APPENDIX

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APPENDIX A

In the
United States Court of Appeals
for the Federal Circuit

PRIMESOURCE BUILDING PRODUCTS, INC.,
Plaintiff-Appellee

v.

UNITED STATES, JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, GINA M. RAIMONDO, SECRETARY OF COMMERCE, CHRISTOPHER MAGNUS, COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION, UNITED STATES CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF COMMERCE,
Defendants-Appellants

2021-2066

Appeal from the United States Court of International Trade in No. 1:20-cv-00032-TCS-JCG-MMB, Senior Judge Timothy C. Stanceu, Judge Jennifer Choe-Groves, Judge M. Miller Baker

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OMAN FASTENERS, LLC, HUTTIG BUILDING PRODUCTS, INC., HUTTIG, INC.,
Plaintiffs-Appellees

v.

UNITED STATES, JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, CHRISTOPHER MAGNUS, COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF COMMERCE, GINA M. RAIMONDO, SECRETARY OF COMMERCE,
Defendants-Appellants

2021-2252

Appeal from the United States Court of International Trade in Nos. 1:20-cv-00037-TCS-JCG-MMB, 1:20-cv-00045-TCS-JCG-MMB, Senior Judge Timothy C. Stanceu, Judge Jennifer Choe-Groves, Judge M. Miller Baker.

Decided: February 7, 2023

JEFFREY S. GRIMSON, Mowry & Grimson, PLLC, Washington, DC, argued for plaintiff-appellee Prime-Source Building Products, Inc. Also represented by BRYAN PATRICK CENKO, JILL CRAMER, KRISTIN HEIM MOWRY, SARAH WYSS.

ANDREW CARIDAS, Perkins Coie, LLP, Washington, DC, argued for plaintiffs-appellees Oman Fasteners, LLC, Huttig Building Products, Inc., Huttig, Inc. Also represented by MICHAEL PAUL HOUSE; KARL J. WORSHAM, Phoenix, AZ.

MEEN GEU OH, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendants-appellants. Also repre-

sented by KYLE SHANE BECKRICH, BRIAN M. BOYNTON, TARA K. HOGAN, PATRICIA M. MCCARTHY.

ADAM H. GORDON, The Bristol Group PLLC, Washington, DC, for amicus curiae The American Steel Nail Coalition. Also represented by LAUREN FRAID, JENNIFER MICHELE SMITH.

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

TARANTO, Circuit Judge.

In 2018, pursuant to § 232 of the Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872, 877, codified as amended at 19 U.S.C. § 1862, the Secretary of Commerce reported to the President that steel imports threatened national security by contributing to unsustainably low levels of use of domestic steel-producing capacity, and the President, agreeing with the Secretary's finding, issued Proclamation 9705 to adopt a plan of action to address that threat, starting with imposition of higher tariffs on steel imports from certain countries but providing for monitoring and future adjustments if needed. In 2020, the President issued Proclamation 9980, which, based on the required monitoring, raised tariffs on imports of steel derivatives such as nails and fasteners. That proclamation was challenged in two cases (before us here) filed in the Court of International Trade (Trade Court)—one by PrimeSource Building Products, Inc.; the other by Oman Fasteners, LLC, Huttig Building Products, Inc., and Huttig, Inc. (collectively, Oman Fasteners)—against the United States, the President, and two federal agencies and their heads (collectively, the government). The Trade Court held Proclamation 9980 to be unauthorized by § 232 because the new derivatives tariffs were imposed after the passing of certain deadlines for presidential action set

forth in § 232. *See PrimeSource Building Products, Inc. v. United States*, 497 F. Supp. 3d 1333 (Ct. Int'l Trade 2021); *PrimeSource Building Products, Inc. v. United States*, 505 F. Supp. 3d 1352 (Ct. Int'l Trade 2021); *Oman Fasteners, LLC v. United States*, 520 F. Supp. 3d 1332 (Ct. Int'l Trade 2021).

The government appeals. After the Trade Court issued its decisions on the merits, we decided *Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021), *cert. denied*, 142 S. Ct. 1414 (2022), which led the Trade Court to issue stays of its judgments in the two cases. In *Transpacific*, we upheld a presidential proclamation that increased tariffs on steel beyond Proclamation 9705's rate, concluding that when the President, within the § 232 time limits at issue, adopts a plan of action that contemplates future contingency-dependent modifications, those time limits do not preclude the President from later adding to the initial import impositions in order to carry out the plan to help achieve the originally stated national-security objective where the underlying findings and objective have not grown stale. We now uphold Proclamation 9980. That proclamation's new imposition reaches imports of steel derivatives, which are within § 232's authorization of presidential action based on the Secretary's finding about imports of steel, and there is no staleness or other persuasive reason for overriding the President's judgment that including derivatives helps achieve the specific, original national-security objective. We therefore reverse the judgments of the Trade Court.

I

A

Section 232 "empowers and directs the President to act to alleviate threats to national security from imports."

Id. at 1311. For the President to act, the Secretary of Commerce must, under § 232(b), first investigate the effects on national security of imports of an article and submit to the President within 270 days a report detailing the Secretary's findings about such effects. 19 U.S.C. § 1862(b)(1)(A)–(3)(A). The report must contain the Secretary's recommendations for action or inaction with respect to imports of that article. *Id.* § 1862(b)(3)(A). If the Secretary finds that imports of the article "threaten to impair the national security, the Secretary shall so advise the President in [the] report." *Id.* Under § 232(c), within 90 days of receiving the Secretary's report, the President must determine whether to concur in that finding. *Id.* § 1862(c)(1)(A)(i). If the President concurs in that finding, then within the same 90 days "the President shall" also "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article *and its derivatives* so that such imports will not threaten to impair the national security." *Id.* § 1862(c)(1)(A) (emphasis added). If the President determines to take action with respect to the import of the article and its derivatives, "the President shall implement that action" within 15 days of the foregoing determinations, *id.* § 1862(c)(1)(B), that is, within 105 days of the Secretary's report.

B

In 2017, the Secretary began investigating steel imports and concluded that they posed a threat to national security. J.A. 232–35. On January 11, 2018, the Secretary reported to the President that the imports were "weakening our internal economy" and harming "the [domestic] steel industry," the continued vitality of which "is essential for national security applications." *Id.* The Secretary recommended that the President "take immediate action

by adjusting the level of these imports through quotas or tariffs" with the goal of "reducing import penetration rates to approximately 21 percent," so that "U.S. industry would be able to operate at 80 percent of their capacity utilization." J.A. 236, 288. The 80 percent rate, the Secretary found, was the minimum "necessary to sustain adequate profitability and continued capital investment, research and development, and workforce enhancement in the steel sector" and to thereby "enable U.S. steel mills to increase operations significantly in the short-term and improve the financial viability of the industry over the long-term." J.A. 234, 289.

On March 8, 2018, the President announced his concurrence and remedial plan. Proclamation 9705: Adjusting Imports of Steel into the United States, 83 Fed. Reg. 11,625 (Mar. 8, 2018). He concurred 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." *Id.* ¶ 5, 83 Fed. Reg. at 11,626. He imposed a 25 percent tariff on imports of various steel articles (*e.g.*, flat-rolled products, bars and rods, tubes, pipes, and ingots) from many countries. *Id.* ¶ 8, clause 2, Annex, 83 Fed. Reg. at 11,626–29; *see PrimeSource*, 497 F. Supp. 3d at 1337–38 n.2. The President deemed this an "important first step in ensuring the economic viability of our domestic steel industry." Proclamation 9705 ¶ 11, 83 Fed. Reg. at 11,626; *id.* clause 2, 83 Fed. Reg. at 11,627. He retained the option to "remove or modify" the impositions if the United States and other countries were to come up with suitable alternatives for remedying the security threat. *Id.* ¶ 9, 83 Fed. Reg. at 11,626. More generally, the President directed the Secretary to "continue to monitor imports of steel articles," "review the status of such imports with respect to the national security," and "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." *Id.* clause 5(b), 83 Fed. Reg. at 11,628.

In light of, *e.g.*, negotiations between the United States government and some foreign governments, the President issued a variety of follow-up proclamations to make changes in the impositions of Proclamation 9705, including the August 2018 Proclamation 9772 that was challenged (and upheld by this court) in *Transpacific*. 4 F.4th at 1314–16. The Secretary monitored relevant imports, as required, and in January 2020, the President issued a new proclamation—now covering *derivatives* of the earlier-covered steel articles—based on information supplied by the Secretary. Proclamation 9980: Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States, 85 Fed. Reg. 5281 (Jan. 24, 2020).[1]

The President recited that the Secretary had informed him that "domestic steel producers' capacity utilization ha[d] not stabilized for an extended period of time at or above the 80 percent capacity utilization level" that was the objective of Proclamation 9705. *Id.* ¶ 5, 85 Fed. Reg. at 5281. The Secretary stated that "imports of certain derivatives of steel articles have significantly increased since the imposition of the tariffs," and "[t]he net effect of the increase of imports of these derivatives has been to erode the customer base for U.S. producers of . . . steel and undermine the purpose of the proclamations adjusting imports of . . . steel articles to remove the threatened impairment of the national security." *Id.* ¶ 5, 85 Fed. Reg.

[1] The new proclamation covered derivatives of aluminum as well as steel articles, but only the steel aspects of the proclamation are at issue before us.

at 5282. The Secretary characterized this increase in imports of steel derivatives as "circumvent[ing] the duties on . . . steel articles imposed in . . . Proclamation 9705" and "threaten[ing] to undermine the actions taken to address the risk to the national security of the United States found in . . . Proclamation 9705." *Id.* ¶ 8, 85 Fed. Reg. at 5282. The Secretary "assessed that reducing imports of the derivative articles" at issue "would reduce circumvention and facilitate the adjustment of imports that . . . Proclamation 9705, as amended, made to increase domestic capacity utilization to address the threatened impairment of the national security of the United States." *Id.* Accepting the foregoing determinations by the Secretary, the President in Proclamation 9980 extended the 25 percent tariff to certain steel derivatives, including nails, staples, and tacks. *Id.* clause 1, Annex II, 85 Fed. Reg. at 5283, 5290–92; *see PrimeSource*, 497 F. Supp. 3d at 1338–39 n.3. He "concluded that it [was] necessary and appropriate" to extend the tariffs to the specified steel derivatives "to address circumvention . . . and to remove the threatened impairment of the national security." Proclamation 9980 ¶ 9, 85 Fed. Reg. at 5283.

C

PrimeSource and Oman Fasteners, which import steel nails and fasteners covered by Proclamation 9980, brought suit in the Trade Court to challenge the proclamation. As relevant now, they contended that the proclamation's extension of the increased tariff to derivatives was contrary to § 232 because it occurred in January 2020, more than 105 days after the President received the Secretary's report. The Trade Court agreed.

The Trade Court in the PrimeSource case concluded that the 90-day and 15-day limits found in § 232(c) apply to the President's imposition of increased burdens on im-

ports under the provision, including modifications of an earlier plan of action that had been timely adopted. 497 F. Supp. 3d at 1343–59. The court held that, insofar as the January 2020 Proclamation 9980 relied on the Secretary's January 2018 report on steel articles to satisfy the § 232(b) prerequisite to presidential action, it was untimely under § 232(c). *Id.* When the government stipulated that it was relying solely on that report to satisfy the § 232(b) prerequisite, the Trade Court held Proclamation 9980 invalid and entered final judgment against the government. *PrimeSource*, 505 F. Supp. 3d at 1353–58. The Trade Court reached the same result in the Oman Fasteners case. 520 F. Supp. 3d at 1335–39.

In both cases, the government timely appealed and also moved for at least a partial stay of the judgment pending appeal. The Trade Court granted stays, reflecting the government's newly enhanced chance of success on the merits in light of the intervening decision of this court in *Transpacific*. *See PrimeSource Building Products, Inc. v. United States*, 535 F. Supp. 3d 1327, 1329–36 (Ct. Int'l Trade 2021); *Oman Fasteners, LLC v. United States*, 542 F. Supp. 3d 1399, 1403–09 (Ct. Int'l Trade 2021). The Trade Court did, however, note two distinctions of these cases from *Transpacific*—these cases involve an extension to derivatives of a tariff initially imposed on the articles whose importation was found to threaten national security, not (as in *Transpacific*) an increase in rate of the initial tariff on the same articles; and the time from Secretary report to challenged proclamation is much larger than in *Transpacific* (two years versus seven months). *See PrimeSource*, 535 F. Supp. 3d at 1332–33; *Oman Fasteners*, 542 F. Supp. 3d at 1403–05.

We have jurisdiction over the Trade Court's final judgments under 28 U.S.C. § 1295(a)(5).[2]

II

On appeal, the government maintains that the Trade Court's decisions are incorrect in light of *Transpacific*. Appellees defend the Trade Court's decisions, asserting that factual differences render *Transpacific* inapplicable and that the government's reading of § 232 would run afoul of the delegation doctrine.

We review the Trade Court's interpretation of the statute de novo. *GPX International Tire Corp. v. United States*, 780 F.3d 1136, 1140 (Fed. Cir. 2015). To the extent relevant here, we may review an allegation that the President acted in violation of the Constitution. *USP Holdings*, 36 F.4th at 1365. For an asserted statutory violation, review is also available, but it is limited: "For a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985). This court has repeatedly relied on the *Maple Leaf* formulation

[2] In *Transpacific*, we flagged the question of whether the claims against the President, as a defendant, must be dismissed. 4 F.4th at 1318 n.5; *accord PrimeSource*, 497 F. Supp. 3d at 1361–62, 1365–70 (Baker, J., concurring in part and dissenting in part). That question arises here as well. Based on our recent precedent, we hold that the claims against the President must be dismissed, but given the presence of the other defendants, we have jurisdiction to review the Trade Court's decisions on the merits. *See USP Holdings, Inc. v. United States*, 36 F.4th 1359, 1366 (Fed. Cir. 2022).

to indicate the "limited" scope of review of non-constitutional challenges to presidential action. *USP Holdings*, 36 F.4th at 1365–66 & n.3 (discussing "limited" scope, quoting *Maple Leaf*, and also quoting formulations approving review of whether "the President clearly misconstrued his statutory authority" and "whether the President has violated an explicit statutory mandate" (cleaned up)); *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018).

A

In *Transpacific*, we addressed whether § 232(c)(1) "permits the President to announce a continuing course of action within the statutory time period and then modify the initial implementing steps in line with the announced plan of action by adding impositions on imports to achieve the stated implementation objective." 4 F.4th at 1318–19. We concluded that the President may do so, explaining:

> [T]he best reading of the statutory text of § 1862, understood in context and in light of the evident purpose of the statute and the history of predecessor enactments and their implementation, is that the authority of the President includes authority to adopt and carry out a plan of action that allows adjustments of specific measures, including by increasing import restrictions, in carrying out the plan over time.

Id. at 1319. And we upheld application of that authority to an increase in impositions that could have been adopted initially under § 232(c) where the President had initially announced a plan of action and later found that an increase would help solve the specific capacity-utilization problem that was the basis for the finding that imports threatened national security. *Id.* at 1310, 1332–33.

Proclamation 9980 comes within the interpretation of § 232 we adopted in *Transpacific*. The initial proclamation (Proclamation 9705) is the same here as in *Transpacific*. As described above, that proclamation rested on the Secretary's finding that imports of steel articles were threatening national security by impairing achievement of an 80 percent capacity utilization level found important for domestic steel makers to sustain their operations to meet national-security needs. J.A. 232–36, 288–89; *see* Proclamation 9705 ¶¶ 2, 4–5, 83 Fed. Reg. at 11,625–26. Proclamation 9705 announced a continuing plan of action aimed at achieving that goal, with monitoring and notice of possible changes in the future. *Id.* ¶¶ 9, 11, clauses 2, 5(b), 83 Fed. Reg. at 11,626–28 (stating that the President "may remove or modify the restriction on steel articles imports," characterizing "the tariff imposed by this proclamation [a]s an important first step in ensuring the economic viability of our domestic steel industry," and directing the Secretary to "continue to monitor imports of steel articles" and to "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"). Later, the Secretary informed the President that a significant increase had occurred in imports of steel derivatives, which in simple economic terms constituted a circumvention of the protections initially adopted to enhance and stabilize domestic steel-making capacity utilization, undermining the effectiveness of the President's previous tariffs. Proclamation 9980 ¶¶ 5, 8, 85 Fed. Reg. at 5281–82. In response, the President extended Proclamation 9705's tariffs to various steel derivative products to address the circumvention threatening the capacity-utilization objective. *Id.* ¶ 9, clause 1, Annex II, 85 Fed. Reg. at 5283, 5290–92.

Thus, the President, having "announce[d] a continuing course of action within the statutory time period" (Proclamation 9705), "modif[ied] the initial implementing steps . . . by adding impositions on imports" (extending the tariffs to derivatives in Proclamation 9980) "in line with the announced plan of action" (Proclamation 9705's directive to the Secretary to monitor imports and inform the President of any relevant changes) "to achieve the stated implementation objective" (long-term stabilization of the capacity utilization rate at or above 80 percent). *Transpacific*, 4 F.4th at 1318–19. An imposition on imports of derivatives of the articles that were the subject of the Secretary's threat finding is expressly authorized as an available remedy by § 232(c). In acting to close a loophole exploited by steel-derivatives importers, the President was making a "contingency-dependent choice[] that [is] a commonplace feature of plans of action," *id.* at 1321, adding use of a tool that he could have used in the initial set of measures and later found important to address a specific form of circumvention Congress recognized when it authorized coverage of derivatives of the articles whose imports the Secretary found to threaten national security. *See* Oral Arg. at 25:03–26:20 (agreeing that the mechanism linking Proclamation 9980 to Proclamation 9705—foreign steel producers, facing raised tariffs on direct imports, sold steel to foreign derivatives makers not (yet) subject to raised tariffs, impairing market opportunities of domestic steel makers—"is not complicated").

B

The attempts by PrimeSource and Oman Fasteners to distinguish *Transpacific* to reach a different result here are unpersuasive. First, the fact that the Secretary's 2018 report and Proclamation 9705 did not address the effect of imports of derivatives is immaterial. The President

may take action against derivative products regardless of whether the Secretary has investigated and reported on such derivatives. *See* 19 U.S.C. § 1862(b) (stating that the Secretary's investigation and report focus on an "article"); *id.* § 1862(c)(1)(A)(ii) (empowering the President to then adjust imports of both "the article and its derivatives"). There is no textual basis for reading § 232 as empowering the President to do so only at the initial plan-adoption stage, not at later, modification stages. And what we recognized in *Transpacific* as serving the "evident purpose" of § 232—permitting the President to act under an announced plan to adjust initial measures over time to reach the initially adopted objective, 4 F.4th at 1323—applies not only to an increase in tariff rates on the same entries but equally to an extension to derivatives of measures initially imposed only on the underlying articles.

Second, the greater gap in time between the Secretary's finding and the challenged proclamation (here, nearly two years; in *Transpacific*, seven months) does not render *Transpacific* inapplicable. There is no textual basis for a specific time limit on adjustments under a timely adopted plan. Indeed, impositions under § 232 have on numerous occasions been modified many years after they were first adopted. *Id.* at 1326–29.

As we noted in *Transpacific*, a different question might be presented where the underlying finding or objective has become substantively stale; here, as in *Transpacific*, we have no occasion to address that issue, because "there is no genuine concern about staleness." *Id.* at 1332. Proclamation 9980 was issued in pursuit of the same goal first articulated in Proclamation 9705 (extended stabilization at 80 percent of domestic capacity utilization) and in response to the "current information" provided to the President by the Secretary under the

"requirements for monitoring the import reductions" that were "put in place" by Proclamation 9705. *Id.* at 1332 n.10. And insofar as appellees fault the President for imposing tariffs on some derivatives but not others, and the government for declining to put into the record the updated data the Secretary conveyed to the President, *see* PrimeSource Br. 31–32; Oman Fasteners Br. 38 & n.15, the criticism is meritless. The information at issue is not part of a legally required and legally consequential decision of the Secretary, *cf. USP Holdings*, 36 F.4th at 1366–67, and so we may not second-guess the facts found and measures taken by the President to support his adjustment, *see Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984) (citing *United States v. George S. Bush & Co.*, 310 U.S. 371, 379–80 (1940)); *Chang v. United States*, 859 F.2d 893, 896 n.3 (Fed. Cir. 1988); Oral Arg. at 13:45–16:00 (acknowledging that there is no review of the President's pertinent factual and remedial-appropriateness determinations).

C

Reading § 232 to permit the President to modify an initial plan of action to include derivatives, as he did here, does not render it an unconstitutional delegation. The Supreme Court has already rejected a delegation-doctrine challenge to § 232 (in an earlier form), holding that the "clear preconditions to Presidential action" established by § 232, *e.g.*, a finding by the Secretary regarding the existence of a national-security threat, and consideration by the President of "a series of specific factors," make that authority "far from unbounded." *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548, 558–60 (1976) (citations omitted). The same is true today, as those "clear preconditions" remain in effect, *id.*, and the President must still consider the statutory factors and

act only upon receipt of a report from the Secretary, even if the President possesses the modification authority at issue here, *see* 19 U.S.C. § 1862(b)–(d). Moreover, if § 232 "easily fulfill[ed] th[e] [intelligible principle] test" in 1976, *Algonquin*, 426 U.S. at 559, it also does so now, given that the 1988 amendments, in adding the present deadlines, further defined the congressional delegation of authority to the President. We have rejected the contention that *Algonquin* does not require rejection of a delegation-doctrine challenge to § 232 in its current form. *Transpacific*, 4 F.4th at 1332–33 (citing *American Institute for International Steel, Inc. v. United States*, 806 F. App'x 982, 983–91 (Fed. Cir. 2020), cert. denied, 141 S. Ct. 133 (2020)); *see also USP Holdings*, 36 F.4th at 1365. We see no basis for concluding otherwise here.

III

In sum, § 232's deadlines did not prevent the President from modifying his initial timely adopted plan of action by issuing Proclamation 9980, and that conclusion does not render § 232 unconstitutional under the delegation doctrine. Because there are no more facts for the Trade Court to find on remand if *Transpacific* controls, as appellees agreed, Oral Arg. at 23:20–25, we reverse the judgments of the Trade Court and remand the cases for entry of judgment against PrimeSource and Oman Fasteners, including dismissal of the claims against the President.

The parties shall bear their own costs.

REVERSED AND REMANDED

APPENDIX B

Slip Op. No. 21-144

UNITED STATES COURT OF INTERNATIONAL TRADE

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

OPINION AND ORDER

[Ordering a stay pending appeal and related measures.]

Dated: October 15, 2021

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

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

Stanceu, Judge. Defendants move for a partial stay pending their appeal of the judgment this Court entered in *Oman Fasteners, LLC v. United States*, Judgment (June 10, 2021), ECF No. 108 ("Judgment"), and for certain other measures related to protection of potential government revenue. In the Judgment, the court awarded remedies for plaintiff Oman Fasteners, LLC ("Oman") and plaintiffs Huttig Building Products, Inc. and Huttig, Inc. (collectively, "Huttig"), importers of steel nails, in a challenge to a Presidential action taken under Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 ("Section 232"), imposing additional duties of 25% *ad valorem* on certain imported products made of steel, including steel nails.[1] *See* Proclamation 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Exec. Office of the President Jan. 29, 2020) ("Proclamation 9980"). Plaintiffs oppose defendants' motion.

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

I. BACKGROUND

The background of this action is set forth in our previous opinion and supplemented herein. *See Oman Fasteners, LLC v. United States*, 45 CIT __, 520 F. Supp. 3d 1332 (2021) ("*Oman*"). Other pertinent background is pre-

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

sented in decisions of this Court adjudicating a claim substantially the same as the one adjudicated in this litigation. *See PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT __, 497 F. Supp. 3d 1333 (2021) ("*PrimeSource I*"), *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT __, 505 F. Supp. 3d 1352 (2021) ("*PrimeSource II*").

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

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

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

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

In the *PrimeSource* litigation, this Court awarded summary judgment to plaintiff PrimeSource Building Products, Inc., holding that Proclamation 9980 was issued beyond the statutory time limits set forth in Section 232. *PrimeSource II*, 45 CIT at __, 505 F. Supp. 3d at 1357. Thereafter, the parties in the instant litigation filed a Joint Status Report, in which the defendants agreed that the decisions in *PrimeSource* were "decisive as to Count I of Plaintiffs' Complaints" and that as a result there was "no reason for this Court not to grant Plaintiffs' Motion for Summary Judgment on Count I of the Complaints . . . and deny Defendant[s'] Motion to Dismiss Count I of

Plaintiffs' Complaints." Joint Status Report 1–2 (Apr. 30, 2021), ECF No. 105. Further, plaintiffs agreed to move the court to lift the stay and dismiss Counts II and III of their complaints. *Id.* Accordingly, in *Oman*, the court granted summary judgment in favor of plaintiffs on Count I of their complaints and dismissed without prejudice Counts II and III. 45 CIT at __, 520 F. Supp. 3d at 1339.

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

Defendants filed a notice of appeal of the Judgment, Notice of Appeal (Aug. 7, 2021), ECF No. 110, and shortly thereafter their motion for a stay pending appeal and other measures, Defs.' Mot. for Stay of J. to Maintain the *Status Quo Ante* Pending Appeal (Aug. 9, 2021), ECF No. 111 (conf.), (Oct. 14, 2021), ECF No. 119 (public) ("Defs.' Mot. for Stay"). Defendants requested that, for the pendency of the appeal, the court: (1) stay the requirement to liquidate Oman's and Huttig's entries without the assessment of the 25% additional duties and reinstate the order to suspend liquidation; (2) stay the requirement to refund with interest any deposits of estimated duties under Proclamation 9980 made by Oman and Huttig; and (3) reinstate the requirements that plaintiffs monitor their imports of merchandise covered by Proclamation 9980 and maintain a sufficient continuous bond for the duty liability on these imports. Defs.' Mot. for Stay 1–2. Plaintiffs filed their opposition to defendants' stay motion on August 30, 2021. Pls.' Opp'n to Defs.' Mot. for Stay of J. Pending Appeal, ECF Nos. 116 (conf.), 117 (public) ("Pls.' Opp'n").

II. DISCUSSION

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

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

A. Success on the Merits

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

The subject of the *Transpacific* litigation is a Presidential proclamation that increased to 50% the then-existing 25% Section 232 duties on imports of steel products from Turkey. *See* Proclamation 9772, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 40,429 (Exec. Office of the President Aug. 15, 2018) ("Proclamation 9772"). In *Transpacific I*, this Court held the proclamation invalid as untimely and as a violation of equal protection. Regarding the former, *Transpacific I* held that Proclamation 9772 was issued after the close of the combined 105-day time period Congress established in the 1988 amendments to Section 232 (the time period codified as Section 232(c)(1), 19 U.S.C. § 1862(c)(1)), that commenced upon President Trump's receipt, on January 11, 2018, of a report by the Secretary of Commerce issued under the authority of 19 U.S.C. § 1862(b)(3)(A) (the "2018 Steel Report"). The President's receipt of the 2018 Steel Report was the procedural predicate for the issuance of a previously issued proclamation, Proclamation 9705, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Exec. Office of the President Mar. 15, 2018) ("Proclamation 9705").

In *Transpacific II*, the Court of Appeals reversed the decision of this Court in *Transpacific I*. On the issue of the time limits added by the 1988 amendments to Section 232, the Court of Appeals reasoned that "[n]one of the new language in the statute, on its own or by comparison to what came before, implies a withdrawal of previously existing presidential power to take a continuing series of affirmative steps deemed necessary by the President to counteract the very threat found by the Secretary." *Transpacific II*, 4 F.4th at 1329. The Court of Appeals stated that "[i]n this context, the directive to the President to act by a specified time is not fairly understood as implicitly meaning 'by then or not at all' as to each discrete imposition that might be needed, as judged over time." *Id.* at 1329–30.

The instant litigation arose from somewhat different facts than did the *Transpacific* litigation. Instead of an upward adjustment to the tariffs imposed by a previous Section 232 proclamation, the action contested here imposed, for the first time, tariffs of 25% on a previously unaffected group of products. These products, identified in Proclamation 9980 as "Derivative Steel Articles," Proclamation 9980, 85 Fed. Reg. at 5,281, were different than the steel articles affected by the earlier Presidential proclamation, Proclamation 9705. As in *PrimeSource*, defendants here relied upon the President's receipt of the 2018 Steel Report as the procedural basis upon which the President issued Proclamation 9980, arguing that the President retained "modification" authority over the previous Section 232 action. *See* Defs.' Mot. to Dismiss Count I for Failure to State a Claim 29–31 (Mar. 20, 2020), ECF No. 57; Joint Status Report 2 ("As was true in the *PrimeSource* litigation . . . [d]efendants' position remains that the procedural preconditions for the issuance of Proclamation 9980 were met by the Secretary's 2018 Steel Re-

port and the timely issuance of Proclamation 9705 . . . .”). Proclamation 9980 was signed by the President on January 24, 2020 (and published in the Federal Register on January 29, 2020), long after the President's receipt, on January 11, 2018, of the 2018 Steel Report. In *PrimeSource I*, this Court held that, due to the combined 105-day time limitation set forth in 19 U.S.C. § 1862(c)(1), the President's authority to adjust tariffs on the “derivative” articles of steel had expired by the time Proclamation 9980 was issued, if that time period were presumed to commence upon the receipt of the 2018 Steel Report. 45 CIT at __, 497 F. Supp. 3d at 1356. We concluded, later, that defendants had waived any defense that the procedural requirements of Section 232 were met based on any procedure other than one reliant upon the 2018 Steel Report. *Oman*, 45 CIT at __, 520 F. Supp. 3d at 1338.

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

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

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

B. Irreparable Harm in the Absence of the Requested Stay

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

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

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

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

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

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

to two parties for assessed duty liability, the importer of record and the surety.

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

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

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

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

C. Balance of the Hardships

The government also prevails on the third factor. As the court has pointed out, bonding that is inadequate to secure potential duties is deleterious to the interest of the United States in the protection of the revenue, an interest protected by statute. Defendants do not seek an order requiring cash deposits. Instead, under the government's motion, plaintiffs will incur the costs of maintaining enhanced bonding for the potential Section 232 duty liability, i.e., the cost of the bond premiums.

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

Oman argues that, in its particular circumstance, it will incur a substantial harm if it must incur the cost of maintaining bonding for entries after June 10, 2021. Pls.' Opp'n 7. Rather than impose the bonding and monitoring requirements directly, the court considers it preferable that the plaintiffs be involved in negotiations of the arrangements for the continuation of bonding on their respective entries. Accordingly, the court will direct defendants to consult with Oman and with Huttig with the objective of reaching, and implementing, agreements under which the entries occurring on and after June 10, 2021, and going forward throughout the appeal, will be covered by bonding, but only such bonding as is reasonably necessary to secure the potential revenue, including the Section 232 duties. The court will direct, further, that should defendants be unable to reach, and enter into, an agreement with a plaintiff or plaintiffs, the involved parties shall file with the court a joint status report on the negotiations.

Oman argues, further, that the harm is magnified due to the same entries subject to the stay being subject to "the as-yet uninitiated seventh administrative review (covering entries between July 1, 2021 and June 30, 2022)

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

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

Characterizing its agreement to continued bonding at the time of the initial preliminary injunction order as the "lesser of two extreme burdens," Oman submits that "to ask Plaintiffs to accept the same bonding—for an even longer period—when this Court has already held that Proclamation 9980 is unlawful and void . . . is an entirely different matter." *Id.* at 9. Plaintiffs also oppose the court's entering a stay that applies retroactively to entries prior to the imposition of the stay because doing so would "grant Defendants a bonding windfall for merchandise that entered the United States at a time when the Court had declared Proclamation 9980 unlawful and void." *Id.* at 10. Oman's argument is unconvincing. As we have explained, our conclusion that the government potentially will have a claim to Section 232 revenue is based on certain

language in *Transpacific II*, to which we give due consideration. The government's proposed motion essentially would continue the balance struck by the parties in their agreements for a consent injunction that maintained enhanced bonding while the outcome of this case was not yet determined by this Court. In comparison, denying the government the authority to require such bonding on current and future entries poses a hardship on the United States that, under the statutory scheme designed to ensure adequate protection of the revenue, is unwarranted now that such potential duty liability exists.

D. The Public Interest

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

III. Conclusion and Order

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

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

ORDERED that the order of this Court to liquidate the entries subject to this litigation and to refund with interest any deposits of estimated duties under Proclamation 9980 made by Oman and Huttig, as stated in the

Judgment entered on June 10, 2021, be, and hereby is, stayed pending the appeal of that Judgment before the United States Court of Appeals for the Federal Circuit; it is further

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

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

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

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

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

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

Dated: October 15, 2021
New York, New York

APPENDIX C

Slip Op. No. 21-72

UNITED STATES COURT OF INTERNATIONAL TRADE

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

OPINION

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

Dated: June 10, 2021

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

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

Assistant Director, and *Meen Geu Oh*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, Washington, D.C.

Stanceu, Judge: Plaintiffs Oman Fasteners LLC ("Oman"), Huttig Building Products, Inc., and Huttig Inc. (collectively, "Huttig"), U.S. importers of steel fasteners, brought actions, now consolidated, to contest a proclamation issued by the President of the United States ("Proclamation 9980") in January 2020. *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Exec. Office of the President Jan. 29, 2020).

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

I. BACKGROUND

A. Proclamation 9980

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

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

B. Procedural History of this Consolidated Action

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

On joint motions, the court consolidated the two actions, with Court Number 20-00037 serving as the lead case. Order (Mar. 16, 2020), ECF No. 54. In the same order, the court, again with the consent of the parties, stayed Counts II and III of each of the two complaints pending the court's decision on Count I of those complaints. *Id.* Stated in brief summary, Count I of each complaint claimed that Proclamation 9980 was invalid because it was not based on a determination the President made within the 90-day period provided in Section 232(c)(1)(A) and was not implemented within the 15-day period set forth in Section 232(c)(1)(B). Compl. ¶¶ 86–106.2.[2]

Defendants moved under USCIT Rule 12(b)(6) to dismiss Count I of each of the plaintiffs' complaints on March

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

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

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

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

II. DISCUSSION

A. Jurisdiction and Standards of Review

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

In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations in the complaint to be true (even if doubtful in fact) and draws all reasonable inferences in a plaintiff's favor. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). A complaint does not need to contain detailed

factual allegations, but it must state enough facts "to raise a right to relief above the speculative level." *Id.* Rule 8(a)(2) of this Court requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

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

B. Plaintiffs' Challenges to Proclamation 9980

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

In Count II, plaintiffs assert that Proclamation 9980 also is invalid because Section 232 is an unconstitutional delegation of power from the Congress to the President that is "devoid of an intelligible principle." Compl. ¶¶ 120, 121. In Count III, plaintiffs argue that Proclamation 9980 violates the constitutional guarantee of equal protection by imposing additional tariffs on some derivative articles of steel and not others, and by excluding from those tariffs identical derivative articles manufactured in some foreign countries but not others, without a legitimate government purpose for the disparate treatment. Compl. ¶¶ 127–131.

C. Our Decision in *PrimeSource I*

In *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT __, 497 F. Supp. 3d 1333 (2021) ("*PrimeSource I*"), we dismissed under USCIT Rule 12(b)(6) all claims of plaintiff PrimeSource Building Products, Inc. ("PrimeSource") except the claim that Proclamation 9980 was untimely because it was issued beyond the 90-day and 15-day time limitations set forth in Section 232(c)(1)(A) and (B), respectively. *PrimeSource I*, 45 CIT at __, 497 F. Supp. 3d at 1361. As do the plaintiffs in this consolidated case, the plaintiff in *PrimeSource* argued that Proclamation 9980 was issued after the expiration of the combined 105-day time period of Section 232(c)(1). *See id.* at __, 497 F. Supp. 3d at 1344; Compl. ¶ 105. PrimeSource argued that the only report that could have qualified as a predicate for Proclamation 9980, and issued under Section 232(b)(3)(A), was one the Secretary of Commerce issued in January 2018 on the effect of certain steel articles on the national security of the United States (the "2018 Steel Report"). *PrimeSource I*, 45 CIT at __, 497 F. Supp. 3d at 1341. That report culminated in the President's issuance of Proclamation 9705 in March 2018, which imposed 25% duties on various steel articles, *see Adjusting Imports of Steel Into the United States* ¶¶ 1–2, 83 Fed. Reg. 11,625 (Exec. Office of the President Mar. 15, 2018), but not on the "derivative" articles of steel affected by Proclamation 9980 in January 2020.

We stated in *PrimeSource I* that "[d]efendants do not dispute that the 2018 Steel Report is, for purposes of Section 232(c), 19 U.S.C. § 1862(c), the report issued according to Section 232(b)(3)(A), 19 U.S.C. § 1862(b)(3)(A), upon which the President based his adjustment to imports of steel derivatives, including steel nails." *PrimeSource I*, 45 CIT at __, 497 F. Supp. 3d at 1345 (citing Defs.' Mot.

24–29). In denying defendants' motion to dismiss PrimeSource's "untimeliness" claim, we concluded that Proclamation 9980 does not comply with the limitations on the President's authority imposed by the 90- and 15-day time limitations of Section 232(c)(1) if the combined 105-day time period is considered to have commenced upon the President's receipt of the 2018 Steel Report. *Id.* at __, 497 F. Supp. 3d at 1356. We held that in this circumstance PrimeSource had stated a plausible claim for relief, and therefore we declined to dismiss it. *Id.* at __, 497 F. Supp. 3d at 1359.

After denying defendants' motion to dismiss as to PrimeSource's timeliness claim, we denied the motion of plaintiff PrimeSource for summary judgment on that claim, determining that there existed one or more genuine issues of material fact. *Id.* at __, 497 F. Supp. 3d at 1361. Although concluding that Proclamation 9980 was untimely under Section 232(c)(1) when viewed solely as an action taken in response to the 2018 Steel Report, we also concluded that there were genuine issues of material fact that bore on the extent to which the subsequent "assessment" or "assessments" of the Commerce Secretary, as identified in Proclamation 9980, validly could be held to have served a function analogous to that of a Section 232(b)(3)(A) report. *Id.* at __, 497 F. Supp. 3d at 1360–61. We also noted that we did not know what form of inquiry or investigation the Commerce Secretary conducted prior to his submission of these communications to the President and whether, or to what extent, that inquiry or investigation satisfied the essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(b)(2)(A). *Id.* at __, 497 F. Supp. 3d at 1360–61.

In summary, we concluded in *PrimeSource I* that factual information pertaining to the Secretary's inquiry on,

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

D. Our Decision in *PrimeSource II*

On March 5, 2021, the parties in the *PrimeSource* litigation submitted a joint status report in lieu of a scheduling order. In it, defendants expressly waived "the opportunity to provide additional factual information that might show that the 'essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(b)(2)(A)' were met," adding that "[d]efendants do not intend to pursue that argument." Joint Status Rep. 2, ECF No. 108 (Ct. No. 20-00032) (quoting *PrimeSource I*, 45 CIT at __, 497 F. Supp. 3d at 1361). Defendants informed the court that their "position continues to be that procedural preconditions for the issuance of Proclamation 9980 were met by

the Secretary's 2018 Steel Report and the timely issuance of Proclamation 9705, a position that the majority has already rejected." *Id.* at 2–3. The *PrimeSource* joint status report concluded by stating that "the parties agree and respectfully submit that there is no reason for this Court to delay entry of final judgment. In so representing, the parties fully reserve all rights to appeal any adverse judgment." *Id.* at 3.

In *PrimeSource Bldg. Prods., Inc. v. United States*, 45 CIT __, Slip Op. 21-36 (Apr. 5, 2021) ("*PrimeSource II*"), we concluded that defendants, through their statements in the parties' joint status report, had waived "any defense that the assessments of the Commerce Secretary, as described in Proclamation 9980, were the functional equivalent of a Section 232(b)(3)(A) report." 45 CIT __, Slip Op. 21-36 at 8. "In particular, defendants have waived any defense grounded in a factual circumstance other than one in which the 2018 Steel Report is the only submission made by the Commerce Secretary that could satisfy the requirements of Section 232(b)(3)(A) and upon which Proclamation 9980 could have been based." *Id.* at __, Slip Op. 21-36 at 9–10. We concluded that "PrimeSource is now entitled to judgment as a matter of law," *id.* at __, Slip Op. 21-36 at 10, and we entered summary judgment in favor of plaintiff PrimeSource on its remaining claim.

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

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

deny Defendant's Motion to Dismiss Count I of Plaintiffs' Complaints." Joint Status Report 1–2. The Joint Status Report states further:

> As was true in the *PrimeSource* litigation prior to the Court's entry of judgment, Defendants in this case do not intend to introduce any additional evidence related to potential factual disputes or additional factual information showing that Proclamation 9980 satisfied the requirements of 19 U.S.C. § 1862(b)(2)(A). Defendants' position remains that the procedural preconditions for the issuance of Proclamation 9980 were met by the Secretary's 2018 Steel Report and the timely issuance of Proclamation 9705, but this Court has already rejected that position. . . . Defendants fully reserve all rights to appeal any adverse judgment.

Id. at 2.

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

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

As discussed above, each plaintiff's Count I claim is that Proclamation 9980 is invalid as untimely because it neither was issued within the 90-day time period allowed by Section 232(c)(1)(A) nor implemented within the 15-day time period allowed by Section 232(c)(1)(B).[3] Compl. ¶¶ 102–106. This claim is indistinguishable from the claim upon which this Court granted summary judgment in favor of the plaintiff in *PrimeSource II*, as the parties to this case acknowledge. Joint Status Report 1 ("The parties have conferred and now agree that the Court's decisions in *Primesource I* and *Primesource II* are decisive as to Count I of Plaintiffs' Complaints.").

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

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

As we concluded in *PrimeSource I*, "the action taken by Proclamation 9980 to adjust imports of derivatives was not implemented during the 105-day time period set forth in § 1862(c)(1), if that time period is considered to have commenced upon the President's receipt of the Steel Report." 45 CIT at __, 497 F. Supp. 3d at 1356. Due to the parties' joint and unopposed representations, there is no genuine issue of material fact as to when that time period began, and defendants have waived any defense based on a contention that the time period began on any date other than the President's receipt of the 2018 Steel Report.

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

III. CONCLUSION

In summary, defendants have waived any defense that the procedural requirements of Section 232 were met based on a procedure other than one reliant upon the 2018 Steel Report. Summary judgment in favor of plaintiffs on Count I of their respective complaints therefore is warranted, Proclamation 9980 having been issued after the

President's delegated authority to impose duties on derivatives of steel products had expired.

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

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

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

Dated: June 10, 2021
New York, New York

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

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

I concur in our dismissal of Counts II and III without prejudice as requested by the parties, but I write separately to explain that in so doing we are not impermissibly "manufacturing" finality for the purpose of securing—if not manipulating—appellate jurisdiction, a controversial practice that is the subject of a long-festering circuit split. *See generally* Mayer Brown LLP, *Federal Appellate Practice* § 2.2(b)(1) (3d ed. 2018); *see also Doe v. United States*, 513 F.3d 1348, 1352–55 (Fed. Cir. 2008).[5]

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

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

For all three counts, Plaintiffs seek the same relief: a judgment declaring Proclamation 9980 void and an injunction restraining its enforcement and compelling refunds of Section 232 duties previously collected. *See* Case 20-37, ECF 2, at 31; Case 20-45, ECF 5, at 30. Because Plaintiffs could—and with the majority's decision today, do—obtain only one recovery, their separate counts are but variations on legal theories supporting one claim. *See Local P-171, Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Thompson Farms Co.*, 642 F.2d 1065, 1070–71

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the Federal Circuit over interlocutory orders of the CIT granting injunctions (whether preliminary or, as here, permanent).

(7th Cir. 1981) (Wisdom, J.) ("At a minimum, claims cannot be separate unless separate recovery is possible on each. Hence, mere variations of legal theory do not constitute separate claims.") (cleaned up). Therefore, in dismissing Counts II and III without prejudice, we do not improperly manufacture finality by dismissing nonfinal separate claims.

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

But where, as here, a plaintiff asserts multiple theories in support of only a single claim for relief and the district court or the CIT *grants* all the requested relief based on only one of the plaintiff's asserted theories, attaining finality does not require the court to *also* adjudicate the plaintiff's alternative theories for recovery on the same claim. By granting the plaintiff all the relief that it could possibly obtain in this action, the majority "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Weed v. Soc. Sec. Admin.*, 571 F.3d 1359, 1361 (Fed. Cir. 2009) (cleaned up and quoting *Cabot Corp. v. United States*, 788 F.2d 1539, 1542 (Fed. Cir. 1986)); *see also Electro-Methods, Inc. v. United States*, 728 F.2d 1471, 1474 (Fed. Cir. 1984) (decision granting "the most important relief [plaintiff] sought" and

"address[ing] (by denying) the other relief [plaintiff] sought" was a "final decision . . . for all practical purposes"); *cf. Ind. Harbor Belt R.R. Co. v. Am. Cyanamid Co.*, 860 F.2d 1441, 1446 (7th Cir. 1988) (Cudahy, J., dissenting) (in a case with only a single claim for purposes of Rule 54(b), "to 'win' a plaintiff need prevail on only one theory, while to 'win' a defendant must prevail on all the theories proposed by the plaintiff").[6]

For purposes of 28 U.S.C § 1291—and by extension 28 U.S.C. § 1295(a)(5)— "[f]inality is to be given a practical rather than a technical construction." *Keith Mfg. Co. v. Butterfield*, 955 F.3d 936, 939 (Fed. Cir. 2020) (quoting *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974)). There is no practical reason to "impose totally redundant and indefensible burdens on . . . trial courts" by requiring them to adjudicate "multiple theories . . . where one would suffice." *Am. Cyanamid*, 860 F.2d at 1448 (Cudahy, J.,

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

dissenting). Like Judge Cudahy, I see no practical purpose in construing the finality requirement to require "the plaintiff to fire additional bullets into the corpse of a defendant he has already killed." *Id.*

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

APPENDIX D

In the
United States Court of Appeals
for the Federal Circuit

PRIMESOURCE BUILDING PRODUCTS, INC.,
Plaintiff-Appellee

v.

UNITED STATES, JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, GINA M. RAIMONDO, SECRETARY OF COMMERCE, TROY MILLER, ACTING COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION, UNITED STATES CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF COMMERCE,
Defendants-Appellants

2021-2066

Appeal from the United States Court of International Trade in No. 1:20-cv-00032-TCS-JCG-MMB, Senior Judge Timothy C. Stanceu, Judge Jennifer Choe-Groves, Judge M. Miller Baker.

OMAN FASTENERS, LLC, HUTTIG BUILDING PRODUCTS, INC., HUTTIG, INC.,
Plaintiffs-Appellees

v.

UNITED STATES, JOSEPH R. BIDEN, JR., PRESIDENT OF THE UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, TROY MILLER, ACTING COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF COMMERCE, GINA M. RAIMONDO, SECRETARY OF COMMERCE,
Defendants-Appellants

2021-2252

Appeal from the United States Court of International Trade in Nos. 1:20-cv-00037-TCS-JCG-MMB, 1:20-cv-00045-TCS-JCG-MMB, Senior Judge Timothy C. Stanceu, Judge Jennifer Choe-Groves, Judge M. Miller Baker.

ON PETITION FOR REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, REYNA, TARANTO, CHEN, HUGHES, STOLL, and STARK, *Circuit Judges*.[1]

PER CURIAM.

ORDER

Oman Fasterners, LLC, Huttig Building Products, Inc., Huttig, Inc. and PrimeSource Building Products, Inc. filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by Joseph R. Biden, Jr., Commerce, Troy Miller, Gina M. Raimondo, United States Customs and Border Protection and the

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[1] Circuit Judge Cunningham did not participate.

United States. The petition was first referred as a petition to the panel that heard the appeal, and thereafter the petition was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

The mandate of the court will issue June 29, 2023.

FOR THE COURT

June 22, 2023
Date

/s/ Jarrett B. Perlow
Jarrett B. Perlow
Acting Clerk of Court

APPENDIX E

19 U.S.C. § 1862

(Section 232 of the Trade Expansion Act)

§ 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) 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.

(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)[2] **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.

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[1] So in original. Two subsecs. (d) have been enacted.

[2] So in original. No subsec. (e) has been enacted.

(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.