962 contains an impermissible delegation of legislative authority and granting Defendants' motion for judgment on the pleadings. Judge Katzmann files a separate dubitante opinion.]

Dated: March 25, 2019

Alan B. Morrison, George Washington University Law School, Donald Bertrand Cameron and Rudi Will Planert, Morris, Manning & Martin, LLP, of Washington,

DC, and Gary N. Horlick, Law Offices of Gary N. Horlick, of Washington, DC argued for plaintiffs, American Institute for International Steel, Inc. a/k/a AIIS, Sim-Tex, LP, and Kurt Orban Partners, LLC. With them on the brief were Steve Charnovitz, George Washington University Law School, Julie Clark Mendoza and Brady Warfield Mills, Morris, Manning & Martin, LLP, of Washington, DC, and Timothy Lanier Meyer, Vanderbilt University Law School.

Tara Kathleen Hogan, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, and Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendants. With them on the brief were Joshua E. Kurland and Stephen C. Tosini, Attorneys, and Joseph H. Hunt, Assistant Attorney General.

Kelly, Judge: Before the court are American Institute for International Steel, Inc., Sim-Tex LP, and Kurt Orban Partners, LLC's ("Plaintiffs") motion for summary judgment and Defendants' motion for judgment on the pleadings, and their respective supporting memoranda. See [Plaintiffs'] Mot. Summary J. & Mem. Supp., July 19, 2018, ECF No. 20 ("Pls.' Br."); Defs.' Mot. J. Pleadings & Opp'n Pls.' Mot. Summary J., Sept. 14, 2018, ECF No. 26 ("Defs.' Opp'n Br."). Plaintiffs seek declaratory and injunctive relief against enforcement of section 232 of the Trade Expansion Act of 1962,

as amended 19 U.S.C. § 1862 (2012)[1] ("section 232"), on the grounds that, on its face, it constitutes an improper delegation of legislative authority in violation of Article I, Section 1 of the U.S. Constitution and the doctrine of separation of powers.[2] See Pls.' Br. at 16–42; see also U.S. Const. art. I, § 1. Defendants argue that Plaintiffs' claim is foreclosed by Fed. Energy Admin. v. Algonquin SNG Inc., where the Supreme Court stated that section 232's standards are "clearly sufficient to meet any delegation doctrine attack." Defs.' Opp'n Br. at 13 (quoting Fed. Energy Admin. v. Algonquin SNG Inc., 426 U.S. 548, 559 (1976)).[3] Alternatively, Defendants argue that the statutory scheme "amply satisfies the nondelegation doctrine." Id. at 14.

BACKGROUND

Section 232 authorizes the Secretary of Commerce to commence an investigation "to determine the effects on the national security of imports" of any article. 19

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[1] Further citations to the Trade Expansion Act of 1962, as amended, are to the relevant provisions of the United States Code, 2012 edition.

[2] Basrai Farms appears as amicus curiae in this action and filed a brief in support of Plaintiffs' position and in opposition to Defendants' position. See generally Br. Basrai Farms Opp'n Defs.' Mot. J. Pleadings & Supp. Pls.' Mot. Summary J., Oct. 5, 2018, ECF No. 39.

[3] American Iron and Steel Institute ("AISI") and Steel Manufacturers Association ("SMA") appear as amici curiae in this action and filed a brief in opposition to Plaintiffs' position. See generally Br. Amici Curiae [AISI] & [SMA] Opp'n Pls.' Mot. Summary J., Sept. 14, 2018, ECF No. 30.

U.S.C. § 1862(b)(1)(A). The Secretary of Commerce must "provide notice to the Secretary of Defense" of the investigation's commencement and, in the course of the investigation, "consult with the Secretary of Defense regarding the methodological and policy questions raised[.]" 19 U.S.C. § 1862(b)(1)(B); 19 U.S.C. § 1862(b)(2)(A)(i). The Secretary of Commerce must also "(ii) seek information and advice from, and consult with, appropriate officers of the United States, and (iii) if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." 19 U.S.C. § 1862(b)(2)(A)(ii)-(iii). The Secretary of Defense shall also, if requested by the Secretary of Commerce, provide to the Secretary of Commerce "an assessment of the defense requirements of any article that is the subject of an investigation conducted under this section." 19 U.S.C. § 1862(b)(2)(B).

Upon the investigation's completion or within the timeline provided, the Secretary of Commerce must provide the President with a report of the investigation's findings, advise on a course of action, and if the Secretary determines that the article under investigation "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," advise the President of the threat. 19 U.S.C. § 1862(b)(3)(A).

After receiving the Secretary of Commerce's report, if the President concurs with the finding that a threat exists, he shall "determine the nature and

duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii).

Additionally,

> By no later than the date that is 30 days after the date on which the President makes any determinations under paragraph (1), the President shall submit to the Congress a written statement of the reasons why the President has decided to take action, or refused to take action, under paragraph (1).

19 U.S.C. § 1862(c)(2).

Finally, section (d) lists the following factors that the Secretary and the President should consider when acting pursuant to the statute:

> (d) Domestic production for national defense; impact of foreign competition on economic welfare of domestic industries
>
> For the purposes of this section, the Secretary and the President shall, in the light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the

> requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements. In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

19 U.S.C. § 1862(d).

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction under 28 U.S.C. § 1581(i)(2),(4) (2012). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." USCIT R. 56(a). "Judgment on the pleadings is appropriate where there are

no material facts in dispute and the party is entitled to judgment as a matter of law." Forest Labs, Inc. v. United States, 476 F.3d 877, 881 (Fed. Cir. 2007) (citation omitted). Plaintiffs challenge the constitutionality of section 232. Compl. ¶ 11, June 27, 2018, ECF No. 10; Pls.' Br. at 3, 16–42. The issue of a statute's constitutionality is a question of law appropriate for summary disposition, which the court reviews "completely and independently." See, e.g., Demko v. United States, 216 F.3d 1049, 1052 (Fed. Cir. 2000).

DISCUSSION

Article I, Section I of the U.S. Constitution provides that "all legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. The Supreme Court established the standard by which delegations are to be judged in J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928), explaining that "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."

Since 1935 no act has been struck down as lacking an intelligible principle. See Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The Supreme Court has upheld delegations of authority as sufficient to guide the executive branch where they contained standards such as: regulating broadcast

licensing as "public interest, convenience, or necessity" require, National Broadcasting Co. v. United States, 319 U.S. 190, 225–26 (1943); ensuring that a company's existence in a holding company does not "unduly or unnecessarily complicate the structure" or "unfairly or inequitably distribute voting power among security holders[,]" American Power & Light Co. v. SEC, 329 U.S. 90, 104–05 (1946); and setting nationwide air-quality standards limiting pollution to the level required "to protect the public health." Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001). Most importantly for the challenge here, in Algonquin, the Supreme Court found that section 232 "easily" met the intelligible principle standard because

> [i]t establishes clear preconditions to Presidential action[,]—[i]nter alia, a finding by the Secretary of the Treasury 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." Moreover, the leeway that the statute gives the President in deciding what action to take in the event the preconditions are fulfilled is far from unbounded. The 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." And § 232(c),[4]

[4] Section 232 has been amended since the Supreme Court issued Algonquin. Under the current law, section 232(d) mirrors what was previously section 232(c) and section 232(c) enumerates the President's authority, as was previously codified in section

> [a]rticulates a series of specific factors to be considered by the President in exercising his authority under § 232(b). In light of these factors and our recognition that "(n)ecessity . . . fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules . . . ," we see no looming problem of improper delegation.

Algonquin, 426 U.S. at 559–60 (citation and footnote omitted). This court is bound by Algonquin.

Plaintiffs argue unpersuasively that Algonquin does not control because the plaintiffs in Algonquin "did not bring a facial challenge to the constitutionality of section 232," but rather challenged the President's statutory authority to impose a specific kind of remedy and argued for a narrow statutory construction to avoid a nondelegation problem. See Pls.' Br. at 31–33; Resp. Mem. Supp. Pls.' Opp'n Defs.' Mot. J. Pleadings & Reply Mem. Supp. Pls.' Mot. Summary J. at 4–7, Oct. 5, 2018, ECF No. 33 (Pls.' Reply Br."). This argument fails to carry the day, given that the parties in Algonquin argued the nondelegation issue, and the District Court for the District of Columbia and Supreme Court squarely addressed it. The district court ruled that section 232 is "a valid delegation of authority by Congress to the President and confers upon him the power to impose import license fees on oil imports once he determines the fact of threatened impairment of the national security." Algonquin SNG, Inc. v. Fed. Energy

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232(b). Section 232, substantively, remains the same in relevant part.

Admin., 518 F.2d 1051, 1063 (D.C. Cir. 1975) (Robb, J., dissenting) (attaching, in the Appendix, the U.S. District Court for the District of Columbia's opinion and order in this action stating that one thrust of the challenge is whether the proclamation at issue "is an unconstitutional delegation by Congress of legislative power"). Reversing the District Court, the U.S. Court of Appeals for the District of Columbia found that the President's license fee program was not authorized by the statute, see id. at 1055, 1062. Thereafter, the Supreme Court squarely confronted the nondelegation challenge in response to the arguments put forth by parties in their briefs. Algonquin, 426 U.S. at 559–60.

Plaintiffs also argue that Algonquin does not control because, since its issuance, "the legal landscape of judicial review of presidential decisions involving implementation of federal statutes has changed markedly[.]" See Pls.' Br. at 29–30. Specifically, Plaintiffs argue that the Supreme Court's decisions explaining that the President is not an agency and therefore not subject to review under the Administrative Procedure Act ("APA") undercut Algonquin's relevance. See id. at 29–31 (citing Franklin v. Massachusetts, 505 U.S. 788 (1992); Dalton v. Specter, 511 U.S. 462 (1994)). Thus, Plaintiffs premise their quest to overcome Algonquin on their view that the Supreme Court and all parties in Algonquin assumed a more searching standard of judicial review, see id. at 29–30, and that without the availability of such review, the standards articulated in section 232 must be considered anew to ascertain

whether they meet the intelligible principle standard. See id. at 30–33, 42.

Plaintiffs' premise cannot withstand scrutiny. Dalton and Franklin did not change "the legal landscape of judicial review" with respect to section 232. See Pls.' Br. at 29–30. Indeed, no court before or after Algonquin held that the President was subject to the APA. See 1 Kenneth Culp Davis, Administrative Law Treatise § 1.2 at 8 (2d ed. 1978); 1 Kristin E. Hickman & Richard J. Pierce, Jr., Administrative Law Treatise § 1.2.4 at 15 (6th ed. 2019); see also Franklin, 505 U.S. at 796, 800–01 (holding, definitively, that the President is not subject to review under the APA).[5] More importantly for purposes of this case, the APA did not expand judicial review to include review of matters committed to presidential discretion. The Attorney General's Manual on the Administrative Procedure Act, considered an authoritative interpretation of the APA and entitled to deference, see Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 546 (1978), makes clear that presidential determinations committed to the President's discretion by an enabling statute

[5] Courts had suggested, without deciding the question, that the APA applied to the President. See Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. Connally, 337 F. Supp. 737, 761 (D.D.C. 1971) (Leventhal, J., for three-judge panel) (noting scholars who believed the President was an agency under the APA); DeRieux v. Five Smiths, Inc., 499 F.2d 1321, 1332 & n.13 (Temp. Emer. Ct. App. 1974) (relying on Amalgamated Meat Cutters to review an executive order and stating that the court's analysis assumed, for the sake of argument, "that the President is an agency within the meaning of the APA.").

are not subject to review for rationality, findings of fact, or abuse of discretion. See U.S. Dep't of Justice, Att'y Gen.'s Manual on the APA at 94–95 (1947) ("Manual") (noting, for example, that United States v. George S. Bush & Co., 310 U.S. 371 (1940), held that the President's actions under section 336(c) of the Tariff Act of 1930 were unreviewable because the statute left the determination to the President "if in his judgment" action was necessary); see also Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. Connally, 337 F. Supp. 737, 760 (D.D.C. 1971) (Leventhal, J., for three-judge panel) (noting the rare occasions when Congress commits matters to executive discretion to avoid judicial review for errors of law and abuse of discretion). In fact, Dalton acknowledged that prior decisions similarly found that matters committed to presidential discretion could not be reviewed for abuse of that discretion. Dalton, 511 U.S. at 474 (quoting Dakota Cent. Tel. Co. v. S.D. ex rel. Payne, 250 U.S. 163, 184 (1919), for the proposition that "where a claim 'concerns not a want of [presidential] power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power' "). Thus, prior to Dalton, and at the time of Algonquin, there was no judicial review of matters that Congress had committed to presidential discretion—such as those the President makes under section 232—for rationality, findings of fact, or abuse of discretion. See George S. Bush & Co.,

310 U.S. at 379–80; 19 U.S.C. § 1862(c)(1)(A)(ii).[6] Instead, both before and after Algonquin, courts assessed presidential determinations committed to presidential discretion pursuant to nonstatutory review for being unconstitutional or in excess of statutorily granted authority.[7]

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[6] Plaintiffs, perhaps unintentionally, touch upon this idea in their reply brief, stating that "even if there w[as] an express provision for judicial review, the courts would be assigned an impossible task." Pls.' Reply Br. at 20. Indeed, the task would be impossible not because Dalton and Franklin changed the legal landscape for judicial review of presidential action, but because section 232 commits requisite determinations to the President's discretion. See 19 U.S.C. § 1862(c). Judicial review was as much of an "impossible task" in Algonquin as it is here; neither Dalton nor Franklin made it any more or less practicable. The delegation of decision-making authority in section 232 existed at the time of Algonquin and the Supreme Court nonetheless found that it "easily fulfills" the nondelegation test. Algonquin, 426 U.S. at 559. This court is thus bound by Algonquin.

[7] In addition to establishing judicial power to review the constitutionality of statutes, Marbury v. Madison, 5 U.S. 137 (1803), demonstrated that courts can review the President's power under a statute and determine whether the President acted in excess of such statutory powers. This latter form of review has been described as nonstatutory review and is to be contrasted with the type of judicial review provided for by a specific statute, such as the APA. See Jonathan R. Siegel, Suing the President: Nonstatutory Review Revisited, 97 Colum. L. Rev. 1612, 1613–14 (1997) (discussing nonstatutory review). For example, in United States v. Yoshida International, Inc., 526 F.2d 560 (C.C.P.A. 1975), the Court of Customs and Patent Appeals ("CCPA") addressed whether Presidential Proclamation 4074 was within the President's delegated authority. Proclamation 4074 declared, inter alia, a national emergency related to the country's economic position, and assessed a supplemental duty of 10% on all dutiable products. Yoshida International, 526 F.2d at 567–68. Further, the

Here, determinations pursuant to section 232 are committed to presidential discretion. See 19 U.S.C. § 1862(c). Section 232 empowers the President to either concur or not in the Secretary's finding as to whether an article under investigation constitutes a threat to national security and 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." 19

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proclamation authorized the President to, at any time, modify or terminate, in whole or in part, any proclamation made under his authority. Id. at 568. The CCPA held that although neither the Tariff Act of 1930 nor the Trade Expansion Act of 1962 authorized the proclamation, its adoption fell within the powers granted to the President under the Trading with the Enemy Act, i.e., to regulate or prohibit importation of goods during periods of war or national emergency. Id. at 576. The court reviewed the action not under the APA or any statute conferring judicial review but sought to answer the question of whether Proclamation 4074 was an ultra vires presidential act. Id. at 583.

Likewise, U.S. Cane Sugar Refiners' Ass'n v. Block, 683 F.2d 399 (C.C.P.A. 1982), addressed whether the President acted within his delegated authority in issuing Proclamation 4941, which limited entry of sugar to a specific quantity between May 11, 1982, and June 30, 1982, and then to an amount as set by the Secretary of Agriculture. Under section 201(a) of the Trade Expansion Act of 1962, the President could proclaim additional import restrictions as deemed appropriate to carry out a trade agreement entered pursuant to section 201 between June 30, 1962, and July 1, 1967. Id. at 401. The CCPA upheld the President's action, holding that the Geneva Protocol of the General Agreement on Tariffs and Trade, which the President invoked in the proclamation, is a trade agreement for purposes of section 201, and thus the President's act was authorized by statute. Id. at 402, 404. Such reviews of presidential action demonstrate the availability of nonstatutory review separate and distinct from review under the APA.

U.S.C. § 1862(c)(1)(A)(i)-(ii). The President's determination of whether to concur is not qualified by any language or standard, establishing that it is left to his discretion. Accordingly, the President's determination as to the form of remedial action is a matter "in the judgment of the President[.]" 19 U.S.C. § 1862(c)(1)(A)(ii). By committing the determinations of whether to concur with the Secretary and what remedial action to take, if any, to the judgment of the President, Congress precluded an inquiry for rationality, fact finding, or abuse of discretion. See Manual at 94–96; George S. Bush & Co., 310 U.S. at 379–80. Notwithstanding Dalton and Franklin, because the statutory language here commits determinations to the President's discretion, the review available for presidential action has always been limited to constitutionality and action beyond statutory authority. Thus, there has been no change in the legal landscape since Algonquin as far as section 232 is concerned.

Nonetheless, Plaintiffs ask the court to consider the broad authority given to the President that triggers executive action, i.e., the "essentially unlimited definition of national security," as well as the "limitless grant of discretionary remedial powers," as indicative that the statute does not have an intelligible principle. See Pls.' Br. at 5–6, 19–20; see also 19 U.S.C. § 1862(c)–(d). Plaintiffs emphasize the expansive options available to the President to confront what he deems a national security issue. See Pls.' Br. at 6, 19–20. Plaintiffs argue the President is only limited by his imagination,

see id. at 20, and that the President could take any number of actions under the statute, including

> imposing tariffs on goods that are currently duty-free and increasing tariffs above those currently existing under the law for the subject article—with no limit on the level of the tariff. Thus, section 232 permits the President to impose tariffs—taxes—in unlimited amounts and of unlimited duration on any imported articles—or, as in the case with the steel tariff, on an entire class of imported articles. The President may also impose quotas—whether or not there are existing quotas—and with no limit on how much a reduction from an existing quota (or present or historical level of imports) there can be for the subject article. In addition, the President could choose to impose licensing fees for the subject article, either in lieu of or in addition to any tariff or quota already in place. Conversely, the President may also reduce an existing tariff or increase a quota, whenever he concludes that such a reduction or increase is in the interest of national security, as elastically defined. And for all these changes in the law, the President may select the duration of each such change without any limits on his choice, and he may make any changes with no advance notice or delay in implementation.

Pls.' Br. at 6.[8] Admittedly, the broad guideposts of subsections (c) and (d) of section 232 bestow flexibility on

[8] Plaintiffs emphasize the range of actions available to the President under section 232 and reference specific acts that he

has taken. See Pls.' Br. at 12, 19–20; Pls.' Reply Br. at 5–6, 12–13. For example, on March 8, 2018, the President issued Proclamation 9705 imposing a 25% tariff on all imported steel articles, other than those imported from Canada and Mexico. See Proclamation 9705 of March 8, 2018, 83 Fed. Reg. 11,625 (Mar. 15, 2018). The President also enacted Proclamation 9704 under section 232, which imposed a tariff of 10% on aluminum articles, other than those imported from Canada and Mexico. See Proclamation 9704 of March 8, 2018, 83 Fed. Reg. 11,619 (Mar. 15, 2018). Subsequently, the President issued several amendments to Proclamation 9705 under section 232, providing for various country-based exemptions from the steel tariff. See Proclamation 9711 of March 22, 2018, 83 Fed. Reg. 13,361 (Mar. 28, 2018) (exempting, in addition to Canada and Mexico, the following countries from the steel tariff: the Commonwealth of Australia ("Australia"), the Argentine Republic ("Argentina"), the Republic of South Korea ("Korea"), the Federative Republic of Brazil ("Brazil"), and the European Union ("EU") on behalf of its member countries); Proclamation 9740 of April 30, 2018, 83 Fed. Reg. 20,683 (May 7, 2018) (announcing an agreement with Korea to impose a quota on Korean imports of steel articles into the United States, extending the temporary exemption from the steel tariff for Argentina, Australia, and Brazil, and extending the temporary exemption for Canada, Mexico, and the EU); Proclamation 9759 of May 31, 2018, 83 Fed. Reg. 25,857 (June 5, 2018) (announcing agreements to exempt on a long-term basis Argentina, Australia, and Brazil from the steel tariff announced in Proclamation 9705). Plaintiffs also note the President is not required to apply his chosen remedy to imports from all countries but can pick and choose a remedy. See Pls.' Br. at 7, 19–20. Such discretion was recently demonstrated, Plaintiffs note, when the President doubled the tariff on steel imports from Turkey with no national security justification beyond that which is applicable to steel imports from other countries. See Proclamation 9772 of August 10, 2018, 83 Fed. Reg. 40,429 (Aug. 15, 2018) (raising the steel tariff to 50% for Turkey); see also Pls.' Reply Br. at 12 (reproducing the proclamation as Exhibit 15 to Supp. Mem. Supp. Pls.' Mot. Summary J., Aug. 16, 2018, ECF No. 24).

the President and seem to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach. See 19 U.S.C. § 1862(c) (providing the President shall "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security."), and 19 U.S.C. § 1862(d) (providing that the President shall take into consideration "the close relation of the economic welfare of the Nation to our national security, . . . any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports . . . , without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.").

To be sure, section 232 regulation plainly unrelated to national security would be, in theory, reviewable as action in excess of the President's section 232 authority. See, e.g., Indep. Gasoline Marketers Council, Inc. v. Duncan, 492 F. Supp. 614, 620 (D.D.C. 1980) (holding that the President's imposition of a gasoline "conservation fee" pursuant to section 232(b) of the Trade Expansion Act was not authorized by the statute). However, identifying the line between regulation of trade in furtherance of national security and an impermissible encroachment into the role of Congress could be elusive in some cases because judicial review would allow neither an inquiry into the President's

motives nor a review of his fact-finding. See George S. Bush & Co., 310 U.S. at 379–80; Florsheim Shoe Co. v. U.S., 744 F.2d 787, 796–97 (Fed. Cir. 1984). One might argue that the statute allows for a gray area where the President could invoke the statute to act in a manner constitutionally reserved for Congress but not objectively outside the President's statutory authority, and the scope of review would preclude the uncovering of such a truth. Nevertheless, such concerns are beyond this court's power to address, given the Supreme Court's decision in Algonquin, 426 U.S. at 558–60.

CONCLUSION

For the foregoing reasons, the Plaintiffs' motion for summary judgment is denied, and the Defendants' motion for judgment on the pleadings is granted. Judgment will enter accordingly.

/s/ Claire R. Kelly
Claire R. Kelly, Judge

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

Dated: March 25, 2019
New York, New York

Katzmann, Judge, dubitante.[1] Section 232 of the Trade Expansion Act of 1962, as amended in 19 U.S.C.

[1] "[E]xpressing the epitome of the common law spirit, there is the opinion entered dubitante – the judge is unhappy about some

aspect of the decision rendered, but cannot quite bring himself to record an open dissent." Lon Fuller, Anatomy of the Law 147 (1968). See generally Jason Czarnezki, The Dubitante Opinion, 39 Akron L. Rev. 1 (2006).

The dubitante opinion has a well-established place in American jurisprudence. See, e.g., Radio Corp. of America v. United States, 341 U.S. 412, 421 (1951) (Frankfurter, J., dubitante) ("Since I am not alone in entertaining doubts about this case they had better be stated."); O'Keefe v. Smith, Hinchman & Grylls Associates, 380 U.S. 359, 371–72 (1965) (Douglas, J., dubitante) ("I would not be inclined to reverse a Court of Appeals that disagreed with . . . findings as exotic as we have here."); Kartell v. Blue Shield of Mass., Inc., 592 F.2d 1191, 1195–96 (1st Cir. 1979) (Coffin, C.J., dubitante) ("While I share the court's desire to defer to Massachusetts courts for all the help we can get . . . I confess to some uneasiness about our privilege as an appellate court simply to abstain when the district court has not seen fit to do so . . . I hope the court is correct."); Feldman v. Allegheny Airlines, Inc., 524 F.2d 384, 393 (2d Cir. 1975) (Friendly, J., concurring dubitante) ("Although intuition tells me that the Supreme Court of Connecticut would not sustain the award made here, I cannot prove it. I therefore go along with the majority, although with the gravest doubts."); Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP, 684 F.3d 1364, 1374 (Fed. Cir. 2012) (Reyna, J., dubitante) ("As I cannot prove or disprove our result, I go along with the majority – but with doubt.").

The dubitante opinion has also been issued where – as I do in the case before us now – a judge considers himself or herself to be constrained or bound by precedent, but wishes to suggest an alternative view. See., e.g., Weaver v. Marine Bank, 683 F.2d 744, 749 (3rd Cir. 1982) (Sloviter, J., dubitante) ("With great deference to my colleagues on the court when the [precedential] decision was rendered, it appears to rest on a misapprehension and misapplication of the Supreme Court's decision."); United States v. Jeffries, 692 F.3d 473, 483 (6th Cir. 2012) (Sutton, J., dubitante) ("Sixth Circuit precedent compels this interpretation of § 875(c) . . . I write separately because I wonder whether our initial decisions in this area (and those of other courts) have read the statute the right way from the outset."); PETA v. U.S. Dept. of

§ 1862 (2012) ("section 232"), provides that if the Secretary of Commerce finds that an "article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," the President 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."

Section 232 was enacted pursuant to the power granted exclusively to Congress by Article I, Section 8 of the Constitution, which provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises," as well as "To regulate Commerce with foreign Nations." There is no provision in the Constitution that vests in the President the same "Power To Lay and collect . . . Duties." In short, the power to impose duties is a core legislative function.

On March 18, 2018, after receiving the report of the Secretary of Commerce, the President, invoking section 232, issued two proclamations imposing tariffs

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Agriculture, 797 F.3d 1087, 1099 (D.C. Cir. 2015) (Millett, J., dubitante) ("If the slate were clean, I would feel obligated to dissent from the majority's standing decision. But I am afraid that the slate has been written upon, and this court's . . . precedent will not let me extricate this case from its grasp."); Brenndoerfer v. U.S. Postal Service, 693 Fed.Appx. 904, 906–07 (Fed. Cir. 2017) (Wallach, J., concurring dubitante) ("Because I am bound by our precedent, I agree with the majority that [Petitioner's] petition must be dismissed for lack of subject matter jurisdiction. However, I reiterate that '[i]t may be time' [to revisit the issue] in 'light of recent Supreme Court precedent.' " (citations omitted)).

of 25% on steel and 10% on aluminum imports effective March 23, 2018,[2] while providing for flexibility with regard to country and product applicability of the tariffs. The new tariffs were to be imposed in addition to duties already in place, including antidumping and countervailing duties under domestic laws designed to preserve fair trade for the American economy.[3] It appears that the March 18, 2018 proclamations were the first presidential actions based on section 232 in more than thirty years.[4]

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[2] Proclamation 9704 of March 8, 2018, 83 Fed. Reg. 11,619 (Mar. 15, 2018) amended in Proclamation 9776 of August 29, 2018, 83 Fed. Reg. 45,019 (Sept. 4, 2018) and Proclamation 9705 of March 8, 2018, 83 Fed. Reg. 11,625 (Mar. 15, 2018) amended in Proclamation 9777 of August 29, 2018, 83 Fed. Reg. 45,025 (Sept. 4, 2018).

[3] "Dumping occurs when a foreign company sells a product in the United States at a lower price than what it sells that same product for in its home market. Such a product can be described as being sold below 'fair value.'" Sioux Honey Ass'n v. Hartford Fire Ins. Co., 672 F.3d 1041, 1046 (Fed. Cir. 2012). "[A] countervailable subsidy exists where a foreign government provides a financial contribution which confers a benefit to the recipient." ATC Tires Private Ltd. v. United States, 42 CIT ___, ___, 322 F. Supp. 3d 1365, 1366–67 (2018). To empower the Department of Commerce ("Commerce") to offset harmful economic distortions caused by countervailable subsidies and dumping, Congress enacted the Tariff Act of 1930. Sioux Honey, 672 F.3d at 1046. Under the Tariff Act's framework, Commerce may investigate potential countervailable subsidies or dumping and, if appropriate, issue orders imposing duties on the merchandise under investigation. 19 U.S.C. §§ 1671, 1673; see also Sioux Honey, 672 F.3d at 1046; ATC Tires, 322 F. Supp. 3d at 1366–67.

[4] The Congressional Research Service has reported in a study that "[p]rior to the [current] Administration, a President arguably last acted under Section 232 in 1986. In that case, Commerce

The question before us may be framed as follows: Does section 232, in violation of the separation of powers, transfer to the President, in his virtually unbridled discretion, the power to impose taxes and duties that is fundamentally reserved to Congress by the Constitution? My colleagues, relying largely on a 1976 Supreme Court decision, conclude that the statute passes constitutional muster. While acknowledging the binding force of that decision, with the benefit of the fullness of time and the clarifying understanding borne of recent actions, I have grave doubts. I write, respectfully, to set forth my concerns.

It was the genius of the Framers of the Constitution of this Nation, forged from the struggle against tyranny, that they declared the essential importance of the separation of the powers.[5] In The Federalist No. 47, James Madison wrote that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than" the separation of powers. The Federalist No. 47, at 301 (James Madison) (Clinton Rossiter ed., 1961). "The accumulation of all powers, legislative, executive and judiciary in the same hands . . . must justly be

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determined that imports of metal-cutting and metal-forming machine tools threatened to impair national security. . . . [T]he President sought voluntary export restraint agreements with leading foreign exporters, and developed domestic programs to revitalize the U.S. industry." Cong. Research Serv., R45249, Section 232 Investigations: Overview and Issues for Congress 4 (2018).

[5] See generally M.J.C. Vile, Constitutionalism and the Separation of Powers, 156–175 (1967) (reprinted in 1969); Keith E. Whittington & Jason Iuliano, The Myth of the Nondelegation Doctrine, 165 U. Pa. L. Rev. 379 (2017).

pronounced the very definition of tyranny." Id. Although the Constitution does not have an explicit provision recognizing the separation of powers, the Constitution does identify three distinct types of governmental power – legislative, executive and judicial – and, in the Vesting Clauses, commits them to three distinct branches of Government. Those clauses provide that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives," U.S. Const. art. I, § 1; "[t]he executive Power shall be vested in a President of the United States," U.S. Const. art. II, § 1, cl. 1; and "[t]he judicial Power of the United States[] shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," U.S. Const. art. III, § 1. Insofar as the Constitution departs from a pure separation of powers model and allows some sharing of powers across the branches of government, those exceptions are set out in text. The President is given a share of the legislative power through the prerogative of the presidential veto. U.S. Const. art. I, § 7. The Senate is given a share of the executive power through the right to advise and consent to the appointment of government officers. U.S. Const. art. II, § 2.

A review of Supreme Court jurisprudence, from the early days of the Republic, evinces affirmation of the principle that the separation of powers must be respected and that the legislative power over trade cannot be abdicated or transferred to the Executive. Indeed, the first case raising the question of

unconstitutional delegation of legislative power was a trade case, Cargo of the Brig Aurora v. United States, 11 U.S. (7 Cranch) 382, 382–85 (1813). That case involved the condemnation and seizure of cargo of the brig Aurora in the Port of New Orleans, imported from Great Britain in violation of the Non-Intercourse Act of 1809 ("1809 Act"). Ch. 242, 2 Stat. 528 (1809). The 1809 Act, which sought to keep the United States from entanglement in the war between Britain and France by forbidding the importation of goods from either of those nations, had authorized the President to lift the embargo upon his declaration that either of those nations had ceased to violate the neutral commerce of the United States. Id. When the 1809 Act expired, the Non-Intercourse Act of 1810 extended its terms but temporarily suspended its implementation to permit each of the two warring nations an opportunity to renounce her policies against American shipping and to announce respect for American neutrality. The President was again authorized to lift the embargo upon declaration by proclamation that the nation had "cease[d] to violate the neutral commerce of the United States." Cargo of the Brig Aurora, 11 U.S. at 384. The President issued a proclamation declaring that France had revoked her edicts such that she was now respectful of America's neutral commerce, thus lifting the embargo against France. Id. The President, however, determined that Britain had not modified its offending edicts, and thus the embargo against her remained in place. Id. Counsel for the owner of the cargo contended that Congress had impermissibly "transfer[red] the legislative power to the President" and that Congress

could not enact legislation which predicated the revival of an expired law upon a proclamation by the President attesting to facts as articulated by Congress. Id. at 386. In rejecting this argument and upholding the act, the Court ruled that it could "see no sufficient reason[ ] why the legislature should not exercise it [sic] discretion in reviving the act, . . . either expressly or conditionally, as their judgment should direct . . . upon the occurrence of any subsequent combination of events." Id. at 388. In other words, the law was constitutional because the President was acting as a fact-finder, not a lawmaker.

By the time the Supreme Court addressed its next nondelegation challenge in a trade case, Field v. Clark, 143 U.S. 649 (1892), it had previously observed that "[t]he line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 20 (1825). In the 1892 case, Field, supra, importers brought a suit claiming that duties imposed pursuant to the Tariff Act of 1890 should be refunded because that act was an unconstitutional delegation of legislative power. The Tariff Act of 1890 provided:

> That with a view to secure reciprocal trade with countries producing [specified] articles . . . whenever, and so often as the [P]resident shall be satisfied that the [G]overnment of

> any country producing . . . such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of . . . [such articles] into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of [such articles] . . . for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid upon [such articles]. . . .

Field, 143 U.S. at 697–98. In rejecting the claim that the Tariff Act of 1890 unconstitutionally delegated legislative power to the President, the Court stated:

> That Congress cannot delegate legislative power to the [P]resident is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The [A]ct of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the [P]resident with the power of legislation. . . . Congress itself prescribed, in advance, the duties to be levied, collected and paid . . . while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the [P]resident. . . . But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were

> imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which [C]ongress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by [C]ongress. As the suspension was absolutely required when the [P]resident ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws.

Id. at 692–93.

The next case adjudicating a challenge to a trade statute on the grounds of unconstitutional delegation of legislative power to the President was J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394 (1928). An importer of barium dioxide challenged the tariff assessed on a shipment by virtue of the "flexible tariff provision" of the Tariff Act of 1922, enacted:

> to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States, so that the duties not only

> secure revenue, but at the same time enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States.

Id. at 404. In that provision, Congress authorized the President to adjust the duties set by the statute if the President determined after investigation that the duty did not "equalize . . . differences in costs of production in the United States and the principal competing country. . . . Provided, [t]hat the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified" by statute. Id. at 401. Noting that the "difference which is sought in the statute is perfectly clear and perfectly intelligible," the Court also observed that it was difficult for Congress to fix the rates in the statute. Id. at 404. Accordingly, the Tariff Commission was assigned to "assist in . . . obtaining needed data and ascertaining the facts justifying readjustments," to "make an investigation and in doing so must give notice to all parties interested and an opportunity to adduce evidence and to be heard." Id. The President would then "proceed to pursue his duties under the [A]ct and reach such conclusion as he might find justified by the investigation[,] and to proclaim the same, if necessary." Id. at 405.

Noting that the Federal Constitution "divide[s] the governmental power into three branches," the Hampton Court stated that "it is a breach of the national fundamental law if Congress gives up its legislative powers and transfers it to the President. . . ." Id. at 406. However, Congress could "invoke the action" of

the Executive "in so far as the action invoked shall not be an assumption of the constitutional field of action of [the Legislative] branch." Id. "[I]n determining what it may do in seeking assistance from [the Executive], the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." Id. Then the Hampton court announced what has come to be known as the "intelligible principle" formulation: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." Id. at 409. Citing to Field, supra, the Court pointed to the limited and circumscribed nature of the Executive action, concluding the President was:

> not in any real sense invest[ed] . . . with the power of legislation, because nothing involving the expediency or just operation of such legislation was left to the determination of the President; that the legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency.

Id. at 410. The President "was the mere agent of the law-making department." Id. at 411. "What the President was required to do was merely in execution of the act of Congress." Id. at 410–11.

The "intelligible principle" standard is the standard which has since been applied to determine whether there has been an impermissible delegation of

legislative power. As my colleagues note, in the years since the "intelligible principle" was announced, and in cases involving numerous statutes, only twice has the Court invalidated a statute because it impermissibly delegated the power vested in the Congress to the Executive. "In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474 (2001) (citing Panama Refining Co. v. Ryan, 293 U.S. 388 (1935) and A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)). Since 1935, the Court has never invalidated a statute because of impermissible delegation of legislative power to the Executive. This deference "is a reflection of the necessities of modern legislation dealing with complex economic and social problems. . . . Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules." American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946).

In the one trade case before the Court since Hampton where it was contended that the statute at issue constituted an unconstitutional delegation of legislative power to the Executive, the statute in question was the one before us now – section 232. See Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548

(1976). In that case – after a determination that foreign petroleum was being imported into the United States in such quantities and at such low costs as to threaten to impair national security by inhibiting the development of domestic production and refinery capacity – the President imposed license fees upon the exporters in an effort to control imports pursuant to section 232. The Attorney General of the Commonwealth of Massachusetts and others brought suit, primarily making the narrow statutory claim that while section 232 authorized the President to adjust the imports of petroleum and petroleum products by imposing quotas, the remedy that the President sought, import licensing fees, was not authorized by the statute. Id. at 556. They also argued that unless this construction was adopted, the Court would have to reach the constitutional question of whether section 232 was an impermissible delegation of legislative power to the President. Id. at 558–59. The Supreme Court opinion, as my colleagues note, not only decided (in favor the Federal Energy Administration) the statutory question as to whether licenses were permissible, but also reached the constitutional question. Referencing the "intelligible principle," the Court ruled that "[e]ven if § 232(b) is read to authorize the imposition of a license fee system, the standards that it provides the President in its implementation are clearly sufficient to meet any delegation doctrine attack." Id. at 559.

Of course, as a lower court, it behooves us to follow the decision of the highest court. It can also be observed that new developments and the record of

history may supplement and inform our understanding of law. Indeed, the Algonquin court concluded with the following:

> Our holding today is a limited one. As respondents themselves acknowledge, a license fee as much as a quota has its initial and direct impact on imports, albeit on their price as opposed to their quantity. As a consequence, our conclusion here, fully supported by the relevant legislative history, that the imposition of a license fee is authorized by § 232(b) in no way compels the further conclusion that any action the President might take, as long as it has even a remote impact on imports, is also so authorized.

Id. at 571 (emphasis in original).

Analyzing the delegation question from the face of the statute, the Algonquin court took note of "clear conditions to Presidential action" that established an intelligible principle restricting presidential action: The Secretary is required to make a finding 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. "The President can act only to the extent 'he deems necessary to adjust the imports of such article and its derivative so that such imports will not threaten to impair the national security.' And § 232(c) articulates a series of specific factors to be considered by the President in exercising his authority under § 232(b)." Id. at 559. While section 232 states as the Court recited, there is no statutory

requirement that the President's actions match the Secretary's report or recommendations. The President is not bound in any way by any recommendations made by the Secretary, and he is not required to base his remedy on the report or the information provided to the Secretary through any public hearing or submission of public comments. There is no rationale provided for how a tariff of 25% was derived in some situations, and 10% in others. There is no guidance provided on the remedies to be undertaken in relation to the expansive definition of "national security" in the statute – a definition so broad that it not only includes national defense but also encompasses the entire national economy. The record reveals, for example, that the Secretary of Defense stated that "the U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production."[6]

As the preceding review of the trilogy of Aurora, Field, and Hampton evinces, the trade statutes in those cases did not impermissibly transfer the legislative function to the Executive because they provided ascertainable standards to guide the President – standards such that the congressional will had been articulated and was thus capable of effectuation. What we have come to learn is that section 232, however, provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress. Nor does the statute

[6] Letter from James N. Mattis, Secretary of Defense, to Wilbur L. Ross Jr., Secretary of Commerce (2018), Pl.'s Mot. for Summary J. (July 19, 2018) at Exh. 8, ECF No. 20-7.

require congressional approval of any presidential actions that fall within its scope.[7] In short, it is difficult to escape the conclusion that the statute has permitted the transfer of power to the President in violation of the separation of powers.

To note these concerns is not to diminish in any way the reality, sanctioned under established constitutional principles, that in the workings of an increasingly complex world, Congress may assign responsibilities to the Executive to carry out and implement its policy. Nor is it to ignore the flexibility that can be allowed the President in the conduct of foreign affairs. See United States v. Curtiss-Wright Export Corp, 299 U.S. 304 (1936). However, that power is also not unbounded, even in times of crisis. See Hamdi v. Rumsfeld, 542 U.S. 507, 536 (2004) (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 587 (1952)).[8]

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[7] Compare the Crude Oil Windfall Profit Tax Act of 1980, creating a joint disapproval resolution provision under which Congress can override presidential actions in the case of adjustments to petroleum or petroleum product imports). The Crude Oil Windfall Profit Tax Act of 1980, § 402, Pub. L. 96-223, 19 U.S.C. § 1962, 94 Stat. 229, repealed by Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1322.

[8] Regarding the interplay between the Constitution and statute, one commentator has observed:

> The Constitution grants Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises" and "To regulate Commerce with foreign Nations." The president has no similar grant of substantive authority over economic policy, international or domestic. Consequently, international trade policy differs substantially from other foreign affairs issues, such as war powers,

In the end, I conclude that, as my colleagues hold, we are bound by Algonquin, and thus I am constrained to join the judgment entered today denying the Plaintiffs' motion and granting the Defendants' motion. I respectfully suggest, however, that the fullness of time can inform understanding that may not have been available more than forty years ago. We deal now with real recent actions, not hypothetical ones. Certainly, those actions might provide an empirical basis to revisit assumptions. If the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the Constitution, what would?

/s/ Gary S. Katzmann
Gary S. Katzmann, Judge

> where the president shares constitutional authority with Congress. Where international trade policy is concerned, the president's authority is almost entirely statutory.

Timothy Meyer, Trade, Redistribution, and the Imperial Presidency, 44 Yale J. Int'l L. Online 16 (2018) (footnotes omitted) available at http://www.yjil.yale.edu/features-symposium-international trade-in-the-trump-era/.

UNITED STATES COURT OF INTERNATIONAL TRADE

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, and KURT ORBAN PARTNERS, LLC, **Plaintiffs,** **v.** **UNITED STATES and KEVIN K. MCALEENAN, Commissioner, United States Customs and Border Protection,** **Defendants.**	**Before: Claire R. Kelly, Jennifer Choe-Groves & Gary S. Katzmann, Judges** **Court No. 18-00152**

JUDGMENT

Upon consideration of Plaintiffs, American Institute for International Steel, Inc., Sim-Tex LP, and Kurt Orban Partners, LLC's motion for summary judgment and Defendants, United States and Kevin K. McAleenan's motion for judgment on the pleadings, and all other papers filed in this action, and in accordance with the opinions issued on this date, it is

ORDERED that Plaintiffs' motion is denied; it is further

ORDERED that Defendants' motion is granted; and it is further

ORDERED that judgment is entered for Defendants.

/s/ Claire R. Kelly
Claire R. Kelly, Judge

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

/s/ Gary S. Katzmann
Gary S. Katzmann, Judge

Dated: March 25, 2019
New York, New York

§ 1862. Safeguarding national security

(a) Prohibition on decrease or elimination of duties or other import restrictions if such reduction or elimination would threaten to impair national security

No action shall be taken pursuant to section 1821(a) of this title or pursuant to section 1351 of this title to decrease or eliminate the duty or other import restrictions on any article if the President determines that such reduction or elimination would threaten to impair the national security.

(b) Investigations by Secretary of Commerce to determine effects on national security of imports of articles; consultation with Secretary of Defense and other officials; hearings; assessment of defense requirements; report to President; publication in Federal Register; promulgation of regulations

(1)(A) Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of Commerce (hereafter in this section referred to as the "Secretary") shall immediately initiate an appropriate investigation to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion.

(B) The Secretary shall immediately provide notice to the Secretary of Defense of any investigation initiated under this section.

(2)(A) In the course of any investigation conducted under this subsection, the Secretary shall—

(i) consult with the Secretary of Defense regarding the methodological and policy questions raised in any investigation initiated under paragraph (1),

(ii) seek information and advice from, and consult with, appropriate officers of the United States, and

(iii) if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation.

(B) Upon the request of the Secretary, the Secretary of Defense shall provide the Secretary an assessment of the defense requirements of any article that is the subject of an investigation conducted under this section.

(3)(A) By no later than the date that is 270 days after the date on which an investigation is initiated under paragraph (1) with respect to any article, the Secretary shall submit to the President a report on the findings of such investigation with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, the recommendations of the Secretary for action or inaction under this section.

If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in such report.

(B) Any portion of the report submitted by the Secretary under subparagraph (A) which does not contain classified information or proprietary information shall be published in the Federal Register.

(4) The Secretary shall prescribe such procedural regulations as may be necessary to carry out the provisions of this subsection.

(c) Adjustment of imports; determination by President; report to Congress; additional actions; publication in Federal Register

(1)(A) Within 90 days after receiving a report submitted under subsection (b)(3)(A) in which the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President shall—

(i) determine whether the President concurs with the finding of the Secretary, and

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

(B) If the President determines under subparagraph (A) to take action to adjust imports of an article and its derivatives, the President shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A).

(2) By no later than the date that is 30 days after the date on which the President makes any determinations under paragraph (1), the President shall submit to the Congress a written statement of the reasons why the President has decided to take action, or refused to take action, under paragraph (1). Such statement shall be included in the report published under subsection (e).

(3)(A) If—

(i) the action taken by the President under paragraph (1) is the negotiation of an agreement which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security, and

(ii) either—

(I) no such agreement is entered into before the date that is 180 days after the date on which the President makes the determination under paragraph (1)(A) to take such action, or

(II) such an agreement that has been entered into is not being carried out or is ineffective in eliminating the threat to the national security posed by imports of such article,

the President shall take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security. The President shall publish in the Federal Register notice of any additional actions being taken under this section by reason of this subparagraph.

(B) If—

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

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

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

(d)[1] Domestic production for national defense; impact of foreign competition on economic welfare of domestic industries

For the purposes of this section, the Secretary and the President shall, in the light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and

[1] So in original. There are two subsecs. designated (d). Second subsec. (d) probably should be designated (e).

other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements. In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

(d)[1] **Report by Secretary of Commerce**

(1) Upon the disposition of each request, application, or motion under subsection (b), the Secretary shall submit to the Congress, and publish in the Federal Register, a report on such disposition.

(2) Omitted.

(f) Congressional disapproval of Presidential adjustment of imports of petroleum or petroleum products; disapproval resolution

(1) An action taken by the President under subsection (c) to adjust imports of petroleum or petroleum products shall cease to have force and effect upon the enactment of a disapproval resolution, provided for in paragraph (2), relating to that action.

(2)(A) This paragraph is enacted by the Congress—

(i) as an exercise of the rulemaking power of the House of Representatives and the Senate, respectively, and as such is deemed a part of the rules of each House, respectively, but applicable only with respect to the procedures to be followed in that House in the case of disapproval resolutions and such procedures supersede other rules only to the extent that they are inconsistent therewith; and

(ii) with the full recognition of the constitutional right of either House to change the rules (so far as relating to the procedure of that House) at any time, in the same manner, and to the same extent as any other rule of that House.

(B) For purposes of this subsection, the term "disapproval resolution" means only a joint resolution of either House of Congress the matter after the resolving clause of which is as follows: "That the Congress disapproves the action taken under section 232 of the Trade Expansion Act of 1962 with respect to petroleum imports under _____ dated _____.", the first blank

space being filled with the number of the proclamation, Executive order, or other Executive act issued under the authority of subsection (c) of this section for purposes of adjusting imports of petroleum or petroleum products and the second blank being filled with the appropriate date.

(C)(i) All disapproval resolutions introduced in the House of Representatives shall be referred to the Committee on Ways and Means and all disapproval resolutions introduced in the Senate shall be referred to the Committee on Finance.

(ii) No amendment to a disapproval resolution shall be in order in either the House of Representatives or the Senate, and no motion to suspend the application of this clause shall be in order in either House nor shall it be in order in either House for the Presiding Officer to entertain a request to suspend the application of this clause by unanimous consent.

Federal Register/Vol. 83, No. 51/
Thursday, March 15, 2018

Proclamation 9705 of March 8, 2018

Adjusting Imports of Steel Into the United States

By the President of the United States of America

A Proclamation

1. On January 11, 2018, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effect of imports of steel mill articles (steel articles) on the national security of the United States under section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862).

2. The Secretary found and advised me of his opinion 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. The Secretary found that the present quantities of steel articles imports and the circumstances of global excess capacity for producing steel 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." Because of these risks and the risk that the United States may be unable to "meet [steel] demands for national defense and critical industries in a national emergency," and taking into account the close relation of the economic welfare of the Nation to our national security, *see* 19 U.S.C. 1862(d), the Secretary concluded that the present

quantities and circumstances of steel articles imports threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.

3. In reaching this conclusion, the Secretary considered the previous U.S. Government measures and actions on steel articles imports and excess capacity, including actions taken under Presidents Reagan, George H.W. Bush, Clinton, and George W. Bush. The Secretary also considered the Department of Commerce's narrower investigation of iron ore and semi-finished steel imports in 2001, and found the recommendations in that report to be outdated given the dramatic changes in the steel industry since 2001, including the increased level of global excess capacity, the increased level of imports, the reduction in basic oxygen furnace facilities, the number of idled facilities despite increased demand for steel in critical industries, and the potential impact of further plant closures on capacity needed in a national emergency.

4. In light of this conclusion, the Secretary recommended actions to adjust the imports of steel articles so that such imports will not threaten to impair the national security. Among those recommendations was a global tariff of 24 percent on imports of steel articles in order to reduce imports to a level that the Secretary assessed would enable domestic steel producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production. The Secretary has also recommended that I authorize him, in

response to specific requests from affected domestic parties, to exclude from any adopted import restrictions those steel articles for which the Secretary determines there is a lack of sufficient U.S. production capacity of comparable products, or to exclude steel articles from such restrictions for specific national security-based considerations.

5. I concur 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, and I have considered his recommendations.

6. Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

7. Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), authorizes the President to embody in the Harmonized Tariff Schedule of the United States (HTSUS) the substance of acts affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.

8. In the exercise of these authorities, I have decided to adjust the imports of steel articles by imposing a 25 percent ad valorem tariff on steel articles, as defined below, imported from all countries except Canada and Mexico. In my judgment, this tariff is necessary and

appropriate in light of the many factors I have considered, including the Secretary's report, updated import and production numbers for 2017, the failure of countries to agree on measures to reduce global excess capacity, the continued high level of imports since the beginning of the year, and special circumstances that exist with respect to Canada and Mexico. This relief will help our domestic steel industry to revive idled facilities, open closed mills, preserve necessary skills by hiring new steel workers, and maintain or increase production, which will reduce our Nation's need to rely on foreign producers for steel and ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense. Under current circumstances, this tariff is necessary and appropriate to address the threat that imports of steel articles pose to the national security.

9. In adopting this tariff, I recognize that our Nation 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. I also recognize our shared concern about global excess capacity, a circumstance that is contributing to the threatened impairment of the national security. Any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country. Should the United States and any such country arrive at a satisfactory alternative means to address the threat to the

national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require.

10. I conclude that Canada and Mexico present a special case. Given our shared commitment to supporting each other in addressing national security concerns, our shared commitment to addressing global excess capacity for producing steel, the physical proximity of our respective industrial bases, the robust economic integration between our countries, the export of steel articles produced in the United States to Canada and Mexico, and the close relation of the economic welfare of the United States to our national security, *see* 19 U.S.C. 1862(d), I have determined that the necessary and appropriate means to address the threat to the national security posed by imports of steel articles from Canada and Mexico is to continue ongoing discussions with these countries and to exempt steel articles imports from these countries from the tariff, at least at this time. I expect that Canada and Mexico will take action to prevent transshipment of steel articles through Canada and Mexico to the United States.

11. In the meantime, the tariff imposed by this proclamation is an important first step in ensuring the economic viability of our domestic steel industry. Without this tariff and satisfactory outcomes in ongoing negotiations with Canada and Mexico, the industry will

continue to decline, leaving the United States at risk of becoming reliant on foreign producers of steel to meet our national security needs—a situation that is fundamentally inconsistent with the safety and security of the American people. It is my judgment that the tariff imposed by this proclamation is necessary and appropriate to adjust imports of steel articles so that such imports will not threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States of America, including section 301 of title 3, United States Code, section 604 of the Trade Act of 1974, as amended, and section 232 of the Trade Expansion Act of 1962, as amended, do hereby proclaim as follows:

(1) For the purposes of this proclamation, "steel articles" are defined at the Harmonized Tariff Schedule (HTS) 6-digit level as: 7206.10 through 7216.50, 7216.99 through 7301.10, 7302.10, 7302.40 through 7302.90, and 7304.10 through 7306.90, including any subsequent revisions to these HTS classifications.

(2) In order to establish increases in the duty rate on imports of steel articles, subchapter III of chapter 99 of the HTSUS is modified as provided in the Annex to this proclamation. Except as otherwise provided in this proclamation, or in notices published pursuant to clause 3 of this proclamation, all steel articles imports

specified in the Annex shall be subject to an additional 25 percent ad valorem rate of duty with respect to goods entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on March 23, 2018. This rate of duty, which is in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles, shall apply to imports of steel articles from all countries except Canada and Mexico.

(3) The Secretary, in consultation with the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the United States Trade Representative (USTR), the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and such other senior Executive Branch officials as the Secretary deems appropriate, is hereby authorized to provide relief from the additional duties set forth in clause 2 of this proclamation for 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 is also authorized to provide such relief based upon specific national security considerations. Such relief shall be provided for a steel article only after a request for exclusion is made by a directly affected party located in the United States. If the Secretary determines that a particular steel article should be excluded, the Secretary shall, upon publishing a notice of such determination in the *Federal Register*, notify Customs and Border Protection (CBP) of the Department of Homeland Security concerning such article so that it will be excluded from

the duties described in clause 2 of this proclamation. The Secretary shall consult with CBP to determine whether the HTSUS provisions created by the Annex to this proclamation should be modified in order to ensure the proper administration of such exclusion, and, if so, shall make such modification to the HTSUS through a notice in the *Federal Register*.

(4) Within 10 days after the date of this proclamation, the Secretary shall issue procedures for the requests for exclusion described in clause 3 of this proclamation. The issuance of such procedures is exempt from Executive Order 13771 of January 30, 2017 (Reducing Regulation and Controlling Regulatory Costs).

(5) (a) The modifications to the HTSUS made by the Annex to this proclamation shall be effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on March 23, 2018, and shall continue in effect, unless such actions are expressly reduced, modified, or terminated.

(b) The Secretary shall continue to monitor imports of steel articles and shall, from time to time, in consultation with the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the USTR, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, the Director of the Office of Management and Budget, and such other senior Executive Branch officials as the Secretary deems appropriate, review the

status of such imports with respect to the national security. The Secretary shall inform the President of any circumstances that in the Secretary's opinion might indicate the need for further action by the President under section 232 of the Trade Expansion Act of 1962, as amended. The Secretary shall also inform the President of any circumstance that in the Secretary's opinion might indicate that the increase in duty rate provided for in this proclamation is no longer necessary.

(6) Any provision of previous proclamations and Executive Orders that is inconsistent with the actions taken in this proclamation is superseded to the extent of such inconsistency.

IN WITNESS WHEREOF, I have hereunto set my hand this eighth day of March, in the year of our Lord two thousand eighteen, and of the Independence of the United States of America the two hundred and forty-second.

/s/ Donald J. Trump

Federal Register/Vol. 83, No. 60/
Wednesday, March 28, 2018

Proclamation 9711 of March 22, 2018

Adjusting Imports of Steel Into the United States

By the President of the United States of America

A Proclamation

1. On January 11, 2018, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effect of imports of steel mill articles on the national security of the United States under section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862).

2. In Proclamation 9705 of March 8, 2018 (Adjusting Imports of Steel Into the United States), I concurred in the Secretary's finding that steel mill 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, and decided to adjust the imports of steel mill articles, as defined in clause 1 of Proclamation 9705, as amended by clause 8 of this proclamation (steel articles), by imposing a 25 percent ad valorem tariff on such articles imported from all countries except Canada and Mexico.

3. In proclaiming this tariff, I recognized that our Nation 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. I also recognized our shared concern about global excess capacity, a circumstance that is contributing to the threatened

impairment of the national security. I further determined that any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country, and noted that, should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel articles imports from that country and, if necessary, adjust the tariff as it applies to other countries as the national security interests of the United States require.

4. The United States is continuing discussions with Canada and Mexico, as well as the following countries, on satisfactory alternative means to address the threatened impairment to the national security by imports of steel articles from those countries: the Commonwealth of Australia (Australia), the Argentine Republic (Argentina), the Republic of Korea (South Korea), the Federative Republic of Brazil (Brazil), and the European Union (EU) on behalf of its member countries. Each of these countries has an important security relationship with the United States and I have determined that the necessary and appropriate means to address the threat to the national security posed by imports from steel articles from these countries is to continue these discussions and to exempt steel articles imports from these countries from the tariff, at least at

this time. Any country not listed in this proclamation with which we have a security relationship remains welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports of steel articles from that country.

5. The United States has an important security relationship with Australia, including our shared commitment to supporting each other in addressing national security concerns, particularly through our security, defense, and intelligence partnership; the strong economic and strategic partnership between our countries; our shared commitment to addressing global excess capacity in steel production; and the integration of Australian persons and organizations into the national technology and industrial base of the United States.

6. The United States has an important security relationship with Argentina, including our shared commitment to supporting each other in addressing national security concerns in Latin America, particularly the threat posed by instability in Venezuela; our shared commitment to addressing global excess capacity in steel production; the reciprocal investment in our respective industrial bases; and the strong economic integration between our countries.

7. The United States has an important security relationship with South Korea, including our shared commitment to eliminating the North Korean nuclear threat; our decades-old military alliance; our shared

commitment to addressing global excess capacity in steel production; and our strong economic and strategic partnership.

8. The United States has an important security relationship with Brazil, including our shared commitment to supporting each other in addressing national security concerns in Latin America; our shared commitment to addressing global excess capacity in steel production; the reciprocal investment in our respective industrial bases; and the strong economic integration between our countries.

9. The United States has an important security relationship with the EU and its constituent member countries, including our shared commitment to supporting each other in national security concerns; the strong economic and strategic partnership between the United States and the EU, and between the United States and EU member countries; and our shared commitment to addressing global excess capacity in steel production.

10. In light of the foregoing, I have determined that the necessary and appropriate means to address the threat to the national security posed by imports of steel articles from these countries is to continue ongoing discussions and to increase strategic partnerships, including those with respect to reducing global excess capacity in steel production by addressing its root causes. In my judgment, discussions regarding measures to reduce excess steel production and excess steel capacity, measures that will increase domestic

capacity utilization, and other satisfactory alternative means will be most productive if the tariff proclaimed in Proclamation 9705 on steel articles imports from these countries is removed at this time.

11. However, the tariff imposed by Proclamation 9705 remains an important first step in ensuring the economic viability of our domestic steel industry and removing the threatened impairment of the national security. Without this tariff and the adoption of satisfactory alternative means addressing long-term solutions in ongoing discussions with the countries listed as excepted in clause 1 of this proclamation, the industry will continue to decline, leaving the United States at risk of becoming reliant on foreign producers of steel to meet our national security needs—a situation that is fundamentally inconsistent with the safety and security of the American people. As a result, unless I determine by further proclamation that the United States has reached a satisfactory alternative means to remove the threatened impairment to the national security by imports of steel articles from a particular country listed as excepted in clause 1 of this proclamation, the tariff set forth in clause 2 of Proclamation 9705 shall be effective May 1, 2018, for the countries listed as excepted in clause 1 of this proclamation. In the event that a satisfactory alternative means is reached such that I decide to exclude on a long-term basis a particular country from the tariff proclaimed in Proclamation 9705, I will also consider whether it is necessary and appropriate in light of our national

security interests to make any corresponding adjustments to the tariff set forth in clause 2 of Proclamation 9705 as it applies to other countries. Because the current tariff exemptions are temporary, however, I have determined that it is necessary and appropriate to maintain the current tariff level at this time.

12. In the meantime, to prevent transshipment, excess production, or other actions that would lead to increased exports of steel articles to the United States, the United States Trade Representative, in consultation with the Secretary and the Assistant to the President for Economic Policy, shall advise me on the appropriate means to ensure that imports from countries exempt from the tariff imposed in Proclamation 9705 do not undermine the national security objectives of such tariff. If necessary and appropriate, I will consider directing U.S. Customs and Border Protection (CBP) of the Department of Homeland Security to implement a quota as soon as practicable, and will take into account all steel articles imports since January 1, 2018, in setting the amount of such quota.

13. Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

14. Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), authorizes the President to embody in the Harmonized Tariff Schedule of the United

States (HTSUS) the substance of statutes affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States of America, including section 232 of the Trade Expansion Act of 1962, as amended, section 301 of title 3, United States Code, and section 604 of the Trade Act of 1974, as amended, do hereby proclaim as follows:

(1) Imports of all steel articles, as defined in clause 1 of Proclamation 9705, as amended by clause 8 of this proclamation, from the countries listed in this clause shall be exempt from the duty established in clause 2 of Proclamation 9705 until 12:01 a.m. eastern daylight time on May 1, 2018. Further, clause 2 of Proclamation 9705 is amended by striking the last two sentences and inserting the following two sentences: "Except as otherwise provided in this proclamation, or in notices published pursuant to clause 3 of this proclamation, all steel articles imports specified in the Annex shall be subject to an additional 25 percent ad valorem rate of duty with respect to goods entered, or withdrawn from warehouse for consumption, as follows: (a) on or after 12:01 a.m. eastern daylight time on March 23, 2018, from all countries except Canada, Mexico, Australia, Argentina, South Korea, Brazil, and the member countries of the European Union, and (b) on or after 12:01 a.m. eastern daylight time on May 1,

2018, from all countries. This rate of duty, which is in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles, shall apply to imports of steel articles from each country as specified in the preceding sentence.".

(2) Paragraph (a) of U.S. note 16, added to subchapter III of chapter 99 of the HTSUS by the Annex to Proclamation 9705, is amended by replacing "Canada and of Mexico" with "Canada, of Mexico, of Australia, of Argentina, of South Korea, of Brazil, and of the member countries of the European Union".

(3) The "Article description" for heading 9903.80.01 of the HTSUS is amended by replacing "Canada or of Mexico" with "Canada, of Mexico, of Australia, of Argentina, of South Korea, of Brazil, or of the member countries of the European Union".

(4) The exemption afforded to steel articles from Canada, Mexico, Australia, Argentina, South Korea, Brazil, and the member countries of the EU shall apply only to steel articles of such countries entered, or withdrawn from warehouse for consumption, through the close of April 30, 2018, at which time Canada, Mexico, Australia, Argentina, South Korea, Brazil, and the member countries of the EU shall be deleted from paragraph (a) of U.S. note 16 to subchapter III of chapter 99 of the HTSUS and from the article description of heading 9903.80.01 of the HTSUS.

(5) Any steel article that is admitted into a U.S. foreign trade zone on or after 12:01 a.m. eastern daylight time on March 23, 2018, may only be admitted as

"privileged foreign status" as defined in 19 CFR 146.41, and will be subject upon entry for consumption to any ad valorem rates of duty related to the classification under the applicable HTSUS subheading. Any steel article that was admitted into a U.S. foreign trade zone under "privileged foreign status" as defined in 19 CFR 146.41, prior to 12:01 a.m. eastern daylight time on March 23, 2018, will likewise be subject upon entry for consumption to any ad valorem rates of duty related to the classification under applicable HTSUS subheadings imposed by Proclamation 9705, as amended by this proclamation.

(6) Clause 3 of Proclamation 9705 is amended by inserting a new third sentence reading as follows: "Such relief may be provided to directly affected parties on a party-by-party basis taking into account the regional availability of particular articles, the ability to transport articles within the United States, and any other factors as the Secretary deems appropriate.".

(7) Clause 3 of Proclamation 9705, as amended by clause 6 of this proclamation, is further amended by inserting a new fifth sentence as follows: "For merchandise entered on or after the date the directly affected party submitted a request for exclusion, such relief shall be retroactive to the date the request for exclusion was posted for public comment.".

(8) The reference to "7304.10" in clause 1 of Proclamation 9705, is amended to read "7304.11".

(9) The Secretary, in consultation with CBP and other relevant executive departments and agencies,

shall revise the HTSUS so that it conforms to the amendments and effective dates directed in this proclamation. The Secretary shall publish any such modification to the HTSUS in the *Federal Register*.

(10) Any provision of previous proclamations and Executive Orders that is inconsistent with the actions taken in this proclamation is superseded to the extent of such inconsistency.

IN WITNESS WHEREOF, I have hereunto set my hand this twenty-second day of March, in the year of our Lord two thousand eighteen, and of the Independence of the United States of America the two hundred and forty-second.

/s/ Donald J. Trump

Federal Register/Vol. 83, No. 88/
Monday, May 7, 2018

Proclamation 9740 of April 30, 2018

Adjusting Imports of Steel Into the United States

By the President of the United States of America

A Proclamation

1. On January 11, 2018, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effect of imports of steel mill articles on the national security of the United States under section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862).

2. In Proclamation 9705 of March 8, 2018 (Adjusting Imports of Steel Into the United States), I concurred in the Secretary's finding that steel mill 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, and decided to adjust the imports of steel mill articles, as defined in clause 1 of Proclamation 9705, as amended by clause 8 of Proclamation 9711 of March 22, 2018 (Adjusting Imports of Steel Into the United States) (steel articles), by imposing a 25 percent ad valorem tariff on such articles imported from all countries except Canada and Mexico. I further stated that any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country, and noted that, should the United States and any such country arrive at a

satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel articles imports from that country and, if necessary, adjust the tariff as it applies to other countries, as the national security interests of the United States require.

3. In Proclamation 9711, I noted the continuing discussions with the Argentine Republic (Argentina), the Commonwealth of Australia (Australia), the Federative Republic of Brazil (Brazil), Canada, Mexico, the Republic of Korea (South Korea), and the European Union (EU) on behalf of its member countries, on satisfactory alternative means to address the threatened impairment to the national security by imports of steel articles from those countries. Recognizing that each of these countries and the EU has an important security relationship with the United States, I determined that the necessary and appropriate means to address the threat to national security posed by imports of steel articles from these countries was to continue the ongoing discussions and to exempt steel articles imports from these countries from the tariff proclaimed in Proclamation 9705 until May 1, 2018.

4. The United States has successfully concluded discussions with South Korea on satisfactory alternative means to address the threatened impairment to our national security posed by steel articles imports from South Korea. The United States and South Korea have agreed on a range of measures, including measures to

reduce excess steel production and excess steel capacity, and measures that will contribute to increased capacity utilization in the United States, including a quota that restricts the quantity of steel articles imported into the United States from South Korea. In my judgment, these measures will provide an effective, long-term alternative means to address South Korea's contribution to the threatened impairment to our national security by restraining steel articles exports to the United States from South Korea, limiting transshipment, and discouraging excess capacity and excess steel production. In light of this agreement, I have determined that steel articles imports from South Korea will no longer threaten to impair the national security and have decided to exclude South Korea from the tariff proclaimed in Proclamation 9705. The United States will monitor the implementation and effectiveness of the quota and other measures agreed upon with South Korea in addressing our national security needs, and I may revisit this determination, as appropriate.

5. The United States has agreed in principle with Argentina, Australia, and Brazil on satisfactory alternative means to address the threatened impairment to our national security posed by steel articles imported from these countries. I have determined that the necessary and appropriate means to address the threat to national security posed by imports of steel articles from Argentina, Australia, and Brazil is to extend the temporary exemption of these countries from the tariff proclaimed in Proclamation 9705, in order to finalize the details of these satisfactory alternative means to

address the threatened impairment to our national security posed by steel articles imported from these countries. In my judgment, and for the reasons I stated in paragraph 10 of Proclamation 9711, these discussions will be most productive if steel articles from Argentina, Australia, and Brazil remain exempt from the tariff proclaimed in Proclamation 9705, until the details can be finalized and implemented by proclamation. Because the United States has agreed in principle with these countries, in my judgment, it is unnecessary to set an expiration date for the exemptions. Nevertheless, if the satisfactory alternative means are not finalized shortly, I will consider re-imposing the tariff.

6. The United States is continuing discussions with Canada, Mexico, and the EU. I have determined that the necessary and appropriate means to address the threat to the national security posed by imports of steel articles from these countries is to continue these discussions and to extend the temporary exemption of these countries from the tariff proclaimed in Proclamation 9705, at least at this time. In my judgment, and for the reasons I stated in paragraph 10 of Proclamation 9711, these discussions will be most productive if steel articles from these countries remain exempt from the tariff proclaimed in Proclamation 9705.

7. For the reasons I stated in paragraph 11 of Proclamation 9711, however, the tariff imposed by Proclamation 9705 remains an important first step in ensuring the economic stability of our domestic steel industry and removing the threatened impairment of the national security. As a result, unless I determine by

further proclamation that the United States has reached a satisfactory alternative means to remove the threatened impairment to the national security by imports of steel articles from Canada, Mexico, and the member countries of the EU, the tariff set forth in clause 2 of Proclamation 9705 shall be effective June 1, 2018, for these countries.

8. In light of my determination to exclude, on a long-term basis, South Korea from the tariff proclaimed in Proclamation 9705, I have considered whether it is necessary and appropriate in light of our national security interests to make any corresponding adjustments to the tariff set forth in clause 2 of Proclamation 9705 as it applies to other countries. I have determined that, in light of the agreed-upon quota and other measures with South Korea, the measures being finalized with Argentina, Australia, and Brazil, and the ongoing discussions that may result in further long-term exclusions from the tariff proclaimed in Proclamation 9705, it is necessary and appropriate, at this time, to maintain the current tariff level as it applies to other countries.

9. Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

10. Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), authorizes the President to embody

in the Harmonized Tariff Schedule of the United States (HTSUS) the substance of statutes affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States of America, including section 232 of the Trade Expansion Act of 1962, as amended, section 301 of title 3, United States Code, and section 604 of the Trade Act of 1974, as amended, do hereby proclaim as follows:

(1) Imports of all steel articles from Argentina, Australia, Brazil, and South Korea shall be exempt from the duty established in clause 2 of Proclamation 9705, as amended by clause 1 of Proclamation 9711. Imports of all steel articles from Canada, Mexico, and the member countries of the EU shall be exempt from the duty established in clause 2 of Proclamation 9705 until 12:01 a.m. eastern daylight time on June 1, 2018. Further, clause 2 of Proclamation 9705, as amended by clause 1 of Proclamation 9711, is also amended by striking the last two sentences and inserting in lieu thereof the following two sentences: "Except as otherwise provided in this proclamation, or in notices published pursuant to clause 3 of this proclamation, all steel articles imports specified in the Annex shall be subject to an additional 25 percent ad valorem rate of duty with respect to goods entered for consumption, or withdrawn from warehouse for consumption, as

follows: (a) on or after 12:01 a.m. eastern daylight time on March 23, 2018, from all countries except Argentina, Australia, Brazil, Canada, Mexico, South Korea, and the member countries of the European Union, and (b) on or after 12:01 a.m. eastern daylight time on June 1, 2018, from all countries except Argentina, Australia, Brazil, and South Korea. This rate of duty, which is in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles, shall apply to imports of steel articles from each country as specified in the preceding sentence.".

(2) In order to provide the quota treatment referred to in paragraph 4 of this proclamation to steel articles imports from South Korea, U.S. Note 16 of subchapter III of chapter 99 of the HTSUS is amended as provided for in Part A of the Annex to this proclamation. U.S. Customs and Border Protection (CBP) of the Department of Homeland Security shall implement this quota as soon as practicable, taking into account all steel articles imports from South Korea since January 1, 2018.

(3) The exemption afforded to steel articles from Canada, Mexico, and the member countries of the EU shall apply only to steel articles of such countries entered for consumption, or withdrawn from warehouse for consumption, through the close of May 31, 2018, at which time such countries shall be deleted from the article description of heading 9903.80.01 of the HTSUS.

(4) Clause 5 of Proclamation 9711 is amended by inserting the phrase ", except those eligible for

admission under "domestic status" as defined in 19 CFR 146.43, which is subject to the duty imposed pursuant to Proclamation 9705, as amended by Proclamation 9711," after the words "Any steel article" in the first and second sentences.

(5) Steel articles shall not be subject upon entry for consumption to the duty established in clause 2 of Proclamation 9705, as amended by clause 1 of this proclamation, merely by reason of manufacture in a U.S. foreign trade zone. However, steel articles admitted to a U.S. foreign trade zone in "privileged foreign status" pursuant to clause 5 of Proclamation 9711, as amended by clause 4 of this proclamation, shall retain that status consistent with 19 CFR 146.41(e).

(6) No drawback shall be available with respect to the duties imposed on any steel article pursuant to Proclamation 9705, as amended by clause 1 of this proclamation.

(7) The Secretary, in consultation with CBP and other relevant executive departments and agencies, shall revise the HTSUS so that it conforms to the amendments and effective dates directed in this proclamation. The Secretary shall publish any such modification to the HTSUS in the *Federal Register*.

(8) Any provision of previous proclamations and Executive Orders that is inconsistent with the actions taken in this proclamation is superseded to the extent of such inconsistency.

IN WITNESS WHEREOF, I have hereunto set my hand this thirtieth day of April, in the year of our Lord two thousand eighteen, and of the Independence of the United States of America the two hundred and forty-second.

/s/ Donald J. Trump

Federal Register/Vol. 83, No. 108/
Tuesday, June 5, 2018

Proclamation 9759 of May 31, 2018

Adjusting Imports of Steel Into the United States

By the President of the United States of America

A Proclamation

1. On January 11, 2018, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effect of imports of steel mill articles on the national security of the United States under section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862).

2. In Proclamation 9705 of March 8, 2018 (Adjusting Imports of Steel Into the United States), I concurred in the Secretary's finding that steel mill 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, and decided to adjust the imports of steel mill articles, as defined in clause 1 of Proclamation 9705, as amended (steel articles), by imposing a 25 percent ad valorem tariff on such articles imported from most countries, beginning March 23, 2018. I further stated that any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country, and noted that, should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I

determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel articles imports from that country and, if necessary, adjust the tariff as it applies to other countries, as the national security interests of the United States require.

3. In Proclamation 9711 of March 22, 2018 (Adjusting Imports of Steel Into the United States), I noted the continuing discussions with the Argentine Republic (Argentina), the Commonwealth of Australia (Australia), the Federative Republic of Brazil (Brazil), Canada, Mexico, the Republic of Korea (South Korea), and the European Union (EU) on behalf of its member countries, on satisfactory alternative means to address the threatened impairment to the national security posed by imports of steel articles from those countries. Recognizing that each of these countries and the EU has an important security relationship with the United States, I determined that the necessary and appropriate means to address the threat to national security posed by imports of steel articles from these countries was to continue the ongoing discussions and to exempt steel articles imports from these countries from the tariff proclaimed in Proclamation 9705, as amended, until May 1, 2018.

4. In Proclamation 9740 of April 30, 2018 (Adjusting Imports of Steel Into the United States), I noted that the United States had agreed in principle with Argentina, Australia, and Brazil on satisfactory alternative means to address the threatened impairment to our national security posed by steel articles imports

from these countries and extended the temporary exemption of these countries from the tariff proclaimed in Proclamation 9705, as amended, in order to finalize the details.

5. The United States has agreed on a range of measures with these countries, including measures to reduce excess steel production and excess steel capacity, measures that will contribute to increased capacity utilization in the United States, and measures to prevent the transshipment of steel articles and avoid import surges. In my judgment, these measures will provide effective, long-term alternative means to address these countries' contribution to the threatened impairment to our national security by restraining steel articles exports to the United States from each of them, limiting transshipment and surges, and discouraging excess steel capacity and excess steel production. In light of these agreements, I have determined that steel articles imports from these countries will no longer threaten to impair the national security and thus have decided to exclude these countries from the tariff proclaimed in Proclamation 9705, as amended. The United States will monitor the implementation and effectiveness of the measures agreed upon with these countries to address our national security needs, and I may revisit this determination, as appropriate.

6. In light of my determination to exclude, on a long-term basis, these countries from the tariff proclaimed in Proclamation 9705, as amended, I have considered whether it is necessary and appropriate in light of our national security interests to make any corresponding

adjustments to such tariff as it applies to other countries. I have determined that, in light of the agreed-upon measures with these countries, and the fact that the tariff will now apply to imports of steel articles from additional countries, it is necessary and appropriate, at this time, to maintain the current tariff level as it applies to other countries.

7. Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

8. Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), authorizes the President to embody in the Harmonized Tariff Schedule of the United States (HTSUS) the substance of statutes affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States of America, including section 232 of the Trade Expansion Act of 1962, as amended, section 301 of title 3, United States Code, and section 604 of the Trade Act of 1974, as amended, do hereby proclaim as follows:

(1) The superior text to subheadings 9903.80.05 through 9903.80.58 of the HTSUS is amended by

replacing "South Korea" with "Argentina, of Brazil, or of South Korea".

(2) For the purposes of administering the quantitative limitations applicable to subheadings 9903.80.05 through 9903.80.58 for Argentina and Brazil, the annual aggregate limits for each country set out in the Annex to this proclamation shall apply for the period starting with calendar year 2018 and for subsequent years, unless modified or terminated. The quantitative limitations applicable to subheadings 9903.80.05 through 9903.80.58 for these countries, which for calendar year 2018 shall take into account all steel articles imports from each respective country since January 1, 2018, shall be effective for steel articles entered for consumption, or withdrawn from warehouse for consumption, on or after June 1, 2018, and shall be implemented by U.S. Customs and Border Protection (CBP) of the Department of Homeland Security as soon as practicable, consistent with the superior text to subheadings 9903.80.05 through 9903.80.58. The Secretary of Commerce shall monitor the implementation of the quantitative limitations applicable to subheadings 9903.80.05 through 9903.80.58 and shall, in consultation with the Secretary of Defense, the United States Trade Representative, and such other senior Executive Branch officials as the Secretary deems appropriate, inform the President of any circumstance that in the Secretary's opinion might indicate that an adjustment of the quantitative limitations is necessary.

(3) The text of subdivision (e) of U.S. note 16 to subchapter III of chapter 99 of the HTSUS is amended

by striking the last sentence and inserting in lieu thereof the following sentence: "Beginning on July 1, 2018, imports from any such country in an aggregate quantity under any such subheading during any of the periods January through March, April through June, July through September, or October through December in any year that is in excess of 500,000 kg and 30 percent of the total aggregate quantity provided for a calendar year for such country, as set forth on the internet site of CBP, shall not be allowed.".

(4) The Secretary of Commerce, in consultation with CBP and with other relevant executive departments and agencies, shall revise the HTSUS so that it conforms to the amendments and effective dates directed in this proclamation. The Secretary shall publish any such modification to the HTSUS in the *Federal Register*.

(5) Clause 5 of Proclamation 9711, as amended, is amended by striking the phrase "as amended by Proclamation 9711," in the first and second sentences and inserting in lieu thereof the following phrase: "as amended, or to the quantitative limitations established by proclamation,". Clause 5 of Proclamation 9711, as amended, is further amended by inserting the phrase "or quantitative limitations" after the words "ad valorem rates of duty" in the first and second sentences.

(6) Clause 5 of Proclamation 9740 is amended by striking the phrase "as amended by clause 1 of this proclamation," and inserting in lieu thereof the

following phrase: "as amended, or to the quantitative limitations established by proclamation," in the first sentence. Clause 5 of Proclamation 9740 is further amended by striking the words "by clause 4 of this proclamation" from the second sentence.

(7) Any provision of previous proclamations and Executive Orders that is inconsistent with the actions taken in this proclamation is superseded to the extent of such inconsistency.

IN WITNESS WHEREOF, I have hereunto set my hand this thirty-first day of May, in the year of our Lord two thousand eighteen, and of the Independence of the United States of America the two hundred and forty-second.

/s/ Donald J. Trump

Federal Register/Vol. 158, No. 83/
Wednesday, August 15, 2018

Proclamation 9772 of August 10, 2018

Adjusting Imports of Steel Into the United States

By the President of the United States of America

A Proclamation

1. On January 11, 2018, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effect of imports of steel articles on the national security of the United States under section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862). The Secretary found and advised me of his opinion 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.

2. In Proclamation 9705 of March 8, 2018 (Adjusting Imports of Steel Into the United States), I concurred in the Secretary's finding that steel articles, as defined in clause 1 of Proclamation 9705, as amended by clause 8 of Proclamation 9711 of March 22, 2018 (Adjusting Imports of Steel Into the United States), 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, and decided to adjust the imports of these steel articles by imposing a 25 percent ad valorem tariff on such articles imported from most countries.

3. In Proclamation 9705, I also directed the Secretary to monitor imports of steel articles and inform me of any circumstances that in the Secretary's opinion might indicate the need for further action under section 232 with respect to such imports.

4. The Secretary has informed me that while capacity utilization in the domestic steel industry has improved, it is still below the target capacity utilization level the Secretary recommended in his report. Although imports of steel articles have declined since the imposition of the tariff, I am advised that they are still several percentage points greater than the level of imports that would allow domestic capacity utilization to reach the target level.

5. In light of the fact that imports have not declined as much as anticipated and capacity utilization has not increased to that target level, I have concluded that it is necessary and appropriate in light of our national security interests to adjust the tariff imposed by previous proclamations.

6. In the Secretary's January 2018 report, the Secretary recommended that I consider applying a higher tariff to a list of specific countries should I determine that all countries should not be subject to the same tariff. One of the countries on that list was the Republic of Turkey (Turkey). As the Secretary explained in that report, Turkey is among the major exporters of steel to the United States for domestic consumption. To further reduce imports of steel articles and increase domestic capacity utilization, I have determined that it

is necessary and appropriate to impose a 50 percent ad valorem tariff on steel articles imported from Turkey, beginning on August 13, 2018. The Secretary has advised me that this adjustment will be a significant step toward ensuring the viability of the domestic steel industry.

7. Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

8. Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), authorizes the President to embody in the Harmonized Tariff Schedule of the United States (HTSUS) the substance of statutes affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States of America, including section 232 of the Trade Expansion Act of 1962, as amended, section 301 of title 3, United States Code, and section 604 of the Trade Act of 1974, as amended, do hereby proclaim as follows:

(1) In order to establish increases in the duty rate on imports of steel articles from Turkey, subchapter III of chapter 99 of the HTSUS is modified as

provided in the Annex to this proclamation. Clause 2 of Proclamation 9705, as amended by clause 1 of Proclamation 9740 of April 30, 2018 (Adjusting Imports of Steel Into the United States), is further amended by striking the last two sentences and inserting in lieu thereof the following three sentences: "Except as otherwise provided in this proclamation, or in notices published pursuant to clause 3 of this proclamation, all steel articles imports specified in the Annex shall be subject to an additional 25 percent ad valorem rate of duty with respect to goods entered for consumption, or withdrawn from warehouse for consumption, as follows: (a) on or after 12:01 a.m. eastern daylight time on March 23, 2018, from all countries except Argentina, Australia, Brazil, Canada, Mexico, South Korea, and the member countries of the European Union; (b) on or after 12:01 a.m. eastern daylight time on June 1, 2018, from all countries except Argentina, Australia, Brazil, and South Korea; and (c) on or after 12:01 a.m. eastern daylight time on August 13, 2018, from all countries except Argentina, Australia, Brazil, South Korea, and Turkey. Further, except as otherwise provided in notices published pursuant to clause 3 of this proclamation, all steel articles imports from Turkey specified in the Annex shall be subject to a 50 percent ad valorem rate of duty with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on August 13, 2018. These rates of duty, which are in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles, shall

apply to imports of steel articles from each country as specified in the preceding two sentences.".

(2) The text of U.S. note 16(a)(i) to subchapter III of chapter 99 of the HTSUS is amended by deleting "Heading 9903.80.01 provides" and inserting the following in lieu thereof: "Except as provided in U.S. note 16(a)(ii), which applies to products of Turkey that are provided for in heading 9903.80.02, heading 9903.80.01 provides".

(3) U.S. note 16(a)(ii) to subchapter III of chapter 99 of the HTSUS is re-designated as U.S. note 16(a)(iii) to subchapter III of chapter 99 of the HTSUS.

(4) The following new U.S. note 16(a)(ii) to subchapter III of chapter 99 of the HTSUS is inserted in numerical order: "(ii) Heading 9903.80.02 provides the ordinary customs duty treatment of iron or steel products of Turkey, pursuant to the article description of such heading. For any such products that are eligible for special tariff treatment under any of the free trade agreements or preference programs listed in general note 3(c)(i) to the tariff schedule, the duty provided in this heading shall be collected in addition to any special rate of duty otherwise applicable under the appropriate tariff subheading, except where prohibited by law. Goods for which entry is claimed under a provision of chapter 98 and which are subject to the additional duties prescribed herein shall be eligible for and subject to the terms of such provision and applicable U.S. Customs and Border Protection ("CBP") regulations, except that duties under subheading 9802.00.60 shall

be assessed based upon the full value of the imported article. No claim for entry or for any duty exemption or reduction shall be allowed for the iron or steel products enumerated in subdivision (b) of this note under a provision of chapter 99 that may set forth a lower rate of duty or provide duty-free treatment, taking into account information supplied by CBP, but any additional duty prescribed in any provision of this subchapter or subchapter IV of chapter 99 shall be imposed in addition to the duty in heading 9903.80.02.".

(5) Paragraphs (b), (c), and (d) of U.S. note 16 to subchapter III of chapter 99 of the HTSUS are each amended by replacing "heading 9903.80.01" with "headings 9903.80.01 and 9903.80.02".

(6) The "Article description" for heading 9903.80.01 of the HTSUS is amended by replacing "of Brazil" with "of Brazil, of Turkey".

(7) The modifications to the HTSUS made by clauses 2 through 6 of this proclamation and the Annex to this proclamation shall be effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on August 13, 2018, and shall continue in effect, unless such actions are expressly reduced, modified, or terminated.

(8) The Secretary, in consultation with U.S. Customs and Border Protection of the Department of Homeland Security and other relevant executive departments and agencies, shall revise the HTSUS so that it conforms to the amendments directed by this

proclamation. The Secretary shall publish any such modification to the HTSUS in the *Federal Register*.

(9) Any provision of previous proclamations and Executive Orders that is inconsistent with the actions taken in this proclamation is superseded to the extent of such inconsistency.

IN WITNESS WHEREOF, I have hereunto set my hand this tenth day of August, in the year of our Lord two thousand eighteen, and of the Independence of the United States of America the two hundred and forty-third.

/s/ Donald J. Trump

Federal Register/Vol. 84, No. 98/
Tuesday, May 21, 2019

Proclamation 9886 of May 16, 2019

Adjusting Imports of Steel Into the United States

By the President of the United States of America

A Proclamation

1. On January 11, 2018, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effect of imports of steel articles on the national security of the United States under section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862). The Secretary found and advised me of his opinion 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.

2. In Proclamation 9705 of March 8, 2018 (Adjusting Imports of Steel Into the United States), I concurred in the Secretary's finding that steel articles, as defined in clause 1 of Proclamation 9705, as amended by clause 8 of Proclamation 9711 of March 22, 2018 (Adjusting Imports of Steel Into the United States), 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, and decided to adjust the imports of these steel articles by imposing a 25 percent ad valorem tariff on such articles imported from most countries.

3. In Proclamation 9705, I also directed the Secretary to monitor imports of steel articles and inform me of any circumstances that in the Secretary's opinion might indicate the need for further action under section 232 of the Trade Expansion Act of 1962, as amended, with respect to such imports.

4. In August 2018, the Secretary informed me that while capacity utilization in the domestic steel industry had improved, it was still below the target capacity utilization level recommended by the Secretary in his report. Although imports of steel articles had declined since the imposition of the tariff, I was advised that they were still several percentage points greater than the level of imports that would allow domestic capacity utilization to reach the target level. Given that imports had not declined as much as anticipated and capacity utilization had not increased to that target level, I concluded that it was necessary and appropriate in light of our national security interests to adjust the tariff imposed by previous proclamations.

5. In the Secretary's January 2018 report, the Secretary recommended that I consider applying a higher tariff to a list of specific countries should I determine that all countries should not be subject to the same tariff. One of the countries on that list was the Republic of Turkey (Turkey). As the Secretary explained in that report, Turkey was among the major exporters of steel to the United States for domestic consumption. To further reduce imports of steel articles and increase domestic capacity utilization, I determined in Proclamation 9772 of August 10, 2018 (Adjusting Imports of

Steel Into the United States), that it was necessary and appropriate to impose a 50 percent ad valorem tariff on steel articles imported from Turkey, beginning on August 13, 2018. The Secretary advised me that this adjustment would be a significant step toward ensuring the viability of the domestic steel industry.

6. The Secretary has now advised me that, since the implementation of the higher tariff under Proclamation 9772, imports of steel articles have declined by 12 percent in 2018 compared to 2017 and imports of steel articles from Turkey have declined by 48 percent in 2018, with the result that the domestic industry's capacity utilization has improved at this point to approximately the target level recommended in the Secretary's report. This target level, if maintained for an appropriate period, will improve the financial viability of the domestic steel industry over the long term.

7. Given these improvements, I have determined that it is necessary and appropriate to remove the higher tariff on steel imports from Turkey imposed by Proclamation 9772, and to instead impose a 25 percent ad valorem tariff on steel imports from Turkey, commensurate with the tariff imposed on such articles imported from most countries. Maintaining the existing 25 percent ad valorem tariff on most countries is necessary and appropriate at this time to address the threatened impairment of the national security that the Secretary found in the January 2018 report.

8. Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to adjust the

imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

9. Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), authorizes the President to embody in the Harmonized Tariff Schedule of the United States (HTSUS) the substance of statutes affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States of America, including section 232 of the Trade Expansion Act of 1962, as amended, section 301 of title 3, United States Code, and section 604 of the Trade Act of 1974, as amended, do hereby proclaim as follows:

(1) Clause 2 of Proclamation 9705, as amended, is revised to read as follows:

"(2)(a) In order to establish certain modifications to the duty rate on imports of steel articles, subchapter III of chapter 99 of the HTSUS is modified as provided in the Annex to this proclamation and any subsequent proclamations regarding such steel articles.

(b) Except as otherwise provided in this proclamation, or in notices published pursuant to clause 3 of this proclamation, all steel articles imports covered by

heading 9903.80.01, in subchapter III of chapter 99 of the HTSUS, shall be subject to an additional 25 percent ad valorem rate of duty with respect to goods entered for consumption, or withdrawn from warehouse for consumption, as follows: (i) on or after 12:01 a.m. eastern daylight time on March 23, 2018, from all countries except Argentina, Australia, Brazil, Canada, Mexico, South Korea, and the member countries of the European Union; (ii) on or after 12:01 a.m. eastern daylight time on June 1, 2018, from all countries except Argentina, Australia, Brazil, and South Korea; (iii) on or after 12:01 a.m. eastern daylight time on August 13, 2018, from all countries except Argentina, Australia, Brazil, South Korea, and Turkey; and (iv) on or after 12:01 a.m. eastern daylight time on May 21, 2019, from all countries except Argentina, Australia, Brazil, and South Korea. Further, except as otherwise provided in notices published pursuant to clause 3 of this proclamation, all steel articles imports from Turkey covered by heading 9903.80.02, in subchapter III of chapter 99 of the HTSUS, shall be subject to a 50 percent ad valorem rate of duty with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on August 13, 2018 and prior to 12:01 a.m. eastern daylight time on May 21, 2019. All steel articles imports covered by heading 9903.80.61, in subchapter III of chapter 99 of the HTSUS, shall be subject to the additional 25 percent ad valorem rate of duty established herein with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on the date

specified in a determination by the Secretary granting relief. These rates of duty, which are in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles, shall apply to imports of steel articles from each country as specified in the preceding three sentences.".

(2) The text of U.S. note 16(a)(i) to subchapter III of chapter 99 of the HTSUS is amended by deleting "Except as provided in U.S. note 16(a)(ii), which applies to products of Turkey that are provided for in heading 9903.80.02, heading 9903.80.01 provides" and inserting the following in lieu thereof: "Heading 9903.80.01 provides".

(3) Heading 9903.80.02, in subchapter III of chapter 99 of the HTSUS, and its accompanying material, and U.S. note 16(a)(ii) to subchapter III of chapter 99 of the HTSUS, are deleted.

(4) Paragraphs (b), (c), and (d) of U.S. note 16 to subchapter III of chapter 99 of the HTSUS are each amended by replacing "headings 9903.80.01 and 9903.80.02" with "heading 9903.80.01".

(5) The "Article description" for heading 9903.80.01 in subchapter III of chapter 99 of the HTSUS is amended by replacing "of Brazil, of Turkey" with "of Brazil".

(6) The modifications to the HTSUS made by clauses 1 through 5 of this proclamation shall be effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on May 21, 2019 and shall continue in effect,

unless such actions are expressly reduced, modified, or terminated.

(7) Any steel articles imports from Turkey that were admitted into a United States foreign trade zone under "privileged foreign status" as defined in 19 CFR 146.41, prior to 12:01 a.m. eastern daylight time on May 21, 2019, shall be subject upon entry for consumption on or after such time and date to the ad valorem rate of duty in heading 9903.80.01 in subchapter III of chapter 99 of the HTSUS.

(8) Any provision of previous proclamations and Executive Orders that is inconsistent with the actions taken in this proclamation is superseded to the extent of such inconsistency.

IN WITNESS WHEREOF, I have hereunto set my hand this sixteenth day of May, in the year of our Lord two thousand nineteen, and of the Independence of the United States of America the two hundred and forty-third.

/s/ Donald J. Trump

Federal Register/Vol. 84, No. 100/
Thursday, May 23, 2019

Proclamation 9894 of May 19, 2019

Adjusting Imports of Steel Into the United States

By the President of the United States of America

A Proclamation

1. On January 11, 2018, the Secretary of Commerce (Secretary) transmitted to me a report on his investigation into the effect of imports of steel articles on the national security of the United States under section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. 1862). The Secretary found and advised me of his opinion that steel articles were 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.

2. In Proclamation 9705 of March 8, 2018 (Adjusting Imports of Steel Into the United States), I concurred in the Secretary's finding that steel articles, as defined in clause 1 of Proclamation 9705, as amended by clause 8 of Proclamation 9711 of March 22, 2018 (Adjusting Imports of Steel Into the United States), were 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, and decided to adjust the imports of these steel articles by imposing a 25 percent ad valorem tariff on such articles imported from most countries.

3. As stated in the Proclamation dated May 16, 2019 (Adjusting Imports of Steel Into the United States), the Secretary has now advised me that the domestic industry's capacity utilization has improved to approximately the target level recommended in the Secretary's report. This target level, if maintained for an appropriate period, will improve the financial viability of the domestic steel industry over the long term.

4. In Proclamation 9705, I further stated that any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country, and noted that, should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel articles imports from that country and, if necessary, adjust the tariff as it applies to other countries, as the national security interests of the United States require.

5. The United States has successfully concluded discussions with Canada and Mexico on satisfactory alternative means to address the threatened impairment of the national security posed by steel articles imports from Canada and Mexico. The United States has agreed on a range of measures with Canada and Mexico to prevent the importation of steel articles that are unfairly subsidized or sold at dumped prices, to prevent the transshipment of steel articles, and to

monitor for and avoid import surges. These measures are expected to allow imports of steel articles from Canada and Mexico to remain stable at historical levels without meaningful increases, thus permitting the domestic industry's capacity utilization to continue at approximately the target level recommended in the Secretary's report. In my judgment, these measures will provide effective, long-term alternative means to address the contribution of these countries' imports to the threatened impairment of the national security.

6. In light of these agreements, I have determined that, under the framework in the agreements, imports of steel articles from Canada and Mexico will no longer threaten to impair the national security, and thus I have decided to exclude Canada and Mexico from the tariff proclaimed in Proclamation 9705, as amended. The United States will monitor the implementation and effectiveness of these measures in addressing our national security needs, and I may revisit this determination as appropriate.

7. In light of my determination to exclude, on a long-term basis, Canada and Mexico from the tariff proclaimed in Proclamation 9705, as amended, I have considered whether it is necessary and appropriate in light of our national security interests to make any corresponding adjustments to such tariff as it applies to other countries. I have determined that, in light of the agreed-upon measures with Canada and Mexico, it is necessary and appropriate, at this time, to maintain the current tariff level as it applies to other countries.

8. Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to adjust the imports of an article and its derivatives that are being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

9. Section 604 of the Trade Act of 1974, as amended (19 U.S.C. 2483), authorizes the President to embody in the Harmonized Tariff Schedule of the United States (HTSUS) the substance of statutes affecting import treatment, and actions thereunder, including the removal, modification, continuance, or imposition of any rate of duty or other import restriction.

NOW, THEREFORE, I, DONALD J. TRUMP, President of the United States of America, by the authority vested in me by the Constitution and the laws of the United States of America, including section 232 of the Trade Expansion Act of 1962, as amended, section 301 of title 3, United States Code, and section 604 of the Trade Act of 1974, as amended, do hereby proclaim as follows:

(1) Proclamation 9705, as amended, is further amended by revising clause 2 to read as follows:

"(2)(a) In order to establish certain modifications to the duty rate on imports of steel articles, subchapter III of chapter 99 of the HTSUS is modified as provided in the Annex to this proclamation and any subsequent proclamations regarding such steel articles.

(b) Except as otherwise provided in this proclamation, or in notices published pursuant to clause 3 of this proclamation, all steel articles imports covered by heading 9903.80.01, in subchapter III of chapter 99 of the HTSUS, shall be subject to an additional 25 percent ad valorem rate of duty with respect to goods entered for consumption, or withdrawn from warehouse for consumption, as follows: (i) on or after 12:01 a.m. eastern daylight time on March 23, 2018, from all countries except Argentina, Australia, Brazil, Canada, Mexico, South Korea, and the member countries of the European Union; (ii) on or after 12:01 a.m. eastern daylight time on June 1, 2018, from all countries except Argentina, Australia, Brazil, and South Korea; (iii) on or after 12:01 a.m. eastern daylight time on August 13, 2018, from all countries except Argentina, Australia, Brazil, South Korea, and Turkey; (iv) on or after 12:01 a.m. eastern daylight time on May 20, 2019, from all countries except Argentina, Australia, Brazil, Canada, Mexico, South Korea, and Turkey; and (v) on or after 12:01 a.m. eastern daylight time on May 21, 2019, from all countries except Argentina, Australia, Brazil, Canada, Mexico, and South Korea. Further, except as otherwise provided in notices published pursuant to clause 3 of this proclamation, all steel articles imports from Turkey covered by heading 9903.80.02, in subchapter III of chapter 99 of the HTSUS, shall be subject to a 50 percent ad valorem rate of duty with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on August 13, 2018, and prior to 12:01 a.m. eastern daylight time on May 21, 2019. All

steel articles imports covered by heading 9903.80.61, in subchapter III of chapter 99 of the HTSUS, shall be subject to the additional 25 percent ad valorem rate of duty established herein with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on the date specified in a determination by the Secretary granting relief. These rates of duty, which are in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles, shall apply to imports of steel articles from each country as specified in the preceding three sentences."

(2) The "Article description" for heading 9903.80.01, in subchapter III of chapter 99 of the HTSUS, is amended by deleting "of South Korea, of Brazil, of Turkey" and inserting "of Brazil, of Canada, of Mexico, of South Korea, of Turkey".

(3) The modifications made by clauses 1 and 2 of this proclamation shall be effective with respect to goods entered for consumption, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on May 20, 2019, and shall continue in effect, unless such actions are expressly reduced, modified, or terminated.

(4) The Proclamation dated May 16, 2019 (Adjusting Imports of Steel Into the United States), is amended by revising clause 5 to read as follows: "The 'Article description' for heading 9903.80.01 in subchapter III of chapter 99 of the HTSUS is amended by replacing 'of South Korea, of Turkey' with 'of South Korea'.".

(5) Any imports of steel articles from Canada and Mexico that were admitted into a U.S. foreign trade zone under "privileged foreign status" as defined in 19 CFR 146.41, prior to 12:01 a.m. eastern daylight time on May 20, 2019, shall not be subject upon entry for consumption made after 12:01 a.m. eastern daylight time on May 20, 2019, to the additional 25 percent ad valorem rate of duty as imposed by Proclamation 9705, as amended.

(6) Any provision of previous proclamations and Executive Orders that is inconsistent with the actions taken in this proclamation is superseded to the extent of such inconsistency.

IN WITNESS WHEREOF, I have hereunto set my hand this nineteenth day of May, in the year of our Lord two thousand nineteen, and of the Independence of the United States of America the two hundred and forty-third.

/s/ Donald J. Trump

IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, and KURT ORBAN PARTNERS, LLC Plaintiffs, v. UNITED STATES and KEVIN K. MCALEENAN, Commissioner, United States Customs and Border Protection, Defendants.	Court No. 18-00152

COMPLAINT

Plaintiffs American Institute for International Steel, Inc. ("AIIS"), Sim-Tex LP ("Sim-Tex"), and Kurt Orban Partners, LLC ("Orban"), by and through their attorneys, hereby submit their complaint in this action seeking a declaratory judgment that section 232 of the Trade Expansion Act of 1962, as amended, 19 U.S.C. § 1862 ("section 232"), is unconstitutional as an improper delegation of legislative power to the President, in violation of Article I, section 1 of the Constitution and the doctrine of separation of powers and the system of checks and balances that the Constitution protects. Plaintiffs also seek an order of this Court enjoining defendants from enforcing the 25% tariff

increase for imports of steel products and other trade barriers imposed by Presidential Proclamation 9705 of March 8, 2018 (the "25% tariff increase"), as subsequently amended. Plaintiffs' claims arise under the Constitution, and this Court has jurisdiction over this action under 28 U.S.C. § 1581(i)(2) and (4). Because this action raises an issue of the constitutionality of an Act of Congress and the constitutionality of a proclamation of the President, and because this action has significant implications for the administration of the customs laws, Plaintiffs request that the Chief Judge of this Court designate three judges of this Court to hear and determine this action in accordance with 28 U.S.C. § 255.

PARTIES

1. Plaintiff AIIS is a non-profit membership corporation that brings this action on behalf of its more than 100 members. AIIS is incorporated in the District of Columbia and has its principal place of business in Alexandria, Virginia. It is the only steel-related trade association that supports free trade. AIIS's members, which include the Plaintiffs Sim-Tex and Orban, have various business connections with the imported steel products that are subject to the 25% tariff increase challenged in this action. Those members include companies that use imported steel in the manufacture of their own products, traders in steel, importers, exporters, freight forwarders, stevedores, shippers, railroads, port authorities, unions, and many other logistics companies, all of which have been and will continue to be

adversely affected by the 25% tariff increase on imported steel products. AIIS's members handle, import, ship, transport, or store approximately 80% of all imported basic steel products in the United States. Through its international trade counsel, AIIS testified in opposition to the use of section 232 at the public hearing at the U.S. Department of Commerce during the investigation held on May 24, 2017.

2. Plaintiff Sim-Tex is a limited liability company organized under the laws of Texas, with its principal place of business in Waller, Texas. Sim-Tex is an importer and the leading wholesaler in the United States of Oil Country Tubular Goods (OCTG) casing and tubing, which are carbon and alloy steel pipe and tube products used in the production and distribution of oil and gas. Sim-Tex imports directly, as the importer of record, and indirectly, through traders, approximately 40,000 – 45,000 tons per month from Korea, Taiwan, Brazil, Germany, Italy and other sources. Sim-Tex also purchases and sells OCTG tubing (sizes 2" through 3 1/2") produced in the United States. Domestic OCTG producers generally do not produce these smaller sizes in sufficient quantities to fulfill Sim-Tex's needs of approximately 20,000 – 25,000 tons of tubing per month because they can make larger diameter pipe on the same equipment at much higher profit margins. Sim-Tex's domestic allocation of smaller size OCTG tubing is less than 3,000 tons per month, and the balance must be made up with imports.

3. Plaintiff Orban is a limited liability company organized under the laws of California, with its

principal place of business in Burlingame, California. Orban is a specialty steel trader that purchases globally from leading carbon, alloy, and stainless and high nickel alloy manufacturers and sells to manufacturers in the United States. It is a member of Plaintiff AIIS, and it purchases between 200,000 and 250,000 tons of imported steel per year, all of which is subject to the 25% tariff increase. As the importer of record on most of these purchases, it is directly responsible for paying all tariffs, including the 25% tariff increase. Among the products that Orban imports and sells are the following:

- Oil country tubular goods and line pipe for the oil, gas and energy industries;
- Oil country couplings and fittings as well as standard pipe;
- Hot-rolled coil for the production of downhole tubing and casing as well as general durable goods manufacturing;
- Cold rolled and coated flat steels for residential construction as well as the manufacture of steel drums and barrels that serve the U.S. chemical sector;
- Wire rod that is drawn into a multitude of finished wire products for agricultural, durable and non-durable goods applications;
- Stainless steel tubes, bars and wire for specialty applications where corrosion resistance is required;

- Reinforcing bars for residential, non-residential and certain civil construction applications; and
- Hot-rolled bars and grating used in various construction applications.

Many of these products are available in the United States, but the prices globally for the same or even higher quality products are much more competitive than the prices for those products from domestic mills.

4. The defendant United States of America is the entity to which the 25% tariff increases are being paid and is the statutory defendant under section 1581(i)(2) and (4).

5. The defendant Kevin K. McAleenan is the Commissioner of U.S. Customs and Border Protection. He is responsible for collecting the payments made on account of the 25% tariff increase imposed by the President. He is sued in his official capacity only and is a defendant solely to assure that the injunctive relief sought in the complaint can be directed to an individual as well as the United States.

OPERATION OF SECTION 232

6. Section 232 was enacted pursuant to the power granted to Congress in Article I, Section 8 of the Constitution "to lay and collect [t]axes, [d]uties, [i]mposts and [e]xcises" as well as its authority "[t]o regulate [c]ommerce with foreign [n]ations." Section 232(b) directs the Secretary of Commerce (the

"Secretary"), on the application of any department or agency, the request of an interested party, or on his own motion, to undertake an investigation to determine the effects of imports of a particular article of commerce on the national security (the "subject article"). After following certain procedural steps, and within 270 days of initiating the investigation, the Secretary is required to submit a report to the President, which includes his findings on whether the subject article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, and his recommendations for action by the President.

7. Under section 232(c), the President has 90 days to determine whether to concur with the findings of the Secretary, and if he concurs, 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 [subject] article and its derivatives so that such imports will not threaten to impair the national security."

8. Although the initial determination by the Secretary under section 232(b) and the President's action under section 232(c) are tied to "national security," section 232(d) includes an essentially limitless definition of national security and directions as to how that term is to be applied:

> the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security,

> and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

Because section 232(d) allows the Secretary and the President to consider, in essence, anything in the Nation's economy that imports might affect, there is nothing that the President may or may not take into account in determining whether the national security, as elastically defined, may be threatened or impaired by the imports of the subject article and no limit on the import adjustments that he may impose to remedy the threat to section 232(d)'s unbounded meaning of national security.

9. After having made these determinations, the President has an unlimited menu of options that he may employ. These include imposing tariffs on goods that are currently duty-free and increasing tariffs above those currently existing under the law for the subject article—with no limit on the level of the tariff—and/or the imposition of quotas—whether or not there are existing quotas—and with no limit on how much a reduction from an existing quota (or present level of imports) there can be for the subject article. In addition, the President could choose to impose licensing

fees for the subject article, either in lieu of or in addition to any tariff or quota already in place. Conversely, the President may also reduce an existing tariff or increase a quota, whenever he concludes that such a reduction or increase is in the interest of the national security. And for all these changes in the law, the President may select the duration of each such change without any limits on his choice, and he may make any changes with no advance notice or delay in implementation.

10. Under section 232(c) the President has a virtually unlimited range of other choices in determining what adjustments to imports he wishes to make, with no guidance from Congress as to how to make them.

(a) There is no requirement in section 232 that the President treat imports from all countries on a non-discriminatory basis with regard to such matters as the amount of the tariff or level of quota to be imposed, or whether to exempt some countries, but not others from an otherwise applicable tariff or quota. Nor is there any prohibition on such discriminatory treatment.

(b) As more fully described below, although imported steel products vary widely in their uses, quality, specifications, availability in the United States, and relation to national security, the President is permitted to disregard those differences, or take them into account, in his unfettered discretion;

(c) There is no requirement that the President take into account adverse consequences from a

proposed tariff, although he may, if he chooses, do so for any or all such consequences. Those consequences include (1) raising the prices of domestic products; (2) causing workers outside the domestic industry of the subject article to lose their jobs or work fewer hours; (3) favoring imported products that contain the subject article and that can be sold at lower prices in the United States because the tariff does not apply to them; or (4) reducing foreign markets for U.S. exports as a result of higher domestic input prices.

(d) There is no requirement that the President be consistent in his interpretation and implementation of section 232, even for the same articles from one proceeding to the next.

11. Because section 232 allows the President a virtually unlimited range of options if he concludes, in his unfettered discretion, that imports of an article such as steel threaten to impair the national security, as expansively defined, section 232 lacks the intelligible principle that decisions of the United States Supreme Court have required for a law not to constitute a delegation of legislative authority, which would violate Article I, section 1 of the Constitution.

12. Section 232 also lacks procedural protections that might limit the unbridled discretion that the President has under it. The range of omitted procedural protections include the following:

(a) Although the President may order a remedy under section 232 only if he concurs with a finding by the Secretary that imports of the subject article may

threaten to impair the national security, the President is not bound in any way by any remedial recommendations of the Secretary, and he is not required to base his remedy on the report or the information provided to the Secretary through any public hearing or submission of public comments.

(b) The President is not required to provide an opportunity for the public to comment on the actual tariff or quota that he is considering imposing, and the Secretary's request for comments in this case did not identify any specific remedies that he or the President were considering;

(c) The President is not required to explain his decision in light of what prior presidents have done with the same article under section 232, or in light of the Secretary's report or the information provided at the public hearing or from public submissions; and

(d) No one is required to prepare an environmental impact statement or a cost benefit analysis under Executive Order No. 12866 (Sept. 30, 1993), as amended from time to time, or make any kind of rigorous analysis of the positive and negative effects of a proposed tariff or quota.

13. Section 232 does not have a provision for judicial review of orders by the President under it, and because the President is not an agency, judicial review is not available under the Administrative Procedure Act, 5 U.S.C. § 706. Furthermore, the Department of Justice, on behalf of the United States, in a lawsuit challenging the 25% steel tariff increase on the ground

that the President exceeded his statutory authority under section 232, *Severstal Export GMBH, et al. v. United States, et al.*, No. 18-00057 (Ct. Int'l Trade 2018), has taken the position, with which Plaintiffs agree, that once

> the President received the report that constitutes the single precondition for his exercise of discretion under Section 232(c), concurred in its findings, and took the action to adjust imports that was appropriate "in the judgment of the President." 19 U.S.C. § 1862(c). [The] decision to take action was the President's to make, and his exercise of discretion is not subject to challenge [in court].

Defendants' Mot. to Dismiss at 16-17. *Id.* at 19 ("the President's exercise of discretion pursuant to Section 232 is nonjusticiable").

THE PRESIDENT'S 25% TARIFF INCREASE

14. On April 19, 2017, the Secretary opened an investigation into the impact of steel imports on U.S. national security. As part of that investigation, the Secretary held a public hearing on May 24, 2017, and provided for the submission of written statements by interested persons. On January 11, 2018, the Secretary sent the President his report entitled "The Effects of Imports of Steel on the National Security" (hereinafter, the "Steel Report") (available at https://www.commerce.gov/sites/commerce.gov/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf). The Steel Report, which was released to the public on

February 16, 2018, recommended a range of alternative actions, including global tariffs, each of which had the objective of maintaining 80 percent capacity utilization for the U.S. steel industry. Steel Report at 58–61. At the same time, the Secretary issued a report with similar conclusions regarding imports of aluminum.

15. On February 18, 2018, the Secretary of Defense sent a memorandum to the Secretary, with copies to various individuals who work directly for the President, stating that the Defense Department "does not believe that the findings" in the reports on steel and aluminum "impact the ability of DoD programs to acquire the steel and aluminum necessary to meet national defense requirements." (available at https://www.commerce.gov/sites/commerce.gov/files/department_of_defense_memo_response_to_steel_and_aluminum_policy_recommendations.pdf).

16. On March 8, 2018, the President issued Proclamation 9705, which imposed the 25% tariff increase at issue in this action, applicable to all imported steel articles from all countries except Canada and Mexico, effective March 23, 2018. Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 15, 2018). On the same date, the President imposed a similar tariff, but in the lesser amount of 10%, on aluminum imports, also based on section 232. Proclamation No. 9704, 83 Fed. Reg. 11,619 (Mar. 15, 2018).

17. Section (3) of Proclamation 9705 authorized the Secretary "to provide relief from the additional

duties [the 25% tariff increase] set forth in clause 2 of this proclamation for 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 is also authorized to provide such relief based upon specific national security considerations." 83 Fed. Reg. at 11,627. On March 16, 2018, the Secretary issued an interim final rule setting forth the requirements for obtaining such relief. *Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum*, 83 Fed. Reg. 12,106 (Mar. 19, 2018).

18. The 25% tariff increase imposed under section 232 is not based on any showing of illegal or unfair trade practices by steel producers in other countries. Those practices are already the basis of additional tariffs and/or quotas issued under the antidumping and countervailing duty laws of the United States. According to the Steel Report, as of January 11, 2018, for the steel industry alone, there were 164 such orders in effect, and there were an additional 20 publicly announced investigations underway. Steel Report at Appendix K, pp.1-3.

19. In Proclamation 9711, issued on March 22, 2018, the President noted the continuing discussions with Argentina, Australia, Brazil, Canada, Mexico, South Korea, and the European Union (EU) on behalf

of its member countries, on alternative means to address the threatened impairment to the national security posed by imports of steel articles from those countries. He determined that the preferred means to address the threat to national security posed by imports of steel articles from these countries was to continue the ongoing discussions on such alternatives and, in the interim, to exempt steel imports from these countries from the tariff in Proclamation 9705, which he did until May 1, 2018. Proclamation No. 9711, 83 Fed. Reg. 13,361 (Mar. 28, 2018).

20. On April 30, 2018, in Proclamation 9740, 83 Fed. Reg. 20,683 (May 7, 2018), the President noted that the United States had agreed in principle with Argentina, Australia, and Brazil on alternative means to address the threatened impairment to the national security posed by steel articles imports from those countries and extended the temporary exemption of those countries, as well as Canada, Mexico, and the countries of the EU, until June 1, 2018. The Proclamation also excluded South Korea from the 25% tariff increase, without an end date, based on a quota negotiated with South Korea, subject to further monitoring by the United States.

21. On May 31, 2018, the President issued his most recent Proclamation applicable to the 25% tariff increase. Proclamation No. 9759, 83 Fed. Reg. 25,857 (June 5, 2018). That Proclamation excluded Argentina, Australia, Brazil, and South Korea from the 25% tariff increase without an end date, and, at the same time,

the President terminated the temporary exemptions for Canada, Mexico, and the countries of the EU.

22. Since May 31, the President has made no further changes in the application of the 25% tariff increase for steel imports, but as Secretary Wilbur Ross stated on May 31, 2018, "The president has the authority unilaterally . . . to do anything he wishes at any point subsequent to today." *Trump has officially put more tariffs on U.S. allies than on China*, Wash. Post, June 1, 2018, at A13 (available at https://www.washingtonpost.com/news/wonk/wp/2018/05/31/trump-has-officially-put-more-tariffs-on-u-s-allies-than-on-china/?utm_term=.98551855c7ba) (last visited June 26, 2018).

23. To date, the President has applied section 232 only to imports of steel and aluminum, but on May 23, 2018, the Secretary, at the request of the President, announced that he has commenced an investigation into whether imports of automobiles, including SUVs, vans, light trucks, and automotive parts threaten to impair the national security. Press Release, U.S. Dept. of Commerce (May 23, 2019 [sic]) (available at https://www.commerce.gov/news/press-releases/2018/05/us-department-commerce-initiates-section-232-investigation-auto-imports) (last visited June 26, 2018). In addition, in April 2017, the Secretary stated that in addition to steel and aluminum, "core industries" for the Administration's trade agenda include "vehicles, aircraft, shipbuilding, and semiconductors." *Commerce Secretary Ross: Trade 'National Security' Probes Could Extend to Semiconductors, Aluminum*, Dow Jones, Apr. 25, 2017

(available at https://www.dowjones.com/scoops/commerce-secretary-ross-trade-national-security-probes-extend-semiconductors-aluminum/) (last visited June 26, 2018).

THE FAILURE OF SECTION 232 TO PROVIDE AN INTELLIGIBLE PRINCIPLE TO GUIDE DECISIONS OF THE PRESIDENT ON ADJUSTING IMPORTS

24. Under the current tariff regime, there are five general categories of steel products— flat products, long products, pipe & tube products, semi-finished products, and stainless products —and within those five categories, there are separate tariff lines of 61, 25, 27, 8, and 36 sub-products, respectively. Many of the submissions to the Secretary focused on the differences among these 157 sub-products, but the President treated them all identically, except for the possibility of obtaining relief on a product-by-product basis, which, as described in paragraph 25 *infra*, is quite limited. Among the product differences which the President chose to disregard, although he was not legally required to take them into account, nor was he forbidden from doing so, are the following:

(a) U.S. companies supply all the defense needs for the product;

(b) There is no defense use for the product;

(c) U.S. companies do not make the product, do not make it in sufficient quantities to fill the

non-defense needs for the product, and/or do not make it with the quality required by the purchaser of the product and/or its customers;

(d) The product is not available from U.S. companies in the portion of the United States where the purchaser is located and the transportation cost of sending it there is prohibitive; and

(e) Because of the highly specialized nature of the product, and the relatively limited uses, it is not economical for U.S. steel companies to produce it, or the ability to increase supplies of the product can only occur over a number of years and then only if demand for the product can be assured.

25. The possibility of obtaining relief pursuant to the Secretary's interim rule set forth in paragraph 17, *supra*, is quite limited because: (a) each application for an exclusion must be submitted by a single entity; (b) each application can only be for a single product; (c) "[o]nly individuals or organizations using steel in business activities (*e.g.*, construction, manufacturing or supplying steel product to users) in the United States may submit exclusion requests," 83 Fed. Reg. at 12,110 (which excludes importers and traders in steel such as Plaintiffs Sim-Tex and Orban); (d) there is a mandatory waiting period of 30 days during which objections may be filed; (e) there is no process to respond to or rebut objections filed, whether accurate or not, and (f) there is no fixed time within which applications must be decided, although the Secretary has stated that the review "normally will not exceed 90 days." 83

Fed. Reg. at 12,111. The Secretary has acknowledged that there have been nearly 20,000 applications for exclusions filed, most of which have not been decided. There is no provision for judicial review of the denial of an exclusion application, and given the highly discretionary nature of exclusion decisions, success on judicial review would almost certainly be very difficult if not impossible.

26. Although the rationale for tariffs and quotas under section 232 is to provide protection from imports for articles such as steel needed for national security, the President is not required to take into account (although he could if he chose to do so) whether supplies from particular countries are or are not likely to be available to provide for U.S. national security needs. Because section 232 does not embody an intelligible principle, even as applied to which countries should be excluded from any tariff or quota because they are reliable sources of steel during a conflict, the President is free to exclude certain countries or not, without regard to whether they are or are not likely to be able to supply steel when required by national security. On that question, the following facts are uncontested based on the Steel Report, public submissions, and/or statements by the President:

(a) Canada and Mexico are, respectively, the largest and fourth largest current sources of steel imports, totally 25.2% of 2017 imports according to the Steel Report. Steel Report at 28. They are close U.S. allies and trading partners, and, because the United States shares borders with them, there is virtually no

chance that their steel imports will be unavailable in the event of a conflict, yet section 232 does not either compel the President to take those facts into account or forbid him from doing so in deciding whether to apply the 25% tariff increase to those countries;

(b) The countries of the EU are among our closest allies, so that, in the event of an armed conflict, we would expect them to join us and work together to assure that there is sufficient steel available to protect their national security and ours, yet section 232 does not compel the President to take those facts into account, nor does it forbid him from doing so, in deciding whether to apply the 25% tariff increase to the EU countries; and

(c) The President appears to be using the imposition of the 25% tariff increase as a bargaining chip in his trade negotiations with steel producing countries, including Canada, Mexico, South Korea, Brazil, Argentina, Australia, and the EU countries, regarding trade matters unrelated to steel imports. Section 232 neither authorizes nor forbids the President from using the threat to impose tariffs on imported products for that purpose.

27. The submissions to the Secretary produced credible evidence of significant adverse consequences, examples of which are set forth below. Section 232 did not require the President to take those consequences into account when he imposed the 25% tariff increase, although it also did not forbid him from doing so. Among the most significant adverse effects on which

there is no intelligible principle to guide the President are the following:

(a) Reduced competition from imported steel will increase the price of domestic steel;

(b) Increased steel prices will increase the costs to purchasers of products containing steel, including both ultimate consumers and those that use steel products to produce other products;

(c) Increased prices of products using steel products for which the tariff is paid will make those products less competitive (1) against foreign products imported into the United States, and (2) against foreign competitors when U.S. businesses export their products, in both cases widening the trade deficit;

(d) Increased tariffs provide an incentive for U.S. manufacturers of products containing steel to shift some of their facilities abroad in order to avoid paying the 25% tariff, thereby reducing investments in the United States and lowering our total national output;

(e) Reductions in imported steel will not only reduce the jobs in U.S. companies that depend on non-U.S. steel for products that they make, but will also cost jobs in industries such as transportation that deliver foreign steel products, including delivery by water through our major ports;

(f) Encourage retaliation by countries whose products are subject to the 25% tariff increase, by imposing tariffs and/or quotas on U.S. products or services unrelated to the steel industry, thereby harming

U.S. providers of those products or services, including farm products for which the United States is a major exporter;

(g) Creating uncertainty, with the potential to interrupt delivery of steel products to, among others, businesses directly serving the Department of Defense;

(h) Threatening the economic livelihood of small and mid-size businesses that depend on foreign steel, but that have fixed-price contracts with larger companies, such as those in the automobile industry, and for which they cannot re-negotiate the price at which they have agreed to provide fixed quantities, to take into account the tariff-increased price of the steel in their product;

(i) The inability to obtain specialized steel products in the United States may make it very expensive, if not impossible, to provide products needed to comply with Department of Energy efficiency rules;

(j) For certain products, such as tin mill steel used to make food containers, the increase in price may cause food companies to shift to other materials for their containers, such as paper, plastic, and aluminum, and potentially drive the producers of the metal for cans out of business;

(k) Imposing significant delays when foreign specialty steel is not available because of the time (and money) required to have substitute supplies of steel

tested and certified by the ultimate purchasers that have very exacting standards; and

(l) Eliminating foreign sources of a product may result in there being only a single source for a product which, in addition to the potential for monopoly pricing, may, in the event of a natural or economic disaster, eliminate even that sole source.

INJURIES TO PLAINTIFFS

28. For Plaintiffs Sim-Tex and Orban and other members of Plaintiff AIIS that purchase imported steel or products that contain imported steel, the 25% tariff increase has already and will continue to increase the cost of imported steel and, unless those members increase their sales prices, the added tariff costs will reduce their profit. Alternatively, those members can attempt to maintain their profit margins by raising the prices they charge, which will likely reduce their sales in the United States and abroad, and may require them to lay off workers or reduce their wages. The 25% tariff increase will also have a negative effect on their cash flow and on their bank borrowing lines.

29. If section 232 and therefore the 25% tariff increase are held unconstitutional, the companies described in paragraph 28 that actually paid the 25% tariff increase may be able to recover that increase from the United States. But those companies will not be able to recover their lost profits from reduced sales or lower profit margins, and those lost profits constitute irreparable harm to those companies. Moreover,

for those workers at those companies who will have their incomes reduced because there is less work for their companies as a result of the impact of the 25% tariff increase, those lost wages cannot be recovered and therefore constitute further irreparable harm.

30. Many AIIS members do not themselves purchase imported steel or products containing imported steel, but their businesses are involved in various phases of the transportation of imported steel. The 25% tariff increase was intended to, has had, and will continue to have the effect of, reducing the total volume of imported steel, which adversely affects these members in the following ways:

(a) Those members that transport imported steel are paid by the volume of imported steel that they transport; the 25% tariff increase will reduce that volume and thereby reduce their revenue;

(b) The unions that are members of AIIS represent workers who are paid, in part, by the volume of imported steel that they handle in moving that steel from one location to another; the 25% tariff increase will reduce that volume and thereby reduce the income of the unions' members who handle imported steel or possibly eliminate their jobs;

(c) The port authorities, customs brokers, insurance companies, and logistics companies that are members of AIIS derive significant portions of their revenue from their handling of imported steel; the 25% tariff increase will reduce the amount of imported steel

and thereby reduce the revenue of those ports and logistics companies.

Because none of the members of AIIS described in this paragraph will have paid the 25% tariff increase, directly or indirectly, they will have sustained irreparable damage because they will have no claim for monetary damages from the United States even if the 25% tariff increase is held to be unconstitutional.

CLAIMS FOR RELIEF

31. On its face, section 232 does not contain an intelligible principle from the Congress that the President must use when imposing tariffs or quotas under it. Specifically, subsection 232(c) simply authorizes him to "determine the nature and duration of the action that, in [his] judgment . . . must be taken to adjust the imports of [steel products] so that such imports will not threaten to impair the national security."

32. As shown by the submissions to the Secretary described in paragraphs 26 and 27, *supra*, the lack of an intelligible principle in section 232 presents more than a theoretical problem. That absence permitted the President, in his unfettered discretion, to make countless very significant policy choices in implementing section 232 as applied to imports of steel products for which there was no guidance. Under section 232, the President became a lawmaker for tariffs, rather than a law administrator for tariffs. As applied to the 25% tariff increase, section 232 constitutes an unconstitutional delegation of the legislative authority given

to Congress to "lay and collect Taxes, Duties, Imposts and Excises" and to "regulate Commerce with foreign Nations." U.S. Const. art. I, § 8. Therefore, section 232 violates Article I, section 1 of the Constitution under which "All legislative Powers granted herein shall be vested in a Congress of the United States." By contrast, the President does not have the authority to write the laws; rather his duties under Article II, section 3 are to "take Care that the Laws be faithfully executed."

33. Section 232 also violates the doctrine of separation of powers and the system of checks and balances that the Constitution protects because there is no judicial review of the President's determinations under section 232. Given the absence of an intelligible principle to govern section 232, judicial review would be largely meaningless even if it were available. Moreover, there are no other procedural protections against misuse of section 232 which would apply to orders by federal agencies reviewable under the Administrative Procedure Act, such as those described in paragraph 12, *supra*. Furthermore, unlike the process by which a bill becomes a law, which requires approval of both Houses of Congress, after full consideration of the specific language being proposed, and signature by the President (or a congressional two-thirds override of his veto), orders under section 232 are based on the sole determination of the President as to whether the particular form of the tariff or other import adjustment that he has selected will prevent the impairment of the national security, as expansively defined in section 232(d).

34. The result is that the President is permitted by the open-ended grant of power in section 232 to do as he did here regarding steel tariffs: to read section 232 however he pleases, to pick and choose among the alternatives presented, with no limits based on the evidence presented, and with no need to explain his changing decisions or to defend them in a court of law. Presidential lawmaking of that kind is simply not provided for in the United States Constitution and its system of separation of powers and checks and balances created by the Framers, and accordingly, section 232 is unconstitutional on its face for that reason as well.

35. As a result of the unconstitutional 25% tariff increase, each of the Plaintiffs has been and will continue to be irreparably injured as set forth in paragraphs 28-30 above. For these reasons, Plaintiffs lack an adequate remedy at law and are therefore entitled to both a declaratory judgment that section 232 is unconstitutional and an injunction against its continuing application.

DEMAND FOR JUDGMENT AND PRAYER FOR RELIEF

WHEREFORE, Plaintiffs request the following:

a. That the Chief Judge of this Court designate three judges of this Court to hear and determine this action;

b. That the Court enter a declaratory judgment that section 232 and Proclamation 9705, together with the subsequent amendments to it,

are unconstitutional as a violation of Article I, section 1 of the Constitution and the doctrine of separation of powers and the system of checks and balances that the Constitution protects;

c. That the Court permanently enjoin the defendants from enforcing Proclamation 9705 and the subsequent amendments to it;

d. That the Court award Plaintiffs their costs and a reasonable attorneys' fee; and

e. That the Court grant such other and further relief as may be just and proper.

Respectfully submitted,

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this Court pending)

Counsel to Plaintiffs

June 27, 2018

[SEAL]

SECRETARY OF DEFENSE
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MEMORANDUM FOR SECRETARY OF COMMERCE

SUBJECT: Response to Steel and Aluminum Policy Recommendations

This memo provides a consolidated position from the DoD on the investigation of the effect of steel mill imports and the effects of imports of aluminum on national security, conducted by the Department of Commerce under Section 232 of the Trade Expansion Act of 1962 (hereinafter "Section 232 Report").

Regarding the December 15, 2017 reports on steel and aluminum, DoD believes that the systematic use of unfair trade practices to intentionally erode our innovation and manufacturing industrial base poses a risk to our national security. As such, DoD concurs with the Department of Commerce's conclusion that imports of foreign steel and aluminum based on unfair trading practices impair the national security. As noted in both Section 232 reports, however, the U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production. Therefore, DoD does not believe that the findings in the reports impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements.

DoD continues to be concerned about the negative impact on our key allies regarding the recommended options within the reports. However, DoD recognizes that among these reports' alternatives, targeted tariffs are more preferable than a global quota or global tariff. In addition, we recommend an inter-agency group further refine the targeted tariffs, so as to create incentives for trade partners to work with the U.S. on addressing the underlying issue of Chinese transshipment.

If the Administration moves forward with targeted tariffs or quotas on steel, DoD recommends that the management and labor leaders of the respective industries be convened by the President, so that they may understand that these tariffs and quotas are conditional. Moreover, if the Administration takes action on steel, DoD recommends waiting before taking further steps on aluminum. The prospect of trade action on aluminum may be sufficient to coerce improved behavior of bad actors. In either case, it remains important for the President to continue to communicate the negative consequences of unfair trade practices.

This is an opportunity to set clear expectations domestically regarding competitiveness and rebuild economic strength at home while preserving a fair and reciprocal international economic system as outlined in the National Security Strategy. It is critical that we reinforce to our key allies that these actions are

focused on correcting Chinese overproduction and countering their attempts to circumvent existing anti-dumping tariffs – not the bilateral U.S. relationship.

/s/ James N. Mattis

cc:
Secretary of the Treasury
Secretary of State
Chief of Staff to the President
Assistant to the President for National Security Affairs
Chairman, National Economic Council
United States Trade Representative

IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, and KURT ORBAN PARTNERS, LLC, Plaintiffs, v. UNITED STATES and KEVIN K. MCALEENAN, Commissioner, United States Customs and Border Protection, Defendants.	Court No. 18-00152

STATEMENT OF UNDISPUTED FACTS

Plaintiffs American Institute for International Steel, Inc. ("AIIS"), Sim-Tex, LP ("Sim-Tex"), and Kurt Orban Partners, LLC ("Orban") hereby submit, pursuant to Rule 56.3 of the Rules of this Court, this Statement of Undisputed Facts in support of their Motion for Summary Judgment, and state as follows:

1. Plaintiff American Institute for International Steel, Inc. ("AIIS") is a non-profit membership corporation that brings this action on behalf of its 120 members. AIIS's members, which include the Plaintiffs Sim-Tex, LP ("Sim-Tex") and Kurt Orban Partners, LLC ("Orban"), have various business connections

with the imported steel products that are subject to the 25% tariff challenged in this action. **Exhibit 1**.

2. Plaintiff Sim-Tex is a limited liability partnership organized under the laws of Texas, with its principal place of business in Waller, Texas. Sim-Tex is an importer and the leading wholesaler in the United States of oil country tubular goods (OCTG) casing and tubing, which are carbon and alloy steel pipe and tube products used in the production and distribution of oil and gas. Sim-Tex is a member of Plaintiff AIIS, and imports directly, as an importer of record, and indirectly, through traders, substantial volumes of steel products from Taiwan, Germany, Italy and other sources that are subject to the 25% tariff. **Exhibit 2**.

3. Plaintiff Orban is a limited liability company organized under the laws of California, with its principal place of business in Burlingame, California. Orban is an importer and specialty steel trader that purchases globally from leading carbon, alloy, and stainless and high nickel alloy manufacturers and sells to manufacturers in the United States. Orban is a member of Plaintiff AIIS, and imports directly, as an importer of record, and indirectly, through traders, substantial volumes of imported steel from a number of sources including Czech Republic, Indonesia, Italy, Mexico, South Africa, Taiwan, Turkey, UAE, Belarus, India, Pakistan, and Poland that are subject to the 25% tariff. **Exhibit 3**.

4. The members of the Plaintiff AIIS and the Plaintiffs Sim-Tex and Orban have been irreparably

injured by the 25% tariff and continue to be irreparably injured by the 25% tariff. The nature of this injury, including lost sales, lost revenues and lost profits, is detailed in the accompanying declarations of Richard Chriss, President of AIIS, Charles Scianna, President of Sim-Tex, and John Foster, President of Orban, provided in **Exhibits 1**, **2**, and **3**, respectively.

5. On April 19, 2017, the Secretary of Commerce (the "Secretary") opened an investigation into the impact of steel imports on the U.S. national security. As part of that investigation, the Secretary held a public hearing on May 24, 2017, the transcript of which is provided in **Exhibit 4**, and provided for the submission of written statements by interested persons.

6. On January 11, 2018, the Secretary sent the President his report entitled "The Effect of Imports of Steel on the National Security" (hereinafter, "Steel Report") which was released to the public on February 16, 2018. The Steel Report is attached hereto as **Exhibit 5**. The testimony of persons appearing at the public hearing and other written submissions filed with the Secretary in connection with Commerce Department investigation are provided in **Exhibits 6** and **7**, respectively. The letter submitted to the Secretary by the Secretary of Defense, which was required to be requested by the statute but which was not made part of the Steel Report, is provided in **Exhibit 8**.

7. On March 8, 2018, the President issued Proclamation 9705, which concurred in the finding in the Secretary's Report and imposed the 25% tariff at issue

in this action, applicable to all imported steel articles from all countries except Canada and Mexico, effective March 23, 2018. Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 8, 2018). *See* **Exhibit 9**.

8. On March 16, 2018, pursuant to Proclamation 9705, the Secretary issued an interim final rule setting forth the requirements for obtaining relief from the 25% tariff for any steel article "determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality." *Requirements for Submissions Requesting Exclusions*, 83 Fed. Reg. 12,106 (Dep't Commerce Mar. 19, 2018) (interim final rule). *See* **Exhibit 10**.

9. The President subsequently amended the order based on Proclamation 9705 in a series of proclamations to provide for country-based exclusions, some for limited durations and others indefinite. *See* Proclamation No. 9711, 83 Fed. Reg. 13,361 (Mar. 22, 2018) (**Exhibit 11**); Proclamation No. 9740, 83 Fed. Reg. 20,683 (Apr. 30, 2018) (**Exhibit 12**); and Proclamation No. 9759, 83 Fed. Reg. 25,857 (May 31, 2018) (**Exhibit 13**). As a result, as of this date, Argentina, Brazil, and South Korea, are not subject to the 25% tariff on steel imports, but are covered by section 232 absolute quotas. *Section 232 Tariffs on Aluminum and Steel: Duty on Imports of Steel and Aluminum Articles under Section 232 of the Trade Expansion Act of 1962*, U.S. Customs and Border Protection, *available at* https://www.cbp.gov/trade/programs-administration/entry-summary/232-tariffs-aluminum-and-steel (last visited July 18,

2018) (**Exhibit 14**). Australia is not subject to either the tariff or any quotas on steel imports.

Respectfully submitted,

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July 19, 2018

IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, and KURT ORBAN PARTNERS, LLC, Plaintiffs, v. UNITED STATES and KEVIN K. MCALEENAN, Commissioner, United States Customs and Border Protection, Defendants.	Court No. 18-00152

DECLARATION OF RICHARD CHRISS

I, Richard Chriss, President of the Plaintiff American Institute for International Steel, Inc., hereby declare as follows:

1. I am the President of the Plaintiff American Institute for International Steel, Inc. ("AIIS"). I have held this position since December 1, 2016, and before that I was Executive Director at AIIS since November 2013. I am thoroughly familiar with the operations and membership of AIIS, and the statements in this declaration are based on my knowledge of the organization and its members.

2. AIIS is a non-profit membership organization, incorporated in the District of Columbia, and has its principal place of business in Alexandria, Virginia. It is one of the very few steel-related trade associations that supports free trade. Through its international trade counsel, AIIS testified in opposition to the use of section 232 at the public hearing held on May 24, 2017 at the U.S. Department of Commerce ("Commerce Department") during the investigation. AIIS represents its 120 members in this action, which include the Plaintiffs Sim-Tex, LP, and Kurt Orban Partners, LLC, all of whom have business connections with the imported steel products that are subject to the 25% tariff on imported steel products challenged in this action.

3. The members of AIIS include companies that use imported steel in the manufacture of their own products, traders in steel, importers, exporters, freight forwarders, union and non-union stevedores, shippers, railroads, trucking companies, barge and tugboat operators, port authorities, union locals, customs brokers, surveyors, and logistics companies, all of which have been and will continue to be adversely affected by the 25% tariff on imported steel products. AIIS's members handle, import, ship, transport, or store approximately 80% of all imported basic steel products in the United States. These various business connections are more fully described below.

4. There are three important principal aspects of the imported steel business that are essential to understand the impact of the 25% tariff on AIIS's members and the many other businesses in the U.S.

economy affected by them. The principal goal of the 25% tariff is to reduce the level of imports of steel products into the United States, and that effect has already been realized, even though the tariff has only been fully effective since June 1, 2018, when the temporary exclusions for major imports from Mexico, Canada, and the EU countries were lifted. As a result, the reduction in imports will reduce the level of steel products that importers handle, which will reduce their revenues, even if their profits per ton remain constant. The same effect applies to AIIS's other members whose incomes depend in large part on the number of tons of imported steel they handle.

5. A second important feature of the imported steel industry is that it is not one industry, but a large number of separate sub-industries. For example, the Commerce Department divides steel products into five major categories, and within them there are 177 subcategories of products. In addition, some manufacturers have very specific qualifications and tolerances, and not all suppliers can satisfy them. These differences are quite significant because not all U.S. suppliers can provide the type and grade of product currently being supplied by imported steel from a variety of different countries.

6. Third, because the price of imported steel has risen, domestic steel producers have raised the prices charged to domestic steel users who manufacture finished products, without fear that imports will undercut their prices. This increase in the cost of steel to users will raise the price of their finished products, which

will make them less competitive against foreign products which are unaffected by the 25% tariff and thereby increase our trade deficit by increasing higher value-added imports and decreasing exports.

7. **Importers:** These companies are the entities that are the party of record for imported steel. They purchase the steel abroad and arrange to have it enter the United States. They then sell it to third parties, who may be traders or may be manufacturers of products containing imported steel. They are legally obligated to pay any duties, including the 25% tariff at issue in this case. Depending on their contractual arrangements with the companies to which they sell imported steel, they may be able to pass on some or all of the tariff to their purchasers. If they are not able to pass on the cost of the tariff, their profits will be drastically reduced or eliminated entirely. In addition, and perhaps more significantly, their revenues will be diminished because there will be less imported steel for them to import and sell. The 25% tariff will also have a negative effect on their cash flows and on their lines of credit.

8. **Traders:** Some traders are also importers, while others purchase from importers. They make their profits by purchasing steel at one price and selling it at a higher price. Steel tariffs impact their business in two ways. They add a cost on the purchase side, which puts a squeeze on the selling side, either reducing profit or eliminating a sale. In addition, like virtually all of AIIS's members, the 25% tariff will reduce

the level of steel imports, which reduces the total volume of their business and hence their total profits.

9. **Manufacturers:** These members purchase imported steel to use in the products that they make. The 25% tariff will be passed on to them, and if they purchase domestic steel, the price of that has also risen, making it even harder to make a profit.

10. **Transportation:** AIIS's members include those who earn their livings by transporting imported steel. These include railroads, shipping companies, barge operators, trucking companies, logistics companies (who arrange for transportation and other related services), union and non-union stevedores, and the port authorities through which much imported steel arrives in the United States. All of them depend heavily for their revenue on imported steel, because their revenue is based upon volume.

11. **Workers:** They fall into two categories: employees of the different member companies described above and members of local longshore unions. The former suffer when their companies lose business, which costs them hours of work and wages, and possibly their jobs; the latter do not work for particular companies, but are harmed when there are reduced volumes of steel being imported and hence less work for them to do and therefore less pay.

12. **Exporters:** A further effect of increased steel tariffs is that the prices of finished products containing steel will rise, thereby making those products less competitive in the global markets, injuring AIIS

members who export their products, as well as AIIS members who are not manufacturers, but trade in products containing steel and are able to export fewer of them (or at reduced profits) because of the higher prices for those products.

13. **Steel Supply Chain Service Providers:** They include customs brokers, insurance carriers, and surveyors, all of whom lose business when the volume of imports falls.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on this 16th day of July 2018.

/s/ Richard Chriss
Richard Chriss

IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, and KURT ORBAN PARTNERS, LLC, Plaintiffs, v. UNITED STATES and KEVIN K. MCALEENAN, Commissioner, United States Customs and Border Protection, Defendants.	Court No. 18-00152

DECLARATION OF CHARLES SCIANNA

I, Charles Scianna, President of Plaintiff Sim-Tex, LP ("Sim-Tex"), hereby declare as follows:

1. I am the President of the Plaintiff Sim-Tex. I have held this position since 1986. I am thoroughly familiar with the operations of Sim-Tex, and the statements in this declaration are based on my knowledge of the company.

2. Sim-Tex is a limited liability partnership organized under the laws of Texas, with its principal place of business in Waller, Texas. Sim-Tex is an importer and the leading wholesaler in the United States

of oil country tubular goods (OCTG) casing and tubing, which are carbon and alloy steel pipe and tube products used in the production and distribution of oil and gas. Sim-Tex is a member of Plaintiff American Institute for International Steel, Inc. (AIIS). Sim-Tex imports directly, as an importer of record, and indirectly, through traders, approximately 40,000 – 45,000 tons of steel products per month from Korea, Taiwan, Brazil, Germany, Italy and other sources. Imports from Korea and Brazil are subject to quotas imposed pursuant to Section 232, and imports from Sim-Tex's other sources are subject to the 25% additional tariff imposed pursuant to section 232.

3. Sim-Tex also purchases and sells OCTG tubing (sizes 2" through 3 ½") produced in the United States. Domestic OCTG producers generally do not produce these smaller sizes in sufficient quantities to fulfill Sim Tex's needs of approximately 20,000 – 25,000 tons of tubing because they can make larger diameter pipe on the same equipment at much higher profit margins. Sim-Tex's allocation of OCTG tubing is less than 3,000 tons per month, and the balance must be made up with imports.

4. Sim-Tex has been and continues to be adversely affected by the 25% tariff on imported steel products.

5. As the importer of record for a significant portion of the OCTG products that it sells, Sim-Tex purchases the steel abroad and arranges to have it enter the United States. Sim-Tex then sells the OCTG to

third parties, who are generally in the oil and gas drilling, transmission and distribution business. Sim-Tex is legally obligated to pay any duties, including the 25% tariff at issue in this case. Depending on its contractual arrangements with its customers, Sim-Tex may or may not be able to pass on some or all of the tariff to its purchasers. If we are not able to pass on the cost of the tariff, our profits are commensurately reduced or eliminated entirely. In most cases, if the customer cannot absorb the cost of the increased tariff, we cannot make the sale, resulting in lost sales revenues and lost profits. The 25% tariff is also having a negative effect on Sim-Tex's cash flow and lines of credit.

6. Sim-Tex also effectively pays the 25% tariff on transactions on which it is the wholesaler. The traders who import the steel and pay the duties to the government add the cost of the duties to the price they charge to Sim-Tex. Again, Sim-Tex may or may not be able to pass on some or all of this additional cost to its customers. If we are not able to pass on the cost of the tariff, our profits are commensurately reduced or eliminated entirely. The 25% tariff is also having a negative effect on Sim-Tex's cash flow and lines of credit.

Pursuant to 28 U.S.C. § 1746, I hereby declare under penalty of perjury that the foregoing is true and correct. Executed on this 19th day of July 2018.

/s/ Charles Scianna
Charles Scianna

IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

AMERICAN INSTITUTE FOR INTERNATIONAL STEEL, INC., SIM-TEX, LP, and KURT ORBAN PARTNERS, LLC, Plaintiffs, v. UNITED STATES and KEVIN K. MCALEENAN, Commissioner, United States Customs and Border Protection, Defendants.	Court No. 18-00152

DECLARATION OF JOHN FOSTER

I, John Foster, President of Plaintiff Kurt Orban Partners, LLC ("Orban"), hereby declare as follows:

1. I have held this position since 2012. I am thoroughly familiar with the operations of Orban, and the statements in this declaration are based on my knowledge of the company and its business operations.

2. Orban is a limited liability company organized under the laws of California, with its principal place of business in Burlingame, California. Orban is an importer and specialty steel trader that purchases globally from leading carbon, alloy, and stainless and high

nickel alloy manufacturers and sells to manufacturers in the United States. Orban is a member of Plaintiff American Institute for International Steel, Inc. (AIIS), and it purchases between 200,000 and 250,000 tons of imported steel per year, and Orban is the importer of record for most of these purchases.

3. Most of Orban's purchases of imported steel are subject to the 25% tariff. When Orban is the importer of record, it is responsible for paying all duties, including the 25% tariff. Orban may or may not be able to pass on all or part of this tariff.

4. Among the products that Orban imports and sells are the following:

- Oil country tubular goods (OCTG) and line pipe for the oil, gas and energy industries;
- Oil country couplings and fittings;
- Other welded steel pipe;
- Hot-rolled steel coil for the production of OCTG tubing and casing as well as for general durable goods manufacturing;
- Cold-rolled and coated flat steels for residential construction as well as the manufacture of steel drums and barrels that serve the U.S. chemical sector;
- Wire rod that is drawn into a multitude of finished wire products for agricultural, durable and non-durable goods applications;

- Stainless steel tubes, bars and wire for specialty applications where corrosion resistance is required;
- Reinforcing bars for residential, non-residential and certain civil construction applications; and
- Hot-rolled bars and grating used in various construction applications.

5. Orban has been and continues to be adversely affected by the 25% tariff on imported steel products. As the importer of record for a significant portion of the steel products that it sells, Orban purchases the steel abroad and arranges to have it enter the United States. Orban then sells those steel products to third parties. Orban is legally obligated to pay any duties, including the 25% tariff at issue in this case. Depending on its contractual arrangements with its customers, Orban may or may not be able to pass on some or all of the tariff to its purchasers. If it is not able to pass on the cost of the tariff, its profits are commensurately reduced or may be eliminated entirely. In most cases, if we cannot pass on the 25% tariff, we cannot make the sale, resulting in lost sales revenues and lost profits. The 25% tariff is also having a negative effect on Orban's cash flow and lines of credit.

6. Orban also effectively pays the 25% tariff on transactions in which it purchases the steel from importers. As a trader, the countries vary widely according to global pricing and availability, but the following countries we have worked with in the last 12-18

months: Czech Republic, Indonesia, Italy, Mexico, South Africa, Taiwan, Turkey, UAE, Belarus, India, Korea, Pakistan, and Poland. The traders who import the steel and pay the duties to the government add the cost of the duties to the price they charge to Orban. Again, Orban may or may not be able to pass on some or all of this additional cost to its customers.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct. Executed on this 17th day of July 2018.

/s/ John Foster
John Foster