App. 1

United States Court of Appeals
for the Federal Circuit

TRANSPACIFIC STEEL LLC, BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., BORUSAN MANNESMANN PIPE U.S. INC., THE JORDAN INTERNATIONAL COMPANY,
Plaintiffs-Appellees

v.

UNITED STATES, JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, TROY MILLER, IN HIS OFFICIAL CAPACITY AS SENIOR OFFICIAL PERFORMING THE DUTIES OF THE COMMISSIONER FOR UNITED STATES CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF COMMERCE, GINA RAIMONDO, IN HER OFFICIAL CAPACITY AS SECRETARY OF COMMERCE,
Defendants-Appellants

2020-2157

Appeal from the United States Court of International Trade in No. 1:19-cv-00009-CRK-GSK-JAR, Senior Judge Jane A. Restani, Judge Claire R. Kelly, Judge Gary S. Katzmann.

App. 2

Decided: July 13, 2021

MATTHEW MOSHER NOLAN, Arent Fox, LLP, Washington, DC, argued for all plaintiffs-appellees. Plaintiff-appellee Transpacific Steel LLC also represented by DIANA DIMITRIUC QUAIA, NANCY NOONAN, LEAH N. SCARPELLI, RUSSELL ANDREW SEMMEL.

JULIE MENDOZA, Morris, Manning & Martin, LLP, Washington, DC, for plaintiffs-appellees Borusan Mannesmann Boru Sanayi ve Ticaret A.S., Borusan Mannesmann Pipe U.S. Inc. Also represented by DONALD CAMERON, JR., EUGENE DEGNAN, MARY HODGINS, BRADY MILLS, R. WILL PLANERT, EDWARD JOHN THOMAS, III.

LEWIS LEIBOWITZ, The Law Office of Lewis E. Leibowitz, Washington, DC, for plaintiff-appellee Jordan International Company.

TARA K. HOGAN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendants-appellants. Also represented by BRYAN M. BOYNTON, JEANNE DAVIDSON, ANN MOTTO, MEEN GEU OH, STEPHEN CARL TOSINI.

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

Opinion for the court filed by *Circuit Judge* TARANTO.

Dissenting opinion filed by *Circuit Judge* REYNA.

TARANTO, *Circuit Judge*.

In section 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, Congress provided that if the President receives, and agrees with, a finding by a specified executive officer (now the Secretary of Commerce) that imports of an article threaten to impair national security, the President shall take action that the President deems necessary to alleviate the threat from those imports. *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) (addressing then-current version of § 1862 and holding that permitted action includes requiring licenses for imports and that provision raised no substantial issue of improper delegation of legislative power); *American Inst. for Int'l Steel, Inc. v. United States*, 806 F. App'x 982 (Fed. Cir. 2020) (rejecting nondelegation challenge to the current version of the statute). In its present form, the statute includes provisions, added in 1988, that set forth process and timing standards applicable to the Secretary's making of the predicate finding of threat, § 1862(b), and set forth certain timing standards applicable to the President's follow-on decisions if the Secretary finds such a threat, § 1862(c). Of central importance here is § 1862(c)(1). It specifies one period within which the President is to concur or disagree with the Secretary's finding and to determine the necessary action if the President concurs in the finding and another period within which the President is thereafter to implement the chosen action. § 1862(c)(1). This case

involves a challenge to certain presidential action as taken too late under § 1862(c)(1).

In January 2018, the Secretary, in compliance with the process and timing requirements of § 1862(b), found that imports of steel threatened to impair national security because the imports caused domestic steel-production capacity to be used less than the level of utilization needed for operation of the plants to be profitably sustained over time. In March 2018, within the periods prescribed for presidential action, the President agreed with the Secretary's finding, determined the needed plan of action, and announced the plan in a proclamation that imposed some tariffs immediately, announced negotiations with specified nations in lieu of immediate tariffs, invited negotiations more broadly, and stated that the immediate measures might be adjusted as necessary. Proclamation 9705, 83 Fed. Reg. 11,625 (Mar. 15, 2018). Within a few months, as certain negotiations produced agreements or adequately progressed, the President determined that imports were still too high to allow domestic plant utilization to meet the Secretary's identified target, and the President raised the tariff on steel from Turkey, one of the largest producers and exporters of steel imported into the United States. Proclamation 9772, 83 Fed. Reg. 40,429 (Aug. 15, 2018). Proclamation 9772's raising of the tariff on Turkish steel imports is challenged here.

Transpacific Steel LLC, Borusan Mannesmann Boru Sanayi ve Ticaret A.S., Borusan Mannesmann Pipe U.S. Inc., and the Jordan International Company (together, Transpacific)—importers of Turkish steel (in

some cases also producers or exporters)—sued in the Court of International Trade (Trade Court), alleging that the President's issuance of Proclamation 9772 was unlawful. The Trade Court held the action unlawful on two grounds. First, the court held that Proclamation 9772 was unauthorized because, unlike the initial Proclamation 9705, it was issued outside the time periods set out in § 1862(c)(1) for presidential action after the Secretary's finding (in which the President concurred) of a national-security threat from steel imports. To take this action in August 2018, the court ruled, the President had to secure a new report with a new threat finding from the Secretary. Second, the court held that singling out steel from Turkey for the increased tariff violated the equal-protection guarantee of the Fifth Amendment to the Constitution.

We reverse. The President did not violate § 1862 in issuing Proclamation 9772. The President did not depart from the Secretary's finding of a national-security threat; indeed, the President specifically adhered to the Secretary's underlying finding of the target capacity-utilization level that was the rationale for the predicate threat finding. Moreover, the President made the determination that further import restrictions were needed to achieve that level in a short period after the Secretary's finding and after the initial presidential action. And that initial presidential action (in March 2018) itself announced a continuing course of action that could include adjustments as time passed. In these circumstances, we conclude that the increase in the tariff on steel from Turkey

by Proclamation 9772 did not violate § 1862. We do not address other circumstances that would present other issues about presidential authority to adjust initially taken actions without securing a new report with a new threat finding from the Secretary.

Nor did the President violate Transpacific's equal-protection rights in issuing Proclamation 9772. The most demanding standard that could apply here is the undemanding rational-basis standard. The President's decision to take one of a number of possible steps to achieve the goal of increasing utilization of domestic steel plants' capacity to try to improve their sustainability for national-security reasons meets that standard.

I

A

Section 1862 empowers and directs the President to act to alleviate threats to national security from imports. It does so by modifying and adding to other presidential authority granted by Congress.

Subsection (a). The first subsection of § 1862 refers to two of the preexisting, continuing statutory grants of presidential authority and forbids relaxation of import restrictions under those grants if national security would be threatened. Specifically, subsection (a) addresses 19 U.S.C. §§ 1821 and 1351, which grant the President certain discretionary authority regarding tariffs on goods from foreign nations with which the

President might enter into executive agreements. Section 1821(a), which dates to at least 1962, *see* Trade Expansion Act of 1962, § 201, 76 Stat. at 872, states that the President "may," for any of the broad trade-related purposes identified in 19 U.S.C. § 1801, enter into trade agreements and, among other things, raise or lower duties (within limits) to carry out such agreements. § 1821. Section 1351, which traces back to 1934, *see* Tariff Act of 1934, ch. 474, 48 Stat. 943, confers similar authority. § 1351. Subsection (a) of § 1862 forbids the President, when acting under those provisions, "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." § 1862(a).[1]

Subsection (b). The next subsection sets forth the agency-level processes required for exercise of § 1862's own grant of presidential authority to take action against imports that threaten to impair national security. In particular, subsection (b) prescribes process and timing standards for the Secretary of Commerce to make the finding that is a precondition for the President to take such action under this statute.

If the Secretary receives a request from an agency or department head or an "application of an interested

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[1] In *American Institute for International Steel*, we noted other congressional authorizations of presidential action, and the use of executive agreements, to restrict imports. 806 F. App'x at 983–84, 984 n.1; *see also American Ins. Ass'n v. Garamendi*, 539 U.S. 396, 414–15 (2003) (noting longstanding use and approval of executive agreements).

party," or on the Secretary's "own motion," the Secretary must "immediately initiate an appropriate investigation to determine the effects on the national security of imports of the [relevant] article." § 1862(b)(1)(A). During the investigation, the Secretary must consult with and seek information and advice from certain officers—most notably, the Secretary of Defense—and, if appropriate, "hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." § 1862(b)(2)(A). Within "270 days" of the investigation's start, "the Secretary shall submit to the President a report on the findings of" the investigation. § 1862(b)(3)(A). Based on those findings, the Secretary must include his "recommendations . . . for action or inaction." *Id.* "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." *Id.*

Subsection (c). The next subsection lays out the President's authority and obligation to act under § 1862. As paragraph (1) makes clear, that authority and obligation exist only if the President receives a report "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." § 1862(c)(1)(A). In that event, the President "shall," within 90 days of receiving such a report, "determine whether the President concurs with the finding of the Secretary," *i.e.*, the Secretary's

finding of a threat (not the Secretary's recommendation of action or inaction). § 1862(c)(1)(A)(i). "[I]f the President concurs" in that finding, then the President "shall," within the same 90 days, "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." § 1862(c)(1)(A)(ii). Finally, "[i]f the President determines . . . to take action to adjust imports of an article and its derivatives, the President shall implement that action" within 15 days of the action determination. § 1862(c)(1)(B).[2]

In paragraph (3), subsection (c) specifically addresses the circumstance in which one of the actions that the President initially chooses is not a unilateral imposition on certain imports but, instead, bilateral or multilateral in character, *i.e.*, negotiation of an agreement that "limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security."

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[2] Paragraph (2) requires the President to inform Congress about the paragraph (1) determinations. § 1862(c)(2). This is one of several provisions that insist on public disclosure of the choices made under § 1862. Another is the provision requiring the Secretary to submit to Congress and publish in the Federal Register a report on dispositions under subsection (b). *See* § 1862(e) (though labeled as a second subsection (d), the U.S. Code states that it probably should be designated (e)). In addition, if the President has chosen to pursue bilateral or multilateral agreements initially, but that choice does not bear out in the statutorily specified ways, the President must publish notice of determinations of what if any alternative actions to take. § 1862(c)(3)(A), (B).

§ 1862(c)(3)(A)(i). To prevent that presidential choice from turning into inaction or inadequate action, paragraph (3) provides for unilateral action if either no agreement is reached within 180 days, *id.*, or an agreement is reached but it "is not being carried out *or* is ineffective in eliminating the threat to the national security posed by imports of such article," § 1862(c)(3)(A)(ii) (emphasis added). When either of those conditions is met, "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." § 1862(c)(3)(A). The President must publish in the Federal Register notice of such "additional actions" or of a determination not to take "additional actions." § 1862(c)(3)(A), (B).

Subsection (d). Congress included what amounts to a definitional provision for § 1862. Subsection (d) states a number of "relevant factors" to which the Secretary and the President must "give consideration" in making their determinations regarding "national security." § 1862(d). Among the factors are the "domestic production needed for projected national defense requirements," the "capacity of domestic industries to meet such requirements," the "requirements of growth of such [domestic] industries," "the impact of foreign competition on the economic welfare of individual domestic industries," and whether the "weakening of our internal economy may impair the national security." *Id.* The statute enumerates other considerations as

well, and the entire enumeration is set forth "without excluding other relevant factors." *Id.*[3]

B

1

On April 19, 2017, the Secretary of Commerce started "an investigation to determine the effects on the national security of imports of steel." Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19,205, 19,205 (Apr. 26, 2017). After following the processes, and within the time, prescribed by § 1862(a), the Secretary, on January 11, 2018, sent his report to the President. Publication of a Report on the Effect of Imports of Steel on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended, 85 Fed. Reg. 40,202 (July 6, 2020) (January 2018 report).

The Secretary found that "the present quantities and circumstance of steel imports are weakening our internal economy and threaten to impair the national security as defined in Section 232." *Id.* at 40,204 (internal quotation marks omitted). Underlying that finding,

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[3] Subsection (f) is the final subsection of § 1862. It narrowly addresses presidential action "to adjust imports of petroleum or petroleum products" and, for that subject, specifies that such action "shall cease to have force and effect upon the enactment of a disapproval resolution," defined as "a joint resolution of either House of Congress." § 1862(f).

the Secretary explained, were "[n]umerous U.S. steel mill closures, a substantial decline in employment, lost domestic sales and market share, and marginal annual net income for U.S.-based steel companies." *Id.* Because the "declining steel capacity utilization rate is not economically sustainable," the Secretary reported that "the only effective means of removing the threat of impairment is to reduce imports to a level that should, in combination with good management, enable U.S. steel mills to operate at 80 percent or more of their rated production capacity." *Id.*

Based on the finding of a need for 80% average capacity utilization for the sustainable industry required to remove the national-security threat, the Secretary made several recommendations about how to adjust imports that were leaving domestic plants underutilized. The first option was a "global quota or tariff." *Id.* at 40,205. For the global quota, the Secretary recommended a quota limiting steel imports to 63% of 2017 import levels; for the global tariff, the Secretary recommended a 24% tariff on all steel imports. *Id.* The second option was "tariffs on a subset of countries." *Id.* Under that approach, the Secretary recommended a 53% tariff on all steel imports from "Brazil, South Korea, Russia, Turkey, India, Vietnam, China, Thailand, South Africa, Egypt, Malaysia and Costa Rica." *Id.* For every option, the Secretary noted that "the President could determine that specific countries should be exempted from the proposed" quota or tariff. *Id.* But if the President determined that certain countries should be exempt, the "Secretary recommend[ed] that

any such determination should be made at the outset and a corresponding adjustment be made to the final quota or tariff imposed on the remaining countries." *Id.* at 40,205–06.

The Secretary further recommended "an appeal process by which affected U.S. parties could seek an exclusion from the tariff or quota imposed." *Id.* at 40,206. Under that process, the "Secretary would grant exclusions based on a demonstrated: (1) lack of sufficient U.S. production capacity of comparable products; or (2) specific national security based considerations." *Id.* If an exclusion was granted, the Secretary would also "consider at the time whether the quota or tariff for the remaining products needs to be adjusted to increase U.S. steel capacity utilization to a financially viable target of 80 percent." *Id.*

2

After receiving the Secretary's January 11, 2018 report, with its finding that imports of steel articles threatened to impair national security because they were preventing 80% domestic capacity utilization, the President issued several proclamations relevant here.

Proclamation 9705. On March 8, 2018, well within the prescribed 90 days of receiving the report, the President issued Proclamation 9705. 83 Fed. Reg. 11,625 (Mar. 15, 2018). The President stated that he "concur[red] in the Secretary's finding" on steel articles and had "considered [the Secretary's] recommendations." *Id.* at 11,626, ¶ 5. The President "decided to adjust the

imports of steel articles by imposing a 25 percent ad valorem tariff on steel articles . . . imported from all countries except Canada and Mexico." *Id.* at 11,626, ¶ 8. The tariffs would take effect on March 23, 2018, and "continue in effect, unless such actions are expressly reduced, modified, or terminated." *Id.* at 11,627–28, § 5(a).

On the exception, the President explained that "Canada and Mexico present a special case" because of the countries' "close relation" with and "physical proximity" to the United States and because the President sought "to continue ongoing discussions with these countries." *Id.* at 11,626, ¶ 10. The President also stated his willingness to negotiate with "[a]ny country" that has "a security relationship" with the United States in order to discuss "alternative ways to address the threatened impairment of the national security caused by imports from that country." *Id.* at 11,626, ¶ 9. The President highlighted, though, that if the negotiations led to an agreement with a country with "a satisfactory alternative means to address" the national-security threat, he "may remove or modify the restriction on steel articles imports from that country *and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require.*" *Id.* (emphasis added). In other words, a negotiated deal with one country, if it was generous regarding steel imports from that country, might require lowering imports from other countries by raising the initial tariff imposed on them, so

that the 80% capacity-utilization level could be reached.

To facilitate the planned course of action, the President ordered the Secretary to "continue to monitor imports of steel articles," to consult "from time to time" with various officials "as the Secretary deems appropriate," and to "review the status of such imports with respect to the national security." *Id.* at 11,628, § 5(b). He also ordered the Secretary to "inform the President of any circumstances that in the Secretary's opinion might indicate the need for further action by the President" or if "the increase in duty rate provided for in this proclamation is no longer necessary." *Id.*

Proclamations 9711, 9740, and 9759. Thereafter, the President negotiated with many countries, made agreements with some, and adjusted tariffs on countries that did not negotiate or reach an agreement with the United States. For example, two weeks after Proclamation 9705, the President issued Proclamation 9711. 83 Fed. Reg. 13,361 (Mar. 22, 2018). In that proclamation, the President highlighted that several countries reached out to discuss "satisfactory alternative means to address the threatened impairment to the national security" and noted that he "determined that the necessary and appropriate means to address the threat to the national security posed by imports of steel articles from these countries is to continue ongoing discussions and to increase strategic partnership." *Id.* at 13,361, ¶ 4 and 13,362, ¶ 10. The President concluded: "[D]iscussions regarding measures to reduce excess steel production and excess steel capacity, measures

that will increase domestic capacity utilization, and other satisfactory alternative means will be most productive if the tariff proclaimed in Proclamation 9705 on steel articles imports from these countries is removed at this time." *Id.* at 13,362, ¶ 10. Still, the President declared, the exemption would expire on May 1, 2018, if no agreement was reached. *Id.* at 13,362, ¶ 11. And if an agreement was reached, the President said (as he did in Proclamation 9705), "corresponding adjustments to the tariff" previously set for other countries would be considered. *Id.*

About five weeks later, on April 30, 2018, the President issued Proclamation 9740 announcing agreements and further negotiations. 83 Fed. Reg. 20,683 (May 7, 2018). The President announced that negotiations with South Korea had succeeded, producing an agreement "on a range of measures, . . . including a quota that restricts the quantity of steel articles imported into the United States from South Korea." *Id.* at 20,683, ¶ 4. The President also reported that the "United States has agreed in principle with Argentina, Australia, and Brazil on satisfactory alternative means" and temporarily exempted those countries from the 25% ad valorem tariff "to finalize the details" of the agreements. *Id.* at 20,684, ¶ 5. And he noted that the United States was "continuing discussions with Canada, Mexico and the [European Union]." *Id.* at 20,684, ¶ 6.

Later, on May 31, 2018, the President, in Proclamation 9759, announced that the United States had

reached agreements with Argentina, Australia, and Brazil. 83 Fed. Reg. 25,857, 25,857-58 (June 5, 2018).

Proclamations 9772 and 9886. On August 10, 2018, just over five months after the President issued the first proclamation (Proclamation 9705), he issued the proclamation challenged here by Transpacific, *i.e.*, Proclamation 9772. 83 Fed. Reg. 40,429 (Aug. 15, 2018). The President explained that the Secretary had monitored imports of steel articles (as directed in Proclamation 9705) and, based on that monitoring, the Secretary had "informed [the President] that while capacity utilization in the domestic steel industry has improved, it is still below the target capacity utilization level" identified in the January 2018 report and imports were "still several percentage points greater than the level of imports that would allow domestic capacity utilization to reach the target level." *Id.* at 40,429, ¶¶ 3–4. The President added that in the "January 2018 report, the Secretary recommended . . . applying a higher tariff to a list of specific countries" if the President "determine[d] that all countries should not be subject to the same tariff." *Id.* at 40,429, ¶ 6. The President also noted that the Secretary's report had Turkey on the list and that the report explained that "Turkey is among the major exporters of steel to the United States for domestic consumption." *Id.* Then the President declared: "To further reduce imports of steel articles and increase domestic capacity utilization, I have determined that it is necessary and appropriate to impose a 50 percent ad valorem tariff on steel articles imported from Turkey, beginning on August 13, 2018." *Id.* The

President also highlighted that the Secretary had advised him that the adjustment on steel imports from Turkey "will be a significant step toward ensuring the viability of the domestic steel industry." *Id.*

The 50% ad valorem tariff on Turkish steel remained in place for just under nine months—until May 21, 2019—when it returned to 25%. *See* Proclamation 9886 of May 16, 2019, 84 Fed. Reg. 23,421 (May 21, 2019). In the proclamation announcing the return to the 25% level, the President stated that the Secretary had advised him "that, since the implementation of the higher tariff under Proclamation 9772, . . . the domestic industry's capacity utilization ha[d] improved . . . to approximately the target level recommended in the Secretary's report." *Id.* at 23,421–22, ¶ 6. The President determined that "[t]his target level, if maintained for an appropriate period, will improve the financial viability of the domestic steel industry over the long term." *Id.* at 23,422, ¶ 6. "Given these improvements," the President "determined that it [wa]s necessary and appropriate to remove the higher tariff on steel imports from Turkey imposed by Proclamation 9772, and to instead impose a 25 percent ad valorem tariff on steel imports from Turkey." *Id.* at 23,422, ¶ 7. The President also determined that "[m]aintaining the existing 25 percent ad valorem tariff on most countries [wa]s necessary and appropriate at this time to address the threatened impairment of the national security that the Secretary found in the January 2018 report." *Id.*

C

On January 17, 2019, while the 50% tariff was in effect, Transpacific sued the United States, two agencies of the United States (the Department of Commerce and U.S. Customs and Border Protection), the President, and the heads of the two agencies, invoking the Trade Court's jurisdiction under 28 U.S.C. § 1581(i)(2), (4). *See Transpacific Steel LLC v. United States*, No. 1:19-cv-00009, ECF No. 6 (Ct. Int'l Trade Jan. 17, 2019) (Complaint). Transpacific amended its complaint on April 2, 2019, naming the same defendants. J.A. 95. Like the original complaint, the amended complaint alleged that Proclamation 9772 was unlawful because the President exceeded his authority under 19 U.S.C. § 1862 and violated the Fifth Amendment's guarantees of equal protection and of procedural due process. J.A. 95–559.

On April 3, 2019, the government moved to dismiss the suit for failure to state a claim, and on November 15, 2019, the Trade Court denied the motion. *Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267, 1269 (Ct. Int'l Trade 2019) (*Transpacific I*). The Trade Court held that Transpacific stated a claim that the timing provisions of § 1862(c) foreclosed the President from doing what he did here, namely, announce and put into effect a plan of action within the statutory time periods (as the President did in Proclamation 9705), and then raise tariffs pursuant to the implemented plan after those deadlines passed (as the President did in Proclamation 9772) without obtaining a new report from the Secretary produced through the

statutorily specified procedure. *Id.* at 1274–76. The Trade Court also determined that Transpacific stated a claim that Proclamation 9772 violated the Fifth Amendment's equal-protection guarantee because it alleged that there was "no set of facts that justify identifying importers of steel from Turkey as a class of one." *Id.* at 1272. As for the procedural-due-process claim, the Trade Court did not reach it because the court determined that the President violated the procedural constraints of § 1862. *Id.* at 1276.

Shortly thereafter, the other appellees were permitted to intervene as co-plaintiffs. *See* J.A. 64–65. On January 21, 2020, the parties jointly moved for a judgment on the agency record. J.A. 65. About six months later, on July 14, 2020, the Trade Court issued an opinion and entered judgment for Transpacific. *Transpacific Steel LLC v. United States*, 466 F. Supp. 3d 1246, 1249 (Ct. Int'l Trade 2020) (*Transpacific II*); J.A. 1–2 (Judgment). The Trade Court concluded that Proclamation 9772 was unlawful because the President violated a statutory timing constraint of § 1862 and because singling out importers of Turkish steel products denied them the constitutionally guaranteed equal protection of the laws.

As to § 1862, the court maintained its view that "there is nothing in the statute to support the continuing authority to modify Proclamations outside of the stated time-lines." *Transpacific II*, 466 F. Supp. 3d at 1253. Although the Trade Court recognized that § 1862 before the 1988 amendments let the President "modify previous Proclamations as a form of continuing

authority," the court explained that "the statutory scheme has since been altered, and the court must give meaning to those alterations." *Id.* "The 1988 amendments prescribed time limits," the court noted, "but also deleted language that could be read to give the President the power to continually modify Proclamations." *Id.* And the court repeated that nondelegation concerns reinforced its reading. *Id.* The Trade Court therefore held that "'modifications' of existing Proclamations under the current statutory scheme, without following the procedures in the statute, are not permitted." *Id.*

As to equal protection, the Trade Court concluded that the government flunked the rational-basis standard. "Singling out steel products from Turkey," reasoned the court, "is not a rational means of addressing" the government's national-security concern. *Id.* at 1258. According to the court, the "status quo under normal trade relations is equal tariff treatment of similar products irrespective of country of origin. Although deviation from this general principle is allowable, such deviation cannot be arbitrarily and irrationally enforced in a way that treats similarly situated classes differently without permissible justification." *Id.* (citation omitted). The court, seeing no permissible justification, concluded: "Proclamation 9772 denies [Transpacific] the equal protection of the law." *Id.*

The court then addressed Transpacific's procedural-due-process argument. It stated: "[T]he process [Transpacific] request[s] is simply that the government be made to comply with the procedures laid out

in the statute. Because we hold that [Transpacific is] entitled to that process under the statute, we need not also answer whether any constitutional guarantees of Due Process were violated." *Id.* at 1259. The court added: "Whatever constitutional minimum process might be owed, it is satisfied by requiring that the President abide by the statute's procedures." *Id.*

The same day, the Trade Court entered final judgment. J.A. 1. The court ordered that Proclamation 9772 "is declared unlawful and void" and ordered that the "United States Customs and Border Protection refund [Transpacific] the difference between any tariffs collected on its imports of steel products" under Proclamation 9772 "and the 25% ad valorem tariff that would otherwise apply on these imports together with such costs and interest as provided by law." J.A. 1–2.[4]

The government timely appealed the Trade Court's judgment. We have jurisdiction under 28 U.S.C. § 1295(a)(5).[5]

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[4] The government moved to stay enforcement of the judgment's refund order pending appeal. The Trade Court denied the stay, *Transpacific Steel LLC v. United States*, 474 F. Supp. 3d 1332 (Ct. Int'l Trade 2020), and this court denied the government's request that we stay the order pending appeal, *Transpacific Steel LLC v. United States*, 840 F. App'x 517 (Fed. Cir. 2020).

[5] Transpacific invoked the Trade Court's jurisdiction under a provision that gives that court jurisdiction over "any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for" certain tariffs or duties of the sort at issue here. 28 U.S.C. § 1581(i). The provision clearly covers this case, with one possible, limited exception: There is a question (not raised by any party) whether

II

The government challenges the Trade Court's rulings that Proclamation 9772 violated 19 U.S.C. § 1862 and the Fifth Amendment's guarantee of equal protection. In response, Transpacific defends those rulings, but it does not present here, or seek a conditional remand to press, its procedural-due-process challenge, which we therefore deem dropped. And although Transpacific briefly asserts a nondelegation challenge simply to preserve it, we have already rejected such a challenge, *American Inst. for Int'l Steel*, 806 F. App'x at 983, and Transpacific has presented no developed argument on nondelegation that warrants additional discussion. Accordingly, we limit ourselves to the § 1862 and equal-protection issues.

We review the judgment on the agency record without deference. *See Fedmet Resources Corp. v.*

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the claim against the President comes within the provision. *See Corus Group PLC v. Int'l Trade Comm'n*, 352 F.3d 1351, 1359 (Fed. Cir. 2003) (concluding that the President is not an "officer[ ]" under § 1581(i) and dismissing claim against the President); *PrimeSource Bldg. Prods., Inc. v. United States*, 497 F. Supp. 3d 1333, 1365-70 (Ct. Int'l Trade 2021) (Baker, J., concurring in part and dissenting in part) (discussing the question). We need not address that question because jurisdiction existed over the claims against the other defendants and jurisdiction exists here to review the Trade Court's judgment. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2416 (2018) (for standing, all that need be decided is that one plaintiff has standing); *Horne v. Flores*, 557 U.S. 433, 445 (2009) (same). We reverse and remand this case for entry of judgment against Transpacific; but in the remand, the Trade Court may decide whether the judgment against Transpacific should include dismissal of the claim against the President.

United States, 755 F.3d 912, 918 (Fed. Cir. 2014). This appeal involves only legal issues, which we decide de novo. *See GPX Int'l Tire Corp. v. United States*, 780 F.3d 1136, 1140 (Fed. Cir. 2015).

A

The Trade Court concluded that § 1862 prohibited the President from raising tariffs in Proclamation 9772 because the President issued that proclamation after the 90-day period for the President to decide to concur or disagree with the Secretary's January 2018 finding of threat and to determine how to respond to the threat, and after the 15-day period for the President to implement the chosen response, without obtaining a new finding of threat from the Secretary. The Trade Court so concluded even though: Proclamation 9772 was a further implementation of Proclamation 9705; Proclamation 9705 was issued within the two specified time periods and expressly provided for future adjustments; and Proclamation 9772 adhered to the basis of the threat finding in the Secretary's January 2018 report, namely, the need for a particular domestic-plant utilization level, which the implementation measures had not yet achieved. We reverse. In these circumstances, we conclude that the Trade Court erred in determining that the President's issuance of Proclamation 9772 violated § 1862.

The key issue is whether § 1862(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. We conclude that the President does have such authority in the circumstances presented here. Specifically, we conclude that the 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. Transpacific does not argue that Proclamation 9772 is unlawful under the statute if, as we conclude, the President has the authority to adopt and pursue such a continuing course of action.

In our statutory analysis, we consider text and context, including purpose and history. Judge Reyna, in dissent, reaches different conclusions about these considerations and about the bottom-line result. Our discussion of the individual considerations provides, without further direct reference to Judge Reyna's dissent, the reasons we take a different view on the points of disagreement.

1

We start with the text of 19 U.S.C. § 1862(c)(1) and its "ordinary meaning at the time Congress enacted

the statute." *New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) (cleaned up). Subsection (c)(1) states:

> (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).

§ 1862(c)(1).

Paragraph (1) contains several time directives. "Within 90 days after receiving a report" with a finding that importation of an article threatens to impair national security, the President "shall," first, "determine whether the President concurs with the finding of the Secretary," § 1862(c)(1)(A)(i), and, second, 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," § 1862(c)(1)(A)(ii). Then, if the President has concurred in the finding of threat and determined the action to be taken in response, 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)." § 1862(c)(1)(B).

The Trade Court's interpretation of subsection (c)(1)'s time directives does not follow from the ordinary meaning of the provision's language at the time of enactment. In two ways, the Trade Court took too narrow a view of what the ordinary meaning allows.

First: The Trade Court indicated its view that the "necessary implication" of the timing provisions was that no burden-increasing action could be taken after the specified times. *Transpacific I*, 415 F. Supp. 3d at

1275 n.13; *Transpacific II*, 466 F. Supp. 3d at 1252 ("[T]he temporal restrictions on the President's power to take action pursuant to a report and recommendation by the Secretary is not a mere directory guideline, but a restriction that requires strict adherence. To require adherence to the statutory scheme does not amount to a sanction, but simply ensures that the deadlines are given meaning and that the President is acting on up-to-date national security guidance."). But that is not a necessary implication of the words.

As a matter of ordinary meaning, a command to "take this action by time T" is often, in substance, a compound command—one, a directive (with conferral of authority) to take the action, and, two, a directive to do so by the prescribed time. A violation of the temporal obligation imposed by the second directive does not necessarily negate the primary obligation imposed by—let alone the grant of authority implicit in—the first directive. For example: Most people would understand the directive "return the car by 11 p.m." to require the return of the car even after 11 p.m. *See*, *e.g.*, *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1722 (2017) (using a conversation between friends to show ordinary meaning). That is why a real addition of meaning, or at least a resolution of uncertainty, results when "take this action by time T" is followed by words like "or else don't take it at all."

The Supreme Court has recognized this linguistic point in the context of statutory commands to executive officers to take action within a specified time. It

has made clear that such a command does not, without more, entail lack of authority, or of obligation, to take the action after that date has passed, even though the obligation to act by the specified time has been violated. The Court so ruled in 1986 in *Brock v. Pierce County*, concluding that "the mere use of the word 'shall' in [a statute], standing alone, is not enough to remove the [official's] power to act after" the time deadline. 476 U.S. 253, 262 (1986). As the Supreme Court summarized the point some years later, *Brock* held that the particular time command was "meant 'to spur the Secretary to action, not to limit the scope of his authority,' so that untimely action was still valid." *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158 (2003) (quoting *Brock*, 476 U.S. at 265). In 2003, the Court emphasized: "Nor, since *Brock*, have we ever construed a provision that the Government 'shall' act within a specified time, without more, as a jurisdictional limit precluding action later." *Id.*; *see also*, *e.g.*, *id.* at 157 ("It misses the point simply to argue that the October 1, 1993, date was 'mandatory,' 'imperative,' or a 'deadline,' as of course it was, however unrealistic the mandate may have been."); *id.* at 160–61 (explaining that *Brock* made clear that "a statute directing official action needs more than a mandatory 'shall' before the grant of power can sensibly be read to expire when the job is supposed to be done"); *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 63 (1993) ("[I]f a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction."); *United States v. Montalvo-Murillo*, 495 U.S. 711,

718–19 (1990); *Nielsen v. Preap*, 139 S. Ct. 954, 967–68 (2019) (Alito, J., joined by Roberts, C.J., and Kavanaugh, J.).

The commonsense linguistic point, and its application in the statutory setting, formed the backdrop to Congress's amendments to § 1862 in 1988. The *Brock* decision issued two years before Congress's amendments. *See Barnhart*, 537 U.S. at 160 ("The Coal Act was adopted six years after *Brock* came down, when Congress was presumably aware that we do not readily infer congressional intent to limit an agency's power to get a mandatory job done merely from a specification to act by a certain time."); *Nielsen*, 139 S. Ct. at 967 (Alito, J., joined by Roberts, C.J., and Kavanaugh, J.) ("This principle for interpreting time limits on statutory mandates was a fixture of the legal backdrop when Congress enacted [the statute at issue]."). We thus disagree with the Trade Court to the extent that it viewed the expiration of the time periods in § 1862(c)(1), standing alone, as automatically equating to the expiration of the President's authority to take further burden-increasing steps, as he did here.

Second: The Trade Court's ruling also appears to rest on a premise that the provisions of § 1862(c)(1) at issue apply their time requirements to each individual discrete imposition on imports, rather than to the adoption and initiation of a plan of action or course of action (with choices to impose particular burdens in the carrying out of the plan permissibly made later in time). The language of the provisions, however, does not support that premise.

The terms "action" and "take action" are not limited in that way, but can readily be used to refer to a process or launch of a series of steps over time. *See*, *e.g.*, *Action*, Black's Law Dictionary 49 (4th ed. 1957) ("an act or series of acts"); Black's Law Dictionary 26 (5th ed. 1979) (same); Garner's Dictionary of Modern Legal Usage 19 (2d ed. 1995) ("*action* suggests a process—the many discrete events that make up a bit of behavior—whereas *act* is unitary"); Garner's Dictionary of Legal Usage 18 (3d ed. 2011) (same); Black's Law Dictionary 37 (11th ed. 2019) ("The process of doing something"); *see also*, *e.g.*, *Action*, Random House Webster's Unabridged Dictionary 20 (2d ed. 2001) (similar); American Heritage Dictionary 17 (3d ed. 1992) (similar); Garner's Dictionary of Modern American Usage 14 (1998) ("*Act* is unitary, while *action* suggests a process—the many discrete events that make up a bit of behavior."); Garner's Modern American Usage 16 (3d ed. 2009) (same). The authorization for the President to determine the "nature and duration of the action," § 1862(c)(1)(A)(ii), supports, rather than excludes, coverage of a plan implemented over time, including options for contingency-dependent choices that are a commonplace feature of plans of action. The phrase "implement that action," § 1862(c)(1)(B), likewise conveys an understanding of "action" as covering plans of action. *See Implement*, 1 Shorter Oxford English Dictionary 1330 (5th ed. 2002) ("put (a decision or *plan*) into effect" (emphasis added)); The American Heritage Dictionary of the English Language 660 (1981) ("To provide a definite *plan* or procedure to ensure the fulfillment of" (emphasis added)); *see also*, *e.g.*,

Implement, Webster's New World Dictionary of American English 677 (3rd College ed. 1988) ("to carry into effect" or "give practical effect to"); Random House College Dictionary 667 (Revised ed. 1982) ("to put into effect according to or by means of a definite plan or procedure").

In short, the ordinary meaning of "action" in context indicates that the time directive applies to the announcement and adoption of the plan of action rather than each act following the adopted plan. *Cf.* H.R. Rep. No. 100-576, at 711 (1988) (Conf. Rep.) ("The House bill requires the President to decide whether to take action within 90 days after receiving the Secretary's report, and to *proclaim* such action within 15 days." (emphasis added)).

2

What the terms of subsection (c)(1) indicate, relevant statutory context reinforces. *See Merit Mgt. Group, LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 892–93 (2018) (considering "[t]he language of [the provision at issue], the specific context in which that language is used, and the broader statutory structure"); *Johnson v. United States*, 559 U.S. 133, 139 (2010) ("Ultimately, context determines meaning."); Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* § 24, at 167 (2012) ("[T]he whole-text canon . . . calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

Paragraph (3) specifically bolsters the understanding that the President is not barred, by paragraph (1), from adopting, outside the 15-day period for implementation, specific new burden-imposing measures not decided on and adopted within the period. Paragraph (3) so indicates for the situation when the initially proclaimed action is (bilateral or multilateral) negotiation:

> (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.

§ 1862(c)(3)(A).

Subparagraph (A) indicates that one of the President's options is to try to secure agreements with foreign nations. Negotiation and agreement themselves will typically occur after the 15 days specified in subsection (c)(1)(B) have passed. That is all the more true of the "other actions" the President is directed to take if negotiations fail or if resulting agreements are violated or are ineffective in eliminating the national-security threat. Those provisions run counter to the Trade Court's view that Congress forbade presidential imposition of newly specified burdens after § 1862(c)(1)'s 90-day and 15-day periods.[6]

More generally, § 1862's "evident purpose" is an aspect of the context that must be assessed to determine the fair reading of the statute. *See* Scalia &

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[6] Although the government in this case has not specifically argued that the President, in Proclamation 9772, determined that the steel-import agreements already entered into were "ineffective in eliminating the threat to the national security," § 1862(c)(3)(A)(ii)(II), it is not clear what substantive difference there is between that formulation and the President's declaration in the proclamation that further restrictions on imports were needed to meet the capacity-utilization target.

Garner, *Reading Law* § 4, at 63 (The presumption against ineffectiveness "follows inevitably from the facts that (1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness."); *see also id.* § 3, at 56 ("[C]ontext includes the purpose of the text."). The manifest purpose of this statute is to enable and obligate the President (in whom Congress vested the power to make the remedial judgments) to effectively alleviate the threat to national security identified in a finding by the Secretary with which the President has concurred. Reading § 1862(c)(1) to permit announcement of a plan within the specified 15 days, followed by implementation decisions reflecting contingencies affecting achievement of the goal defined by the Secretary's finding, furthers that evident purpose.

This does not mean that the statutory purpose is furthered by permitting *any* presidential imposition after the 15-day period, even an imposition that makes no sense except on premises that depart from the Secretary's finding, whether because the finding is simply too stale to be a basis for the new imposition or for other reasons. The statute indisputably incorporates a congressional judgment that an affirmative finding of threat by the Secretary is the predicate for presidential action, while also incorporating a congressional judgment that how to address the problem identified in the finding is a matter for the President, whose choices about remedy are not constrained by the Secretary's recommendations. *See* § 1862(c)(1)

(predicating the President's power on the Secretary's "find[ing]" and not the Secretary's "recommendations"). This case involves presidential adherence to the key finding of a need for a certain capacity-utilization level, with no indication of staleness of that finding. We have no occasion to rule on other circumstances or to decide what aspects of presidential decisions under § 1862 are judicially reviewable.

It is enough to say that the Trade Court's categorical narrow reading of § 1862(c)(1)—precluding *all* impositions adopted after the 15-day period in implementation of a plan announced within the period—obstructs the statutory purpose. This case illustrates why. The threat to national security was tied to an excess of imports overall, from numerous countries, that left domestic capacity utilized less than an identified, plant-sustaining level. As the President struck deals with some countries as contemplated by Proclamation 9705, the agreed-to imports from those countries would logically affect—most relevantly, could *reduce*—the volume of imports from other countries, lacking agreements with the United States, that could be allowed if the stated goal of overall-imports reduction was still to be met. Paragraph (3) of § 1862(c) and Proclamation 9705 recognize this evident relationship. To prevent the President from increasing the impositions on non-agreement countries after the initial plan announcement would be to impede the President's ability to be effective in solving the specific problem found by the Secretary.

Transpacific has suggested that the President's authority to act outside the 15-day period without securing a new report from the Secretary is limited to relaxing impositions imposed initially within that period. *See* Oral Arg. at 1:07:48–1:10:00; *see also Transpacific I*, 415 F. Supp. 3d at 1275 (asserting that "the statute specifically grants the President power to 'determine the . . . duration of the action[,]' a power to end any action" (alterations in original) (quoting § 1862(c)(1)(A)(ii))). That suggestion, however, assumes a negative answer to the key question of whether the "action" authorized by paragraph (1) can be a plan under which later measures are imposed. It does not provide support for that answer. And that answer is not supported by the ordinary meaning of the language and conflicts with paragraph (3) of § 1862(c) and § 1862's purpose entrusting the President with the duty to adopt effective measures for the threat found by the Secretary.

3

The "legal and historical backdrop" against which Congress legislated confirms that under § 1862(c)(1) the President has authority to pursue a continuing course of action, with adjustments (including additional impositions) adopted over time. *See Fed. Republic of Germany v. Philipp*, 141 S. Ct. 703, 712 (2021) ("Congress drafted the expropriation exception and its predecessor, the Hickenlooper Amendment, against that legal and historical backdrop."); *id.*

at 711 (interpreting the statute at issue "[b]ased on this historical and legal background").

a

Since 1955, Congress has delegated to the President broad discretion to adjust imports of an article that threaten to impair national security, if a designated executive officer has made a finding of such a threat. Subsequent amendments made changes, including changes to enhance the process leading to the predicate finding at the agency level and, at the presidential level, generally to add to the President's authority and obligation to act in response to the relevant official's threat finding. Throughout, Congress has retained the key term "action" in describing the President's response.

Section 7 of the Trade Agreements Extension Act of 1955 provided in relevant part:

> (b) In order to further the policy and purpose of this section, whenever the Director of the Office of Defense Mobilization has reason to believe that any article is being imported into the United States in such quantities as to threaten to impair the national security, he shall so advise the President, and if the President agrees that there is reason for such belief, the President shall cause an immediate investigation to be made to determine the facts. If, on the basis of such investigation, and the report to him of the findings and recommendations made in connection therewith,

> the President finds that the article is being imported into the United States in such quantitates as to threaten to impair the national security, he shall take such *action* as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security.

Trade Agreements Extension Act of 1955, ch. 169, § 7, 69 Stat. 162, 166 (emphasis added). The provision gave the executive officer the responsibility to make a preliminary "reason to believe" finding, but it did not expressly declare that the officer, after investigation, must make a positive finding of threat as a precondition to presidential action.

In the Trade Agreements Extension Act of 1958, Congress made that precondition explicit and also made other amendments, while keeping the word "action." *See Algonquin*, 426 U.S. at 568 (The 1958 amendments "added no limitations with respect to the type of action that the President was authorized to take. The 1958 re-enactment, like the 1955 provision, authorized the President under appropriate conditions to 'take such action' 'as he deems necessary to adjust the imports.' " (cleaned up)). The 1958 statute provided in relevant part:

> (b) Upon request of the head of any Department or Agency, upon application of an interested party, or upon his own motion, the Director of the Office of Defense and Civilian Mobilization (hereinafter in this section referred to as the "Director") shall immediately

> make an appropriate investigation, in the course of which he shall seek information and advice from other appropriate Departments and Agencies, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. If, as a result of such investigation, the Director is of the opinion that the said *article* is being imported into the United States in such quantities *or under such circumstances* as to threaten to impair the national security, he shall promptly so advise the President, and, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security as set forth in this section, he shall *take such action, and for such time*, as he deems necessary to adjust the imports of such article *and its derivatives* so that such imports will not so threaten to impair the national security.

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

In addition to making explicit that the designated officer must make the threat finding, the 1958 provision embodied four relevant changes from the 1955 version. First, Congress expanded the President's power by adding that the President may adjust not only the "article" but also "its derivatives," even though the executive officer's report had to investigate only the "article." Second, Congress clarified that the President's discretion for the "action" included not only the

nature of the action (*i.e.*, "such action") but its duration (*i.e.*, "for such time"). Third, Congress broadened what would suffice as the predicate for the President's authority: "[W]hile under the 1955 provision the President was authorized to act only on a finding that 'quantities' of imports threatened to impair the national security, the 1958 provision also authorized Presidential action on a finding that an article is being imported 'under such circumstances' as to threaten to impair the national security." *Algonquin*, 426 U.S. at 568 n.24. Fourth, Congress removed the requirement that the relevant officer seek the President's approval before starting an investigation. These features stayed materially the same until 1988.

In 1962, Congress reenacted the 1958 provision—without material change, the Supreme Court has noted, though some wording was altered (*e.g.*, the predicate "opinion" became a predicate "finding")—as section 232 of the Trade Expansion Act of 1962, Pub. L. No. 87–796, 76 Stat. 872, 977. *See Algonquin*, 426 U.S. at 568 ("When the national security provision next came up for re-examination, it was re-enacted without material change as § 232(b) of the Trade Expansion Act of 1962."). Between 1966 and 1988, Congress made various changes to the statute that have not been featured in the arguments made to this court in this case. For example, in 1975, Congress made the Secretary of the Treasury the official with the predicate-finding responsibility and relocated the "unless" clause addressing presidential disagreement with the predicate threat finding. *See* Trade Act of 1974, Pub. L.

No. 93–618, § 127(d)(3), 88 Stat. 1978, 1993 (replacing the Director of the Office of Emergency Planning with the Secretary of the Treasury). In 1980, Congress added a legislative-veto procedure for presidential action adjusting imports of petroleum or petroleum products. *See* Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96–223, § 402, 94 Stat. 229, 301.

Just before Congress enacted its amendments in 1988, 19 U.S.C. § 1862 read in relevant part:

> Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of the Treasury (hereinafter referred to as the "Secretary") shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from, and shall consult with, the Secretary of Defense, the Secretary of Commerce, and other appropriate officers of the United States, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion.
>
> The Secretary shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation. The Secretary shall report the findings of his investigation under this subsection with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such

> findings, his recommendation for action or inaction under this section to the President within one year after receiving an application from an interested party or otherwise beginning an investigation under this subsection.
>
> If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall so advise the President and the President shall take such *action*, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

§ 1862(b) (1980) (emphasis and paragraph breaks added).

In sum, from the beginning, Congress delegated broad powers to the President to combat imports that a designated executive officer found to threaten to impair national security. The word "action," which reflected the President's broad discretion in determining the nature of the act, has always been present. Congress broadened the President's already broad power in 1958 and, at the same time, reinforced the range of presidential discretion by adding the phrase "for such time."

b

Practice under § 1862 during the three decades leading up to the 1988 amendments, and the understanding expressed during that time, provide strong confirmation that the proper meaning of the language at issue here (added by those amendments) is that presidential authority extends to carrying out a course of remedial measures, including measures that further restrict imports, chosen over time to address the threat identified in the underlying finding. *Cf. Sosa v. Alvarez-Machain*, 542 U.S. 692, 714 (2004) ("We think history and practice give the edge to this latter position.").

i

From 1955 to 1988, Presidents frequently adjusted imports, including by increasing impositions so as to restrict imports, without seeking or obtaining a new formal investigation and report after the initial one. In 1959, acting under the 1958 version of § 1862, the relevant official (then, the Director of the Office of Civil and Defense Mobilization) formally investigated and submitted a report to the President stating "his opinion 'that crude oil and the principal crude oil derivatives and products are being imported in such quantities and under such circumstances as to threaten to impair the national security.'" Proclamation 3729, 24 Fed. Reg. 1,781, 1,781 (Mar. 12, 1959) (quoting the report). The President agreed and issued Proclamation 3729, which put into place a scheme, including licenses, to adjust the imports of crude oil and

its derivatives. *Id.* The President also ordered the "Secretary of the Interior [to] keep under review the imports into [certain areas] of residual fuel oil to be used as fuel" and gave the Secretary the authority to "make, on a monthly basis if required, such adjustments in the maximum level of such imports as he may determine to be consonant with the objectives of this proclamation." *Id.* at 1,783, § 2(e). The President further ordered relevant officers to "maintain a constant surveillance of" the imports of the article at issue and "its primary derivatives" and to "inform the President of any circumstances which, . . . might indicate the need for further Presidential action." *Id.* at 1,784, § 6(a).

The specific imposition initially adopted in Proclamation 3729 was modified at least 26 times before a new investigation and report were completed—16 years later in 1975. *See* Restriction of Oil Imports, 43 Op. Att'y Gen. 20, 22 (1975) (1975 AG Opinion) ("Proclamation 3279 has been amended at least 26 times since its issuance in 1959." (citing 19 U.S.C. § 1862 note)). At least some of those modifications (made without a new report) "radically amended the program." *Algonquin*, 426 U.S. at 553; *see also* 1975 AG Opinion at 22 ("Some of those amendments have been minor administrative[] changes; others have involved major alteration of the means by which petroleum imports were restricted; none have been preceded by a formal § 232(b) investigation and finding.").

In 1975, the Attorney General formally opined on the proper interpretation of the statute and concluded that it permitted modifications of prior actions:

> The normal meaning of the phrase "such action," in a context such as this, is not a single act but rather a *continuing course of action*, with respect to which the initial investigation and finding would satisfy the statutory requirement. This interpretation is amply supported by the legislative history of the provision, which *clearly contemplates a continuing process of monitoring, and modifying the import restrictions, as their limitations become apparent and their effects change*.

1975 AG Opinion at 21 (emphases added).[7] The Attorney General emphasized the long practice of

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[7] *See also* Presidential Authority to Adjust Ferroalloy Imports Under § 232(b) of the Trade Expansion Act of 1962, 6 Op. O.L.C. 557, 562 (1982) ("Moreover, as this Department has previously indicated, the statutory language and relevant legislative history contemplate a continuing course of action, with the possibility of future modifications."); *id.* ("As noted in a Commerce Department memorandum, the constant monitoring contemplated by § 232 encompasses not only a review of factual circumstances to determine whether a particular remedy is effective, but also a review to determine whether the initial finding of a threat to the national security remains valid."); Legal Authorities Available to the President to Respond to a Severe Energy Supply Interruption or Other Substantial Reduction in Available Petroleum Products, 6 Op. O.L.C. 644, 678 (1982) ("The President's powers under § 232(b) have received a broad interpretation.").

In 1982, the Office of Legal Counsel stated that, for at least some changes, it would be advisable to seek a new predicate finding, but the circumstances, involving remoteness or indirectness of the connection of the presidential action to the threat, are not present here. *See* 6 Op. O.L.C. at 561 (discussing remoteness of a program's impact on importation); *see also* The President's Power to Impose a Fee on Imported Oil Pursuant to the Trade Expansion Act of 1962, 6 Op. O.L.C. 74, 77–80 (1982) (discussing whether to get a new report with a predicate finding to avoid challenges

presidential action resting on that interpretation and added that Congress was aware of this practice. *See id.* at 22 ("The interpretation here proposed, whereby import restrictions once imposed can be modified without an additional investigation and finding, has been sanctioned by the Congress' failure to object to the President's proceeding on that basis repeatedly during the past 15 years."). The next year, the Supreme Court highlighted the breadth of presidential authority under the statute and added that Congress was aware of presidential practice. *See Algonquin*, 426 U.S. at 570 ("Only a few months after President Nixon invoked the provision to initiate the import license fee system challenged here, Congress once again re-enacted the Presidential authorization encompassed in § 232(b) without material change. . . . The congressional acquiescence in President Nixon's action manifested by the re-enactment of § 232(b) provides yet further corroboration that § 232(b) was understood and intended to authorize the imposition of monetary exactions as a means of adjusting imports.").

Congress amended the statute in April 1980, adding what is now subsection (f), which addresses petroleum and sets out a congressional-disapproval process. Crude Oil Windfall Profit Tax Act, § 402, 94 Stat. at 301. Between the Attorney General's 1975 opinion and that amendment, which was the last one before 1988, the President continued to modify measures adopted under the statute without obtaining new formal

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based on the remoteness or indirectness of the proposed import restrictions). We have no occasion to explore such situations.

reports. *See PrimeSource Bldg. Prods., Inc. v. United States*, 497 F. Supp. 3d 1333, 1375–76, 1387-88 (Ct. Int'l Trade 2021) (Baker, J., concurring in part and dissenting in part) (noting at least seven instances). Between the April 1980 amendment and the inauguration of the new President in January 1981, the President modified a prior proclamation at least four times without a new investigation and report. *See id.* (noting at least four instances). It is not disputed before us that the modifications during the decades of practice included impositions of additional restrictions. *See*, *e.g.*, *id.* at 1386–88.

At the time of the 1988 amendments, then, practice under and executive interpretation of the statute provided a settled meaning of "action" as including a "plan" or a "continuing course of action." *See* Oral Arg. at 1:04:06–1:04:21 (Q: "The pre-1988 version, you would agree, it gave the President the authority to do subsequent actions years after the initial proclamation? Is that right?" A: "That is the way the statute reads."). This settled meaning is strongly presumed to have continued through the 1988 amendments, which kept the key term "action," even while making other changes to the provision, indeed the subsection, in which the term appeared. *See*, *e.g.*, *Helsinn Healthcare S.A. v. Teva Pharms. USA, Inc.*, 139 S. Ct. 628, 633–34 (2019) ("In light of this settled pre-AIA precedent on the meaning of 'on sale,' we presume that when Congress reenacted the same language in the AIA, it adopted the earlier judicial construction of that phrase."); *Dir. of Revenue of Missouri v. CoBank ACB*,

531 U.S. 316, 324 (2001) (requiring a clear indication of a change in meaning to "disrupt the 50-year history of state taxation of banks for cooperatives"); *cf. NLRB v. Noel Canning*, 573 U.S. 513, 525 (2014) ("[T]he longstanding practice of the government can inform our determination of what the law is." (cleaned up)); *Trump v. Hawaii*, 138 S. Ct. 2392, 2415 (2018) (looking at "historical practice" for statutory interpretation).

ii

Overcoming the strong implication of continuity of the settled meaning would require a "clear indication from Congress of a change in policy." *United States v. O'Brien*, 560 U.S. 218, 231 (2010) (internal quotation marks omitted). There is no such indication. Congress did not change "action" in 1988. And what it did change fails to imply the narrowing of presidential authority the Trade Court found.

In the 1988 amendments, Congress elaborated on the process by which the executive official responsible for making the predicate finding of threat—by then, the Secretary of Commerce—was to make that decision. § 1862(b). And in numerous ways, Congress acted to "spur" governmental action, not "limit the scope of . . . authority" previously possessed. *Brock*, 476 U.S. at 265. Even as to the Secretary, Congress shortened the period for the determination to 270 days (from the earlier one year). § 1862(b). Congress then directed that, once the Secretary makes a finding of threat, the President is to respond to that finding within two short

periods—one for the determination whether the President concurred in the finding and the determination what to do about the threat if so, the other for implementing the action the President deemed necessary. § 1862(c)(1). Congress also made express that the presidential action chosen could be a bilateral or multilateral negotiation—something the conferees themselves understood was already implicit in § 1862(c)(1), *see* Conf. Rep. at 712—but it put that option under new constraints so that the option would not be used for what ended up as inaction or ineffective action. § 1862(c)(3).

None 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. To be sure, Congress did change "for such time" language to "duration" language, but that change was a "stylistic" one only, not suggesting a change of meaning. *Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 343 n.3 (2005); *see also* Scalia & Garner, *Reading Law* § 40, at 256 ("stylistic or nonsubstantive changes" do not imply change of prior meaning); *Universal Steel Prods., Inc. v. United States*, 495 F. Supp. 3d 1336, 1351–52 (Ct. Int'l Trade 2021); *PrimeSource*, 497 F. Supp. 3d at 1378 (Baker, J., concurring in part and dissenting in part). The same is true of the change from "take such action . . . as [the President] deems necessary" to "determine

the nature . . . of the action that, in the judgment of the President, must be taken."

The new provisions have the evident purpose of producing more action, not less—and of counteracting a perceived problem of inaction, including inaction through delay. In 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.

There is no material dispute that the background to the 1988 amendments was a perceived problem of inaction, including by delay. The conferees stated the problem: "Present law provides no time limit after the Commerce Secretary's report for the President's decision on the appropriate action to take." Conf. Rep. at 711. Indeed, in 1982, having received a report from the Secretary finding a national-security threat from imports of ferroalloy products, the President was advised by the Office of Legal Counsel that "[n]o time frame constrains the President" in acting on the report. Presidential Authority to Adjust Ferroalloy Imports Under § 232(b) of the Trade Expansion Act of 1962, 6 Op. O.L.C. 557, 562 (1982); *see also id.* at 558, 563. Congress plainly acted to oblige the President to act within specified periods, but as Transpacific has acknowledged, nothing in the legislative history suggests that, if that duty was breached, the President could not act later. Oral Arg. at 1:02:44–1:03:16 (Q: "Where is there any expression of legislative intent that these time limits that were installed in 1988 into section 232(b)

were designed to yank away from the President any authority to take action outside of that time limit? Is the answer that there really isn't anything in the legislative history on that?" A: "I would have to agree with Your Honor, yes, there is nothing in the legislative history that says that.").

The specific focus of Congress's concern involved presidential inaction concerning imports of machine tools. Based on a March 1983 request for investigation, the Secretary, in February 1984, sent the President a report finding that "imports in certain machine tools markets did threaten the U.S. national security." *See* General Accounting Office, *International Trade: Revitalizing the U.S. Machine Tool Industry* 9 (1990) (GAO). The President responded that the "report should incorporate new mobilization, defense, and economic planning factors then being developed by an interagency group" and "directed the Secretary of Commerce to update the machine tools investigation." Statement on the Machine Tool Industry, 1986 Pub. Papers 632, 632–33 (May 20, 1986). Nearly two years later, in March 1986, the Secretary submitted an updated report, and two months after that, the President announced that he agreed with the Secretary's finding and proclaimed his "action plan," his "course of action," *id.*—to "seek voluntary export restraint agreements to reduce machine tool imports as part of an overall Domestic Action Plan supporting the industry's modernization efforts," GAO at 9. About seven months later, in December 1986, the President announced that he reached a five-year voluntary restraint agreement with Japan

and Taiwan. *Id.*; *see also* Statement on the Revitalization of the Machine Tool Industry, 1986 Pub. Papers 1632, 1632–33 (Dec. 16, 1986).

It is undisputed that "Congress did not applaud the" President's delay for the machine-tools articles. *Fed. Republic of Germany*, 141 S. Ct. at 711. The Trade Court has recognized as much. *See Transpacific II*, 466 F. Supp. 3d at 1252 ("[T]he 1988 Amendments were passed against the backdrop of President Reagan's failing to take timely action in response to the Secretary's report finding that certain machine tools threatened to impair national security and Congress's resulting frustration."); *Universal Steel*, 495 F. Supp. 3d at 1352 n.17 ("The history of the 1988 amendments reveals that the amendments were motivated in no small part by a desire to accelerate Presidential action pursuant to Section 232. Congress had been frustrated by perceived undue Presidential delay in taking timely or effective action pursuant to the Secretary's report that machine tools threatened to impair the national security."); *id.* at 1353 ("Furthermore, the 1988 amendments to Section 232 were motivated by a desire to prevent Presidential inaction and inefficiency under Section 232.").[8] This history tends to undermine, not

[8] *See also*, *e.g.*, *Comprehensive Trade Legislation*: *Hearing on H.R. 3 Before the H. Comm. on Ways & Means*, 100th Cong. 199 (1987) (statement of Rep. Jim Wright, Speaker of the U.S. House of Representatives) ("Many of our trade problems can be directly traced to the delays, the abuses of discretion, and ill-considered policy decisions by those officially appointed to carry out American policy. One of the worst delays was the machine tools case."); *Trade Reform Legislation: Hearing Before the Subcomm. on Trade*

support, the Trade Court's ruling that the new timing provisions were meant not only to create a duty to act within specified periods but also to disable the President from acting later if those periods had ended, even if the actions were needed to effectuate the Secretary's finding of threat following a timely-announced plan of action.

4

Transpacific suggests that the Trade Court's narrow reading of § 1862(c)(1) is necessary to avoid making § 1862(c)(3) superfluous. *See* Transpacific Response Br. at 25. We disagree. Subsection (c)(3) makes clear that an initial action can indeed be a plan that leads to additional impositions well after the time periods of subsection (c)(1) have passed. For example, if an agreement with one country is "ineffective in eliminating the

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of the H. Comm. on Ways & Means, 99th Cong. 1282 (1986) (statement of Rep. Barbara B. Kennelly, Member, H. Comm. on Ways & Means) (noting that without a deadline, the President could "leave these cases to languish indefinitely"); *Threat of Certain Imports to National Security: Hearing on S. 1871 Before the S. Comm. on Fin.*, 99th Cong. 18 (1986) (statement of Sen. Charles E. Grassley, Member, S. Comm. on Finance) ("[I]t was almost 2 years from that date before the President asked several major foreign sources of machine tools to cut exports to the United States. And of course, when the national security is at stake, such a delay is incomprehensible to me and to most other people."); *id.* at 24 (statement of Sen. Robert C. Byrd) ("So, there is no time limit under present law for the President to act in which he has to act. We have seen petitions by the ferroalloy industry and the machine tools industry drag on for months and months without resolution.").

threat to the national security posed by imports of such article," as assessed long after the 90-day and 15-day periods have ended, the President "shall take such other actions" as necessary "to adjust the imports of such article so that such imports will not threaten to impair the national security." § 1862(c)(3)(A). Having recognized that entry into negotiations can be part of the President's remedial choice under subsection (c)(1), Congress insisted that the negotiation/agreement option not be a route to inaction, or a substitute for effective action, by writing very specific directives that apply in that situation. Those directives are not superfluous of subsection (c)(1)'s contemplation of a plan of action with adjustment of implementation choices over time.

Relatedly, we reject Transpacific's suggestion that the Trade Court's interpretation of subsection (c)(1) is supported by the fact that paragraph (1) uses "action" (singular) while paragraph (3) uses "actions" (plural). Transpacific Response Br. at 24. "[U]nless the context indicates otherwise[,] words importing the singular include and apply to several persons, parties, or things; words importing the plural include the singular." 1 U.S.C. § 1. In any event, "action," in particular, can refer to an extended-over-time process or a single event at a single moment. Here, paragraph (1)'s reference to "take action" (or "action that . . . must be taken") is addressing the initial announcement of the response as a whole, and naturally encompasses a plan that could have many components or types of components. In contrast, paragraph (3)'s reference to "actions" is in a

context where the distinction is being made between one kind of component (bilateral or multilateral efforts, which have left imports too high) and another kind, drawing the focus to the more granular level. The broad scope of the singular formulation in paragraph (1) is not undermined by the use of the plural in paragraph (3). *See Cherokee Nation v. State of Georgia*, 30 U.S. 5 Pet. 1, 19 (1831) (Marshall, C.J.) ("It has been also said, that the same words have not necessarily the same meaning attached to them when found in different parts of the same instrument: their meaning is controlled by the context. This is undoubtedly true."); *see also Yates v. United States*, 574 U.S. 528, 537 (2015).

Transpacific also suggests that the timing provisions were meant to prevent the President from acting on stale information. Transpacific Response Br. at 29; *see also Transpacific II*, 466 F. Supp. 3d at 1252. But that observation does not support the categorical narrow interpretation adopted by the Trade Court and pressed by Transpacific, especially given the already-discussed considerations of text and context, including purpose and history, that strongly undermine the narrow interpretation. 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. In so stating, we add, we are not prejudging the scope of judicial

reviewability of presidential determinations relevant to that concern.[9]

Here, there is no genuine concern about staleness. Proclamation 9772, the challenged proclamation, came only months after the initial announcement, which itself provided for just such a possible change in the future, and rested on a determination by the Secretary—about needed domestic-plant capacity utilization—as to which no substantial case of staleness has been made.[10]

Finally, Transpacific argues that the constitutional-doubt canon supports its narrow reading of § 1862 because a contrary reading raises serious nondelegation-doctrine concerns. Transpacific Response Br. at 16–17, 19, 31; *see also Transpacific II*, 466 F. Supp. 3d at 1253; *Transpacific I*, 415 F. Supp. 3d at 1275–76. Under governing precedent, there is no substantial

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[9] We also note the possibility that § 1862(b)(1)(A) allows an "interested party" to request that the Secretary launch an investigation to determine that imports found to threaten national security no longer do so. We do not address that possibility.

[10] The finding of the Secretary at issue was about the needed capacity utilization. How much reduction of imports is being achieved as measures are implemented is a separate matter, necessarily a future-oriented one, that is not the subject of § 1862(b). Proclamation 9705 put in place requirements for monitoring the import reductions so that the President had current information. *See* 83 Fed. Reg. at 11,628; *see also* Proclamation 9772, 83 Fed. Reg. at 40,429, ¶¶ 3–4 (relying on updated information); *cf.* Proclamation 3729, 24 Fed. Reg. at 1,783, § 2(e) and 1,784, § 6(a) (ordering monitoring in 1959); 1975 AG Opinion at 21 (contemplating a "continuing process of monitoring"); 6 Op. O.L.C. at 562 (same).

constitutional doubt. *See generally Algonquin*, 426 U.S. at 550–70; *American Inst. for Int'l Steel*, 806 F. App'x at 983–91. The Supreme Court in *Algonquin* concluded that § 1862—before Congress added the timing deadlines—"easily fulfills" the intelligible-principle standard. 426 U.S. at 559. We have not been shown why the particular interpretation of § 1862(c)(1) at issue raises a materially distinct issue under the nondelegation doctrine.

* * *

For the foregoing reasons, we reverse the Trade Court's determination that Proclamation 9772 violated § 1862.

B

It is well established that the Fifth Amendment's Due Process Clause has an equal-protection guarantee that mirrors the Fourteenth Amendment's Equal Protection Clause. *See Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975); U.S. Const. amend. XIV, § 1 ("nor deny to any person within its jurisdiction the equal protection of the laws"); U.S. Const. amend. V ("nor be deprived of life, liberty, or property, without due process of law"). Here, the class allegedly being singled out for unfavorable treatment is the class of "U.S. importers of Turkish steel products." Transpacific Response Br. at 33. Transpacific's claim of unconstitutional discrimination against that class, we conclude, fails.

The most demanding standard that could apply here is the undemanding rational-basis standard. Transpacific has made no persuasive case that the class of importers of a particular product from a particular country falls into any category for which a heightened standard of review under equal-protection analysis has been recognized. The Supreme Court "has long held that a classification neither involving fundamental rights nor proceeding along suspect lines cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012) (cleaned up).

Under rational-basis review, Transpacific, as the challenger, has the burden to establish that there is no "reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993) (internal quotation marks omitted); *see also FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) ("In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."); *Williamson v. Lee Optical of Oklahoma Inc.*, 348 U.S. 483, 487–88 (1955) ("But the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might

be thought that the particular legislative measure was a rational way to correct it.").

Transpacific has failed to meet its burden. Proclamation 9772's "policy is plausibly related to the Government's stated objective to protect" national security. *Hawaii*, 138 S. Ct. at 2420. In Proclamation 9772, the President noted that the Secretary in the January 2018 report had recommended "applying a higher tariff to a list of specific countries should [the President] determine that all countries should not be subject to the same tariff"—a list that includes Turkey—and stated that "Turkey is among the major exporters of steel to the United States for domestic consumption." 83 Fed. Reg. at 40,429, ¶ 6. And the President highlighted that the Secretary "advised [him] that this adjustment will be a significant step toward ensuring the viability of the domestic steel industry." *Id.* For at least those reasons, the President determined that it was "necessary and appropriate" to increase the tariff from 25% to 50% and that the increase would "further reduce imports of steel articles and increase domestic capacity utilization." *Id.* Increasing tariffs on a major exporter is plausibly related to the achievement of the stated objective of achieving the level of domestic capacity utilization needed for plant sustainability found important to protect national security.

Transpacific complains that the President singled out Turkey, even though other countries export more. Transpacific Response Br. at 38 (noting that "Canada, Mexico, Brazil, South Korea, Russia, Japan, Germany, and China" are major exporters of steel). But it is

rational for the President to try a steep increase on tariffs for only one major exporter to see if that strategy helps to achieve the legitimate objective of improving domestic capacity utilization without extending the increase more widely. That is especially true because the United States's relations with any given country often will differ, in ways relevant to § 1862, from its relations with other countries. *See Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1357 (Fed. Cir. 2010) ("The reasons behind different duty rates vary widely based on country of origin, the type of product, the circumstances under which the product is imported, and the state of the domestic manufacturing industry. . . . Further, differential rates may be the result of trade concessions made by the United States in return for unrelated trade advantages.").

Here, of the eight countries Transpacific mentions, the President was negotiating with at least four. *See*, *e.g.*, Proclamation 9740, 83 Fed. Reg. at 20,683–84, ¶¶ 4–6 (noting negotiations with South Korea, Brazil, Canada, and Mexico, among other countries). Of those four, the President had reached agreements with two of them (Brazil and South Korea) before issuing Proclamation 9772. *See*, *e.g.*, *id.* at 20,683–84, ¶¶ 4–5 (agreement with South Korea, which included "a quota that restricts the quantity of steel articles imported into the United States from South Korea"); Proclamation 9759, 83 Fed. Reg. at 25,857–58, ¶ 5 (agreement with Brazil, among other countries). And of the four countries the President might not have been negotiating with, two of them did not appear on the Secretary's

list of a subset of countries to impose tariffs on. *See* January 2018 report, 85 Fed. Reg. at 40,205 (not listing Japan or Germany but listing "Brazil, South Korea, Russia, Turkey, India, Vietnam, China, Thailand, South Africa, Egypt, Malaysia and Costa Rica"). More generally, we see no authority or sound basis for treating equal-protection analysis under the rational-basis standard as requiring judicial inquiry into differences among particular countries' relations with the United States that might legitimately affect the possibility of negotiations or furnish reasons not to include particular countries in efforts to reduce overall imports of a particular article. *See Hawaii*, 138 S. Ct. at 2421 ("[W]e cannot substitute our own assessment for the Executive's predictive judgments on such [foreign-policy] matters, all of which are delicate, complex, and involve large elements of prophecy." (internal quotation marks omitted)).

The Trade Court concluded that the present "case is materially indistinguishable from *Allegheny Pittsburgh Coal Company v. County Commission of Webster County*, 488 U.S. 336 (1989)." *Transpacific II*, 466 F. Supp. 3d at 1258. We disagree. *Allegheny* must be read narrowly; the Supreme Court has made clear that it is the "exception," the "rare case." *Armour*, 566 U.S. at 686–87; *see also Nordlinger v. Hahn*, 505 U.S. 1, 16 (1992) ("*Allegheny Pittsburgh* was the rare case where the facts precluded any plausible inference that the reason for the unequal assessment practice was to achieve the benefits of an acquisition-value tax scheme."). *Allegheny* involved a circumstance in which

the only apparent basis for the county's distinction between the favored and disfavored class was one the county was barred from asserting because the State's constitution disclaimed it. *See Allegheny*, 488 U.S. at 338; *id.* at 345 ("But West Virginia has not drawn such a distinction. Its Constitution and laws provide that all property of the kind held by petitioners shall be taxed at a rate uniform throughout the State according to its estimated market value."); *Armour*, 566 U.S. at 686–87 (describing *Allegheny* as resting on the fact that "in light of the state constitution and related laws requiring equal valuation, there could be no other rational basis for the [challenged] practice").

In the present case, in contrast, there is no applicable federal-law prohibition on different treatment of the imports of articles from different countries. The Trade Court cited 19 U.S.C. § 1881 when asserting that "[t]he status quo under normal trade relations is equal tariff treatment of similar products irrespective of country of origin." *Transpacific II*, 466 F. Supp. 3d at 1258 (citing § 1881). But the Trade Court did not assert that § 1881 is actually a prohibition on the distinction made in implementing § 1862 here. Nor does Transpacific so contend—or even cite § 1881 in defending the Trade Court's decision. Transpacific Response Br. at 31–55. In fact, § 1881 begins with the phrase, "Except as otherwise provided in this title," before stating a principle that "any duty or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement under this title or section 350 of the Tariff Act of 1930 [19 U.S.C. § 1351] of this title shall

apply to products of all foreign countries, whether imported directly or indirectly." The exception for "this title," the government has explained (with no response from Transpacific), refers to Title II of the Trade Expansion Act of 1962, of which section 232 of that Act, *i.e.*, 19 U.S.C. § 1862, is a part. U.S. Opening Br. at 45. The overriding legal bar on the challenged distinction that was present in *Allegheny* is not present here. *See* Oral Arg. at 1:17:15–1:17:38 (Transpacific conceding that the applicable law here differs from the one in *Allegheny*).

Transpacific also points to certain sources outside the agency record—*i.e.*, outside the record on which the Trade Court's judgment rested, by joint motion—to support its argument that the only purpose of Proclamation 9772's policy is animus toward U.S. importers of Turkish steel. *E.g.*, Transpacific Response Br. at 43. But Transpacific has not shown how animus towards importers of goods from a particular country (which is not animus towards people from particular countries) would, if shown, alter the applicability of rational-basis review. And in any event, Transpacific's evidence does not justify altering our conclusion. Nearly all of Transpacific's extrinsic evidence consists of statements by the President that are too "remote in time and made in unrelated contexts" to "qualify as 'contemporary statements' probative of the decision at issue." *Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891, 1916 (2020) (plurality opinion) (quoting *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977)). And the statement from the

President on the same day as Proclamation 9772 does not reflect animus toward *U.S. importers of Turkish steel*, let alone negate the reasonably conceivable state of facts establishing a rational basis for the policy. *See* J.A. 499.

We must "uphold [Proclamation 9772] so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds." *Hawaii*, 138 S. Ct. at 2420. Transpacific has failed to establish that Proclamation 9772 had no "legitimate grounding in national security concerns, quite apart from any . . . hostility" to U.S. importers of Turkish steel. *Id.* at 2421. We conclude that Proclamation 9772 did not violate the equal-protection guarantees of the Fifth Amendment's Due Process Clause.

III

We reverse the Trade Court's decision and remand the case for entry of judgment against Transpacific. On remand, the Trade Court may determine whether that judgment should include dismissal of the claim against the President.

The parties shall bear their own costs.

REVERSED AND REMANDED

United States Court of Appeals
for the Federal Circuit

TRANSPACIFIC STEEL LLC, BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., BORUSAN MANNESMANN PIPE U.S. INC., THE JORDAN INTERNATIONAL COMPANY,
Plaintiffs-Appellees

v.

UNITED STATES, JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, TROY MILLER, IN HIS OFFICIAL CAPACITY AS SENIOR OFFICIAL PERFORMING THE DUTIES OF THE COMMISSIONER FOR UNITED STATES CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF COMMERCE, GINA RAIMONDO, IN HER OFFICIAL CAPACITY AS SECRETARY OF COMMERCE,
Defendants-Appellants

2020-2157

Appeal from the United States Court of International Trade in No. 1:19-cv-00009-CRK-GSK-JAR, Senior Judge Jane A. Restani, Judge Claire R. Kelly, Judge Gary S. Katzmann.

REYNA, *Circuit Judge* dissenting.

John Adams warned that "Power must never be trusted without a Check."[1] The expression of caution from our Founding Father is as much true today as it was at the founding of our nation. It also has exact application to this appeal. The essential question posed by this appeal is whether Congress enacted § 232 to grant the President un-checked authority over the Tariff.

The U.S. Court of International Trade, in a special three judge panel,[2] determined that President Trump exceeded his statutory authority by adjusting tariffs imposed for national security reasons outside the time limits specified in § 232. My colleagues reverse the Court of International Trade holding that § 232 does not temporally limit the President's authority to act. I would affirm the Court of International Trade and hold that the discretionary authority Congress granted the President under § 232 is temporally limited and that the President in this has case exceeded that authority. I dissent.

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[1] Letter from John Adams to Thomas Jefferson (Feb. 2, 1816) (on file with the National Archives), https://founders.archives.gov/documents/Jefferson/03-09-02-0285.

[2] The chief judge of the Court of International Trade is authorized to designate a three-judge panel to decide a case that "(1) raises an issue of the constitutionality of an Act of Congress, a proclamation of the President or an Executive order; or (2) has broad or significant implications in the administration or interpretation of the customs laws." 28 U.S.C. § 255(a).

INTRODUCTION

My dissent is based on three grounds. First, the majority overlooks the context of § 232[3] as a trade statute. In § 232, Congress has delegated to the Executive Branch certain narrow authority over trade—an area over which Congress has sole constitutional authority—for the purpose of safeguarding national security. The majority expands Congress's narrow delegation of authority, vitiating Congress's own express limits, and thereby effectively reassigns to the Executive Branch the constitutional power vested in Congress to manage and regulate the Tariff. *See* U.S. CONST. art. I, § 8. The majority therefore seeks to walk in the shoes of the Founders: its present expansion of Executive Authority is more than legislating from the bench, it is amending the Constitution. Second, § 232 is written in plain words that evoke common meaning and application. The majority articulates no sound reason to diverge from that plain language but expounds at great length, instead, on what the statute does not say or what it purportedly means to say. It engages in statutory leapfrog, hopping here and there but ignoring what it has skipped. Third, § 232's legislative history shows that Congress intended, for good reason, to end the Executive Branch's historical practice of perpetually modifying earlier actions without obtaining a new

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[3] Trade Agreement Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (1962) (codified as amended at 19 U.S.C. § 1862) ("§ 232" or "§ 1862").

report from the Secretary of Commerce and without reporting to Congress.

Discussion

I

Congress's Authority Over Trade

The majority decision is based on a rationale that ignores the history of the U.S. trade law framework. It ignores that significant experience that Congress has in enacting delegation statutes, experience that stretches back to the founding of this country. In vitiating the express limits imposed on a narrow delegation of Congressional authority, the majority tears at the legal framework established by the Founders and Congress and imperils the very relief sought to be provided under § 232.

The Constitution vests in Congress sole power over the Tariff when it confers on Congress the power "To lay and collect Taxes, Duties, Imposts, and Excises" and "To regulate Commerce with foreign Nations." U.S. Const. art. I, § 8. Only Congress, therefore, has power derived from the Constitution to establish, revise, assess, collect, and enforce tariffs (which may include duties, taxes and imposts) that are assessed and collected upon the importation of goods.

Over time, Congress has delegated to the Executive Branch authority to act on certain matters involving tariffs. For example, Congress has delegated to the Executive Branch authority to negotiate tariff

reductions via multilateral trade agreements, such as the General Agreement on Tariffs and Trade ("GATT") (reciprocal and non-reciprocal tariff reduction among the contracting members); regional trade agreements, such as the North American Free Trade Agreement ("NAFTA") (eliminating tariffs on almost 100% of the trade among the parties to the agreement); and non-reciprocal programs, such as the Generalized System of Preferences ("GSP") (programs designed to assist the economic development of lesser developed economies).[4] But in each instance, Congress has maintained oversight by, for example, reviewing negotiating objectives and holding hearings. Congress has also held the ultimate authority to approve the results of the Executive Branch's negotiations.[5] Under our constitutional scheme, any statutory limitations placed by Congress on a delegation of authority to the President bind him to act within those limits, and any action taken outside such limits exceeds such authority and is therefore illegal. That precisely is what happened in this case.

Section 232

Section 232 is a trade relief statute, a narrow delegation of authority by Congress to the President to

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[4] The GSP was authorized by Congress in the Trade Act of 1974, *see* Trade Act of 1974, Pub. L. No. 93-618, § 501, 88 Stat. 1978, 2066 (1975), and is subject to renewal by Congress.

[5] *See*, *e.g.*, Uruguay Round Agreements Act, Pub. L. No. 103-465, § 101(a), 108 Stat. 4809, 4814 (1994) (approving the trade agreements and the statement of administrative action to implement the agreements submitted to Congress).

take trade-related action when necessary to safeguard national security. *See* 19 U.S.C. § 1862. As such, we should be wary of any undue expansion, whether by the Executive or the Judicial branch, of the President's delegated authority.

The § 232 procedures relevant to this appeal are straightforward and clear. At the outset, the Secretary of Commerce initiates an investigation on whether certain importation threatens to impair national security. 19 U.S.C. § 1862(b)(1)(A). Section 232 investigations are trade focused. The "evidence" examined is therefore trade data and economic statistics and any other circumstances involving the production, commercialization, and importation of the good subject to investigation. Factors examined often include U.S. shortages; U.S. and foreign production; excess and underutilized capacity; U.S. shipments and domestic consumption; plant closures; prices; and worker and manufacturing dislocations caused by bilateral or multilateral trade arrangements.[6]

No more than 270 days after the investigation is initiated, the Secretary of Commerce must submit a report to the President on the effects of the importation at issue, whether a threat to national security exists, and the recommended course of action, if any. *Id.* § 1862(b)(3). The President then has 90 days to determine whether he agrees with the Secretary's findings and, if so, determine "the nature and duration of the action that, in the judgment of the President, must be

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[6] *See*, *e.g.*, 31 C.F.R. § 9.4.

taken to adjust the imports" at issue to address the threat. *Id.* § 1862(c)(1)(A). The President's "adjustment of imports" may involve increasing or decreasing tariffs on imports of a good or the establishment or elimination of some other trade-related restriction. To the extent the President acts to "adjust imports" under § 232, such adjustments invariably seek to improve the competitiveness of the U.S. industry that produces the same or similar good as that subject to the investigation (in this case, steel).[7]

The President is then required to "implement that action *by no later than the date that is 15 days after the day on which the President determines to take action*." *Id.* § 1862(c)(1)(B) (emphasis added). The President "shall" also, within 30 days after the President's determination on whether to take action, submit to Congress a written statement of the reasons for the chosen action or inaction.[8] *Id.* § 1862(c)(2).

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[7] *See*, *e.g.*, Proclamation No. 9705, 83 Fed. Reg. 11,625, 11,626 (Mar. 8, 2018) ("This relief will help our domestic steel industry to revive idled facilities, open closed mills, preserve necessary skills by hiring new steel workers, and maintain or increase production, which will reduce our Nation's need to rely on foreign producers for steel and ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense.").

[8] Section 232 also contemplates that the President may decide to take action by way of negotiations with another country to limit or restrict imports into the U.S. *Id.* § 1862(c)(3). If the President decides to negotiate, subsection (c)(3) requires a different timeline. If no agreement is entered into before the date that is 180 days after the date on which the President made his § 1862(c)(1)(A) determination to take action, or if the negotiated

Because the procedures set forth in § 232 are trade focused, and the relief provided is trade specific, the subject matter of § 232 flows directly Congress's constitutional power over the Tariff. The majority decision, however, is untethered from the U.S. trade law context. As such, it answers the wrong question. *See King v. Burwell*, 576 U.S. 473, 492 (2015) (reciting the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme" (citation and quotation omitted)). The real question is whether Congress has delegated to the President authority to act to adjust imports outside § 232's time limits. For the reasons below, and as rightly concluded by the Court of International Trade, the answer is no. Congress has placed time limits upon the President that are plain, clear, and unmistakable, and has mandated that, if the President decides to act, he must do so "by no later than" those time limits.

II

The plain language and legislative history of § 232 demonstrate that the President must act within the specified time limits or else forfeits the right to do so until the Secretary of Commerce provides a new report.

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agreement is not carried out or effective in eliminating the threat, the President "shall take such other actions as the President deems necessary to adjust the imports[.]" *Id.* § 1862(c)(3)(A). This appeal does not directly involve the negotiations alternative.

The Plain Language

Statutory interpretation begins with the language of the statute. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). If the language is plain, then the inquiry ends, and "the sole function of the courts is to enforce it according to its terms." *Id.* (citation and quotation omitted). Here, § 232 plainly requires that the President "shall," within 90 days of receiving the Secretary's report, determine whether she agrees with the report and determine the nature and duration of the action, if any, to take to avoid impairment to national security. 19 U.S.C. § 1862(c)(1)(A). If the President decides to act, she "shall" do so within 15 days of determining that the action is warranted. *Id.* § 1862(c)(1)(B).

The majority decides that "shall" means "may." Maj. Op. at 23–24. I discern no sound reason for that interpretation permitting the President to modify the action indefinitely outside the statutory time limits. The word "shall" in a statute "normally creates an obligation impervious to judicial discretion." *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998); *see also Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) ("Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement."); *United States v. Rodgers*, 461 U.S. 677, 706 (1983). Applying the normal legal meaning of "shall," § 232 requires the President to follow the deadlines set forth in the statute. The result is not draconian: If the President does not act in time, he must obtain a new report from the Secretary of

Commerce—which may be the same as or similar to the previous report—in order to be authorized again to take action to avoid impairment of national security. But nothing in § 232 gives the President discretion to ignore the time limits or modify the initial action indefinitely. "[W]ithout 'any indication' that [§ 232] allows the government to lessen its obligation, we must 'give effect to [§ 232's] plain command.'" *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1321 (2020) (quoting *Lexecon*, 523 U.S. at 35).

The majority also interprets the word "action" to encompass a "plan of action" that may be modified and completed long after the statutory time limits expire. Maj. Op. at 25–26. This reading is unavailing. Section 232 repeatedly refers to *taking* an action, and plans cannot be taken. Section 232's use of the word "implement" does not change this conclusion: a tariff can be implemented, but that does not make that tariff a plan of action or series of actions. Further, Congress chose the singular form of "action" even though, there is no question, it was capable of selecting the plural. *See* 19 U.S.C. § 1862(c)(3) (referring to "actions").

The majority's reading should also be rejected because it clashes with several other aspects of § 232, rendering them superfluous, nonsensical, and useless.[9] The Supreme Court has warned against statutory

[9] Section 232 is but a small part of the overall U.S. trade framework, a framework replete with limitations on presidential authority over trade matters. The majority fails to explain why its interpretation in this case does, or does not, extend to the limitations articulated in other aspects of U.S. trade law.

interpretations that "render[] superfluous another portion of that same law." *Maine*, 140 S. Ct. at 1323 (citations and quotations omitted). First, § 232 requires the President to determine the "duration" of "*the action*" chosen. 19 U.S.C. § 1862(c)(1)(A)(ii). This requirement has no teeth if an "action" may include an open-ended series of actions that may be endlessly modified. Further, § 232 requires the President to provide Congress with a statement of the reasons for the chosen action (or inaction) within 30 days of his determination on whether to take action. *Id.* § 1862(c)(2). Such a requirement is useless to Congress if the statute permits the President to adopt a continuing plan of action that may be changed later.

Section 232 also permits the President to take "such other actions as the President deems necessary" if the President initially selected the action of negotiation and the ensuing negotiations are unfruitful. 19 U.S.C. § 1862(c)(3)(A). The majority argues that this provision's reference to "other actions" suggests that the President may undertake a plan of action that is modifiable after the time limits expire. Maj. Op. at 26–28. But the opposite is true. The President would have no need for "other actions" if an "action" may include multiple actions modifiable over long periods. Moreover, subsection (c)(3) in no way suggests that the President has carte blanche to modify past actions in a continuing fashion without a new report from the Secretary of Commerce and without reporting to Congress. It is irrational to read the subsection on negotiations as expanding the President's authority under

different subsections pertaining to all other actions *excluding* negotiations.

The majority also reduces the statutory deadlines themselves to mere optional suggestions. The majority reasons that § 232 is analogous to a requirement that a person must "return a car by 11 p.m.": Even if the 11 p.m. deadline passes, the obligation to return the car still remains. Maj. Op. at 23. For support, the majority cites *Brock v. Pierce County*, 476 U.S. 253, 265 (1986). But that case is inapposite. The statute in *Brock* authorized the agency to act "separate and apart" from the provision that contained time limitations. *See Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 177 (2003) (Scalia, J., dissenting). No such separate authorization exists here. Nor does *Brock* involve the delegation to the President of a constitutional power belonging to Congress. Because § 232 is such a delegation, extra care should be taken to avoid unduly expanding that delegation—as the majority does now—lest we reweigh the careful balances drawn by both the Founders and Congress.

Lastly, even assuming that an "action" may encompass a "plan of action," it does not follow that § 232's deadlines are mere optional suggestions. To the extent "action" can include a "plan of action," § 232 requires the President to implement *the plan*, not a part of the plan, "by no later than" a specific deadline. 19 U.S.C. § 1862(c)(1)(B) (requiring the President to "implement *that action* by no later than the date that is 15 days after the day on which the President determines to take action" (emphasis added)). The majority provides

no persuasive reason why a "plan of action" is inherently free of time limits, requiring infinite time for completion of the plan.

Because § 232 is plain, the inquiry ends here. *Ron Pair*, 489 U.S. at 241.

Legislative History

The legislative history of § 232 also shows that Congress has not authorized the President to carry out open-ended plans of action, modifiable outside the statutory deadlines, without a new report from the Secretary of Commerce and without reporting to Congress. Before Congress amended § 232 in 1988, the provision stated that the President "shall take such action, and for such time, as he deems necessary." Trade Agreement Expansion Act of 1962, Pub. L. No. 87-794, § 232, 76 Stat. 872, 877 (1962). Under that regime, the President had broad authority to take action and modify that action indefinitely even without obtaining a new report from the Secretary of Commerce. For example, President Eisenhower enacted Proclamation 3729, which was modified *26 times over 16 years* with no new report or investigation initiated. *See* Restriction of Oil Imports, 43 Op. Att'y Gen. 20, 22 (1975) ("Proclamation 3279 has been amended at least 26 times since its issuance in 1959." (citation omitted)). In 1987, President Reagan adopted yet another modification to President Eisenhower's proclamation. *Transpacific Steel LLC v. United States*, 466 F. Supp. 3d 1246, 1253 (Ct. Int'l

Trade 2020). This state of affairs served as the backdrop for Congress's 1988 amendments to § 232.

In 1988, "frustrated" with the status quo, *id.*, Congress enacted requirements that the President must set a duration for his action, carry out that action, and report to Congress, all within specific deadlines. Specifically, Congress amended § 232's language to state that the President "shall *determine the nature and duration* of the action that, in the judgment of the President, must be taken." Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1501(a), 102 Stat. 1107, 1258 (1988) (emphasis added). Congress also added time limits using the key language, "no later than," which appears repeatedly throughout § 232. For example, Congress required the President to implement an action by "no later than the date that is 15 days after" the determination to take the action. 19 U.S.C. § 1862(c)(1)(A). Congress also added that, "[b]y no later than" 30 days after the determination on whether to act, the President must inform Congress of the reasons for the action or inaction. 19 U.S.C. § 1862(c)(2). By its plain terms, the language "no later than" bars action that occurs "later than" the statutory deadline. I see no legitimate reason to ignore the word "no" as the majority does.

The 1988 amendments were a "clear indication from Congress of a change in policy" that overcomes the implication of continuity, *United States v. O'Brien*, 560 U.S. 218, 231 (2010) (citation and quotation omitted), and the majority offers no support for its contention that the changes were only stylistic in nature, Maj.

Op. at 41. Congress's removal of the language, "for such time[ ] as he deems necessary," indicates that the President may no longer act for such time as he deems necessary following the 1988 amendments. Indeed, "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded." *Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 168 n.16 (1993) (citations and quotations omitted). "To supply omissions transcends the judicial function." *Id.* (citation and quotation omitted). Congress's addition of specific deadlines for acting and reporting to Congress compels the conclusion that the President may no longer adopt continuing, open-ended plans of action under § 232.

Congress's approach in 1988 wisely ensured that the President acted with a current report and thus warded off continuing modifications based on stale information or based on a changed purpose, such as a purpose or reasons not relating to the subject importation's effect on national security. I agree with the majority that the purpose of the 1988 amendments was to produce more action, not less. Maj. Op. at 41. But that does not negate that Congress has clearly required the President to act within the specified time limits. *See also* H.R. REP. NO. 99-581, pt. 1, at 135 (1986) ("The Committee believes that if the national security is being affected or threatened, this should be determined and acted upon as quickly as possible."). Although the majority contends that staleness concerns are not present here given that President Trump acted only a few

months after the time limits under § 232 expired, Maj. Op. at 46, what is at stake here is not only this case but future readings of this provision. The majority's malleable interpretation of § 232 opens the door to modifications of prior presidential actions absent the Secretary of Commerce's provision of current information. Instead we should give life to § 232's language as plainly written, which gives the President a narrow window for taking an action after receiving a report from the Secretary of Commerce.

CONCLUSION

The Constitution vests Congress with sole power over the Tariff. U.S. CONST. art. I, § 8. When Congress enacted § 232, it delegated to the President limited authority to act to ameliorate harm caused to the national security by sudden increases of imports of certain goods. Congress, however, in clear and plain words expressly limited its delegation of authority. Yet, the majority interprets § 232 in a manner that renders Congress's express limitations meaningless. I fear that the majority effectively accomplishes what not even Congress can legitimately do, reassign to the President its Constitutionally vested power over the Tariff. I dissent.

United States Court of Appeals
for the Federal Circuit

TRANSPACIFIC STEEL LLC, BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., BORUSAN MANNESMANN PIPE U.S. INC., THE JORDAN INTERNATIONAL COMPANY,
Plaintiffs-Appellees

v.

UNITED STATES, JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, TROY MILLER, IN HIS OFFICIAL CAPACITY AS SENIOR OFFICIAL PERFORMING THE DUTIES OF THE COMMISSIONER FOR UNITED STATES CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF COMMERCE, GINA RAIMONDO, IN HER OFFICIAL CAPACITY AS SECRETARY OF COMMERCE,
Defendants-Appellants

2020-2157

Appeal from the United States Court of International Trade in No. 1:19-cv-00009-CRK-GSK-JAR, Senior Judge Jane A. Restani, Judge Claire R. Kelly, Judge Gary S. Katzmann.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

REVERSED AND REMANDED

ENTERED BY ORDER OF THE COURT

July 13, 2021

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

TRANSPACIFIC STEEL LLC, BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., BORUSAN MANNESMANN PIPE U.S. INC., THE JORDAN INTERNATIONAL COMPANY,
Plaintiffs-Appellees

v.

UNITED STATES, JOSEPH R. BIDEN, JR., IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES, UNITED STATES CUSTOMS AND BORDER PROTECTION, TROY MILLER, IN HIS OFFICIAL CAPACITY AS SENIOR OFFICIAL PERFORMING THE DUTIES OF THE COMMISSIONER FOR UNITED STATES CUSTOMS AND BORDER PROTECTION, DEPARTMENT OF COMMERCE, GINA RAIMONDO, IN HER OFFICIAL CAPACITY AS SECRETARY OF COMMERCE,
Defendants-Appellants

2020-2157

Appeal from the United States Court of International Trade in No. 1:19-cv-00009-CRK-GSK-JAR, Senior Judge Jane A. Restani, Judge Claire R. Kelly, Judge Gary S. Katzmann.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before MOORE, *Chief Judge*, NEWMAN, LOURIE, DYK, PROST, O'MALLEY, REYNA, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.*

PER CURIAM.

ORDER

Borusan Mannesmann Boru Sanayi Ve Ticaret A.S., Borusan Mannesmann Pipe U.S. Inc., The Jordan International Company, and Transpacific Steel LLC filed a combined petition or panel rehearing and rehearing en banc. The petition was referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc 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.

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* Circuit Judge Cunningham did not participate.

The mandate of the court will issue on October 1, 2021.

FOR THE COURT

September 24, 2021
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

Slip Op. 20-98

UNITED STATES COURT OF INTERNATIONAL TRADE

TRANSPACIFIC STEEL LLC, **Plaintiff,** **BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., ET. AL** **Intervenor Plaintiffs,** **v.** **UNITED STATES ET AL.,** **Defendants.**	**Before: Claire R. Kelly, Gary S. Katzmann, and Jane A. Restani, Judges** **Court No. 19-00009**

OPINION

[Proclamation 9772 imposing additional § 232 duties on Turkish steel violates statutorily mandated procedures and the Constitution's guarantee of equal protection under law]

Dated: July 14, 2020

Matthew M. Nolan and Russell A. Semmel, Arent Fox LLP, of Washington, DC, argued for plaintiff Transpacific Steel LLC. With them on the brief were Aman Kakar, Andrew A. Jaxa-Debicki, Diana Dimitriuc-Quaia, and Jason R. U. Rotstein.

Julie C. Mendoza, Brady W. Mills, Donald B. Cameron, Eugene Degnan, Mary S. Hodgins, and Rudi W. Planert

Morris, Manning, & Martin, LLP, of Washington, DC, for intervenor plaintiff Borusan Mannesmann Boru Sanayi ve Ticaret A.S., et. al.

Lewis Evart Leibowitz, the Law Office of Lewis E. Leibowitz, of Washington, DC, for intervenor plaintiff the Jordan International Company.

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

Restani, Judge: The question before us is whether President Trump issued Proclamation No. 9772 of August 10, 2018, 158 Fed. Reg. 40,429 (Aug. 15, 2018) ("Proclamation 9772") in violation of the animating statute and constitutional guarantees. We hold that he did. Proclamation 9722 is unlawful and void.

Plaintiff Transpacific Steel LLC ("Transpacific"), a U.S. importer of steel, requests a refund[1] of the additional tariffs it paid pursuant to Proclamation 9772 on certain steel products from the Republic of Turkey

[1] Transpacific asserts that it paid over $2.8 million as a result of the additional tariffs. See Am. Compl. at Ex. 3.

("Turkey").[2] See Proclamation No. 9705 of March 8, 2018, 83 Fed. Reg. 11,625 (Mar. 15, 2018) ("Proclamation 9705") (imposing a 25 percent tariff duty on steel products from several countries); Proclamation 9772 (imposing a 50 percent tariff duty on steel products from Turkey alone); Am. Compl., ECF No. 19, ¶¶ 2, 4 (Apr. 2, 2019) ("Am. Compl."). Plaintiffs argue that Proclamation 9772 is unlawful because it lacks a nexus to national security, was issued without following mandated statutory procedures, and singles out importers of Turkish steel products in violation of Fifth Amendment Equal Protection and Due Process guarantees.

BACKGROUND

During the Cold War, Congress enacted Section 232 of the Trade Expansion Act of 1962, which authorized the President to adjust imports that pose a threat to the national security of the United States. See Trade Expansion Act of 1962, Pub. L. No. 87-794, Title II,

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[2] After we issued our decision denying the government's motion to dismiss, Borusan Mannesmann Boru Sanayi ve Ticaret A.S. ("BMB"), a steel pipe producer in Turkey and non-resident U.S. importer and Borusan Mannesmann Pipe U.S. Inc. ("BMP") (collectively "Borusan") and the Jordan International Company ("Jordan") were granted leave to intervene as Plaintiff-Intervenors. Order Granting Borusan's Mot. to Intervene, ECF No. 39 (Dec. 10, 2019); Order Granting Jordan's Mot. to Intervene, ECF No. 46 (Dec. 13, 2019). Borusan, Jordan, and Transpacific jointly submitted a motion and brief for judgment on the agency record. Pl. Transpacific & Pl.-Intervenors. Borusan, et al.'s 56.1 Mot. for J. on the Agency R., ECF No. 51 (Jan. 21, 2020) ("Pl. Br."). For ease of reference, we refer to Transpacific, Borusan, and Jordan collectively as "Plaintiffs."

§ 232, 76 Stat. 872, 877 (1962) (codified as amended 19 U.S.C. § 1862) ("Section 232"). Since its original passage, there have been several amendments of the statute of varying magnitude including: altering the agency responsible for advising the president, shortening the time limit for investigation, and adding a congressional override for presidential actions taken to adjust petroleum imports. See generally, Trade Act of 1974, Pub. L. No. 93-618, Title I, § 127, 88 Stat. 1978, 1993–94 (1974); Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96-223, Title IV, § 402, 94 Stat. 229, 301–02 (1980). The most recent substantive change to Section 232 occurred in 1988, when the statute was altered to add time limits on the President's ability to act pursuant to the Secretary of Commerce's affirmative finding that investigated imports are a threat to national security. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, Title I, § 1501, 102 Stat. 1107, 1257–60 (1988). As it currently stands, the process to adjust imports under Section 232 is as follows.

First, the Secretary of Commerce ("Secretary"), in consultation with the Secretary of Defense, initiates an investigation "to determine the effects on the national security of imports of the article[s]." 19 U.S.C. § 1862(b)(1)(A). No later than "270 days after the date on which an investigation is initiated, the Secretary shall submit to the President a report on the findings" that will advise the President if articles being imported into the United States threaten to impair national security and recommend appropriate action. Id.

§ 1862(b)(3)(A). Second, after receiving the Secretary's report, the President "[w]ithin 90 days," must determine whether he or she concurs with the Secretary and, if so, "determine the nature and duration of the action" to "adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security."[3] Id. § 1862(c)(1)(A). In making this assessment, the President "shall" consider various non-exhaustive factors listed in § 1862(d). Id. §1862(d). The President "shall implement that action" no later than 15 days from his or her decision to take such action.[4] Id. § 1862(c)(1)(B). Finally, within 30 days after making any determination, the President must submit to Congress a written statement of reasons for taking that action. Id. § 1862(c)(2). Notably, the time limits described were added as part of the 1988 amendments. See Omnibus Trade and Competitiveness Act of 1988 § 1501. President Trump's recent proclamations are the first issued pursuant to Section 232 since the passage of these amendments. See CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW

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[3] This timeline is altered if the chosen action is to negotiate an agreement limiting importation into or exportation to the United States. 19 U.S.C. §1862(c)(3)(A); see also Transpacific Steel LLC v. United States, 415 F. Supp. 3d 1267, 1276 n.15 (CIT 2019) ("Transpacific I").

[4] While termination of proclamations is provided for in 19 U.S.C. § 1885(b), piecemeal increases to existing 232 duties would interfere with the carefully designed statutory scheme, including the right of Congress to know the reasons for and to react to the duties imposed. See 19 U.S.C. § 1862(c)(2).

AND ISSUES FOR CONGRESS, App'x B (Apr. 7, 2020) ("CRS 232 Overview").

On April 19, 2017, the Secretary initiated an investigation into the effect of imported steel on national security. See Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19,205 (Dep't Commerce Apr. 26, 2017). On January 11, 2018, the Secretary issued his report and recommendation to the President. See The Effect of Imports of Steel on the National Security, (Dep't Commerce Jan. 11, 2018) ("Steel Report").[5] In response, on March 8, 2018, President Trump issued Proclamation 9705, which imposed a 25 percent ad valorem tariff on imports of steel products[6] effective March 23, 2018. See Proclamation 9705. On August 10, 2018, the President issued Proclamation 9772, which imposed a 50 percent ad valorem tariff on steel products imported from Turkey, effective August 13, 2018. See Proclamation 9772. The additional tariffs on Turkish steel products remained in place until the President issued Proclamation 9886,

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[5] A summary of the Steel Report was not published in the Federal Register until July 6, 2020, even though 19 U.S.C. § 1862(b)(3)(B) requires that "any portion of the report submitted by the Secretary . . . which does not contain classified information or proprietary information shall be published in the Federal Register." 19 U.S.C. § 1862(b)(3)(B); see also Publication of a Report on the Effect of Imports of Steel on the National Security, 85 Fed. Reg. 40,202 (Dep't Commerce July 6, 2020). Plaintiffs do not raise this issue and we do not rely on it.

[6] Proclamation 9705 applied to all countries except Canada and Mexico. See Proclamation 9705, ¶ 8.

which removed the additional tariffs on Turkish steel products, effective May 21, 2019. See Proclamation No. 9886 of May 16, 2018, 84 Fed. Reg. 23,421 (May 21, 2019) ("Proclamation 9886").

JURISDICTION AND STANDARDS OF REVIEW

The court has jurisdiction under 28 U.S.C. §§ 1581(i)(2) and (4). A President's action under Section 232 may be reviewed for a "clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." See Maple Leaf Fish Co. v. United States, 762 F.2d 86, 89 (Fed. Cir. 1985). In evaluating an equal protection claim involving neither fundamental rights nor a suspect classification, the court will apply the rational basis test, which asks "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Armour v. City of Indianapolis, 566 U.S. 673, 680 (2012) (quotations and citations omitted). In evaluating a Due Process challenge, the court considers whether there was a deprivation of a constitutionally protected life, liberty, or property interest and, if so, whether the necessary procedures were followed. See Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570–74, 76–77 (1972).

DISCUSSION

I. Whether the President Violated Section 232's Procedural Requirements

Plaintiffs argue that the President violated statutorily mandated temporal conditions, and investigation and report procedures in issuing Proclamation 9772. Pl. Br. at 22–28. In their view, to avoid delegation of powers concerns, the President is bound by these statutory restrictions. Id. at 22–24. Plaintiffs note that the statute requires the President to make a decision based on the Secretary's report and recommendation within 90 days and then implement any chosen action another 15 days after that decision. Id. at 25 (citing 19 U.S.C. § 1862(c)(1)(A)-(B)). Insofar as the government argues that Proclamation 9772 is a modification of the earlier, timely Proclamation 9705, Plaintiffs assert that there is no statutory basis for a purported modification of a previous proclamation and that allowing this interpretation would render the timelines meaningless. Id. at 26. Further, Plaintiffs argue that Proclamation 9772 was issued not following a formal report as required by the statute, but following informal information the President had later received from the Secretary. Id. at 26–28.

The government responds that Congress "inten[ded] to confer continuing authority and flexibility on the President to counter the threat identified" as confirmed by the "language, long-standing congressional understanding, and the purpose of the statute . . . " Defs.' Resp. in Opp'n to Pls.' Mot. for J., ECF No.

55 at 16 (Mar. 9, 2020) ("Gov. Br."). In its view, to require the President to strictly abide by the time restraints in the statute would frustrate its statutory purpose. Id. at 17. The government takes an expansive reading of the statutory terms "nature," "duration," and "implement" and finds that these terms indicate that the President has authority to revisit and modify previous actions taken under Section 232. Id. at 17–19 (citing congressional statements from 1955). Although the government acknowledges that the 1988 amendments intended to accelerate the 232 process, it contends that nothing in those amendments intended to prevent the President from making modifications to earlier Proclamations. Id. at 19–22. The government further contends that requiring the President to act within the temporal windows in the statute would undermine the purpose of Section 232 and would "convert the time-deadlines into impermissible sanctions," when those deadlines are in fact "directory, not mandatory." Id. at 22–27.

The language of the statute is clear, however. After receiving a report from the Secretary, "[w]ithin 90 days," and if the President concurs, he or she shall "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports." 19 U.S.C. § 1862(c)(1)(A). Then the President "shall implement that action by no later than the date that is 15 days after" the determination to take action is made. Id. § 1862(c)(1)(B). As noted in our previous decision, Proclamation 9772 was issued far beyond this temporal window. Transpacific I, 415 F. Supp.

3d at 1273–74. The government continues to argue that the President is permitted to modify his previous proclamation, but as we have already said, "[t]he President's expansive view of his power under section 232 is mistaken, and at odds with the language of the statute, its legislative history, and its purpose." Id. at 1274–75 (citing legislative history undermining the contention that the President can take under Section 232 outside the prescribed time limits).

National security is dependent on sensitive and ever-changing dynamics; the temporal restrictions on the President's power to take action pursuant to a report and recommendation by the Secretary is not a mere directory guideline, but a restriction that requires strict adherence. To require adherence to the statutory scheme does not amount to a sanction, but simply ensures that the deadlines are given meaning and that the President is acting on up-to-date national security guidance. The President is, of course, free to return to the Secretary and obtain an updated report pursuant to the statute. As the government acknowledges, the 1988 Amendments were passed against the backdrop of President Reagan's failing to take timely action in response to the Secretary's report finding that certain machine tools threatened to impair national security and Congress's resulting frustration. Gov. Br. at 20–21 (citing Hearings Before the Committee on Ways and Means on H.R. 3 Trade and International Economic Policy Other Proposals Reform Act, 100th Congr. (1987); Hearings Before the Subcommittee on Trade of H. Comm. On Ways & Means, 99th Cong., 2d

Sess. 1282 (1986)). The purpose and legislative history support that the time limits here were very much intended to require presidential action in a timely fashion, not just encourage it.[7] See Transpacific I, 415 F. Supp. 3d at 1275 (citing legislative history from the 1988 Amendments). Finally, as we noted previously, when Congress means to allow action outside of a set temporal window, it provides for it. See id. at 1276 n.15 (citing 19 U.S.C. § 1862(c)(3)).

Contrary to the government's contention, there is nothing in the statute to support the continuing authority to modify Proclamations outside of the stated

[7] The government cites several cases for the proposition that when a statute does not specify a consequence for failing to meet a deadline, the deadline is merely directory. See Barnhart v. Peabody Coal Co., 537 U.S. 149, 159 (2003); Hitachi Home Electronics (America), Inc. v. United States, 661 F.3d 1343, 1345-46 (Fed. Cir. 2011); Gilda Industries, Inc. v. United States, 622 F.3d 1358, 1365 (Fed. Cir. 2010); Canadian Fur Trappers Corp. v. United States, 884 F.2d 563, 566 (Fed. Cir. 1989). Such cases do not address delegation to the President in an area normally belonging to Congress, i.e. import duties. As discussed infra, without meaningful limits such delegation is improper. Further, the resulting consequences of finding that the deadlines in these cases were mandatory would have had greater permanence than simply requiring the President to return to the Secretary for a current report. Barnhart, 537 U.S. at 160 (deadline was directory as otherwise the consequence would be to "shift financial burdens from otherwise responsible private purses to the public fisc."); Hitachi, 661 F.3d at 1348 (deadline was directory and failing to meet that deadline did not strip Customs of its power to allow or deny a protest); Canadian Fur, 884 F.2d at 566 (deadline was directory and failure for Customs to meet a deadline did not result in liquidation); Gilda, 662 F.3d at 1365 (failure of the United States Trade Representative to timely comply with notice obligations did not mean a retaliatory action would not terminate.).

timelines. The government offers no citation to the statute nor to the recent legislative history to support this theory. Instead, the government relies on legislative history prior to the 1988 amendments. See Gov. Br. at 18–19. As originally enacted, Section 232 may have allowed for the President to modify previous Proclamations as a form of continuing authority. See H.R. Rep. No. 84-745, at 8158 (1955). The court is also aware that prior to the recent amendments, several Presidents modified President Eisenhower's Proclamation No. 3279 of March 10, 1959, 24 Fed. Reg. 1781 (Mar. 12, 1959) ("Proclamation 3279") on Petroleum and Petroleum Products with the latest "modification" occurring under President Reagan in Proclamation No. 4907 of March 10, 1982, 47 Fed. Reg. 10,507 (Mar. 10, 1982). But the statutory scheme has since been altered, and the court must give meaning to those alterations. The 1988 amendments prescribed time limits, as described above, but also deleted language that could be read to give the President the power to continually modify Proclamations. See Omnibus Trade and Competitiveness Act of 1988 § 1501. Prior to the 1988 amendments, the relevant provision read "and the President shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(b) (1982). The current relevant provisions omit the clause "and for such time." See 19 U.S.C. § 1862(b),(c) (2018). These changes appear to further restrict the time under which the president can act to adjust imports under 19 U.S.C. § 1862. Until the current

administration, no President had issued a Proclamation after the 1988 changes, so there was no occasion to consider whether modifying an existing Proclamation remained an allowable exercise. See CRS 232 Overview, App'x B. Given the changes in the statute, the court holds that regardless of whether modifications were permissible before, "modifications" of existing Proclamations under the current statutory scheme, without following the procedures in the statute, are not permitted.

In Federal Energy Administration v. Algonquin SNG, Inc., the Court stressed the importance of the procedural safeguards in holding that Section 232 was not an impermissible delegation of congressional authority over imports. 426 U.S. 548, 559 (1976). As we stated previously, "[i]f the President could act beyond the prescribed time limits, the investigative and consultative provisions would become mere formalities detached from Presidential action." Transpacific I, 415 F. Supp. 3d at 1276. Section 232 grants the President great, but not unfettered, discretion. The President exceeded his authority in issuing Proclamation 9772 outside of the temporal limits required by Section 232.

II. Whether the President Exceeded His Authority by Issuing a Proclamation Purported to Lack a Nexus to National Security

Plaintiffs contend that the President exceeded his authority in issuing Proclamation 9772 because the

Proclamation lacked a nexus to Section 232's national security objective, which would render the Proclamation ultra vires. Pl. Br. at 14–22. Accordingly, they contend that the court may review whether the issuance of the Proclamation 9772 falls within the authority granted to the President under the statute. Id. at 14–16. Citing various D.C. Circuit Court opinions, Plaintiffs argue that this court should engage in such review to determine whether the President acted in conformity with Section 232. See id. at 14–16 (citing Independent Gasoline Marketers Council, Inc. v. Duncan, 492 F. Supp. 614 (D.D.C.1980); AFL-CIO v. Kahn, 618 F.2d 784 (D.C. Cir. 1979) (en banc); United States Chamber of Commerce v. Reich, 74 F.3d 1322 (D.C. Cir. 1996)). Turning to the facts at hand, Plaintiffs argue that Proclamation 9772 was not motivated by proper national security considerations, such as those listed in 19 U.S.C. § 1862(d), but was issued to employ "diplomatic leverage against a foreign government."[8] See id.

[8] Plaintiffs ask the court to consider President Trump's tweet regarding the detainment of Pastor Andrew Brunson in Turkey and his tweet roughly two weeks later declaring: "I have just authorized a doubling of Tariffs on Steel and Aluminum with respect to Turkey as their currency, the Turkish Lira, slides rapidly downward against our very strong Dollar! Aluminum will now be 20% and Steel 50%. Our relations with Turkey are not good at this time!." See Pl. Br. at 19 (citing Donald J. Trump (@realDonaldTrump), TWITTER (Aug. 10, 2018, 8:47 AM), twitter.com/realdonaldtrump/status/1027899286586109955; Donald J. Trump (@realDonaldTrump), TWITTER (July 26, 2018, 11:22 AM), twitter.com/realdonaldtrump/status/1022502465147682817). Plaintiffs further cite tweets and statements issued after Proclamation 9772 went into effect in which the President appears to threaten to destroy the Turkish economy. See id. at 19–20. Because we do not review

at 18–22. They further contend that because imports of Turkish steel products comprise only a comparatively small percentage of steel products imported into the United States, doubling tariffs on those products would have too remote an effect to address national security concerns detailed in the Steel Report. Id. at 21.

The government responds that any analysis of whether Proclamation 9772 has a nexus to Section 232's national security purpose requires the court to engage in an improper inquiry into the President's fact-finding. Gov. Br. at 12–16. It contends that the court cannot analyze the President's action beyond inquiring whether the action taken was "of a type permitted by the statute." Id. at 13. In the government's view, any evaluation of the President's motivations is foreclosed. Id. at 13–15.

The court declines to consider proffered evidence of the President's "true motive" or question his fact-finding. Even if warranted, such an inquiry is unnecessary to the disposition of this matter. What is evident is that the President acted beyond the procedural limitations set forth in the statute in issuing Proclamation 9772, rendering his action ultra vires. In addition to acting outside of the time limitations as noted above, he acted without a proper report and recommendation by the Secretary on the national security threat posed

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the President's fact-finding, we decline to consider this evidence in relation to Plaintiffs' statutory challenge. See Florsheim Shoe Co., Div. of Interco, Inc. v. United States, 744 F.2d 787, 796 (Fed. Cir. 1984).

by imports of steel products from Turkey. See Proclamation 9772. The Steel Report assesses the impact of steel imports in the aggregate on national security and makes no finding regarding Turkey specifically. See generally, Steel Report. Other than the Steel Report, Proclamation 9772 mentions informal discussions between the President and the Secretary regarding the changes to capacity utilization in the domestic steel industry after Proclamation 9705 and how additional tariffs on steel products from Turkey would be "a significant step toward ensuring the viability of the domestic steel industry." See Proclamation 9772 ¶¶ 4, 6. The President is not authorized to act under Section 232 based on any off-handed suggestion by the Secretary; the statute requires a formal investigation and report.[9] See 19 U.S.C.A. § 1862(b), (c). To clarify, the court does not decide that there was not a national

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[9] President Ford's modification of Proclamation 3279, with Proclamation No. 4341 of January 23, 1975, 40 Fed. Reg. 3965 (January 27, 1975) ("Proclamation 4341"), the Proclamation at issue in Algonquin, was issued only after the Secretary issued a report pursuant to 19 U.S.C. § 1862(b). See Algonquin, 426 U.S. 548, 554 (1976). The Court's decision that Section 232 was not an improper delegation was based, in part, on the required precondition that the Secretary make a finding and issue a report. Id. at 559. Allowing the President to skirt this precondition would potentially pose delegation concerns. Further, it is not an insurmountable burden to require that the President return to the Secretary and obtain a new report prior to taking action under Section 232. As noted in a memorandum opinion by the then Assistant Attorney General in the Office of Legal Counsel, the report issued prior to Proclamation 4341 was "completed in only ten days." See Mem. Op. for the Deputy Att'y Gen. "The Presidents Power to Impose a Fee on Imported Oil Pursuant to the Trade Expansion Act of 1962," 6 Op. O.L.C. 74, at 80 (Jan. 14, 1982).

security threat meriting new duties, but instead simply holds that there was no procedurally proper finding of that threat.[10] Thus, the President was not empowered under Section 232 to issue Proclamation 9772.[11]

III. Equal Protection

In addition to their statutory claims, Plaintiffs raise a Fifth Amendment Equal Protection challenge to Proclamation 9772. Pl. Br. at 28–38. Their basic contention is that the Proclamation discriminates between similarly situated importers based on the origin of their imports without rational justification. Id. at 28–34. Plaintiffs argue that the government has offered no sensible reason for targeting imports from Turkey and that no reasonable rationale is apparent. Id. at 30–34. Although Plaintiffs acknowledge that Turkey is named in the Steel Report, they argue that the Secretary's determination was based on the import of steel products in the aggregate and that nothing in the Steel Report supports additional duties on Turkish

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[10] The court is respectful of separation of powers and does not opine on the wisdom of the President's foreign policy. Our role here is to decide whether the statute at issue has been followed.

[11] The court does not foreclose the possibility that a future action could arise that, although procedurally sound, nonetheless is devoid of any discernable national security objective and thus subject to court review. See Am. Inst. for Int'l Steel, Inc. v. United States, 376 F. Supp. 3d 1335, 1344 (CIT 2019) ("To be sure, section 232 regulation plainly unrelated to national security would be, in theory, reviewable as action in excess of the President's section 232 authority.").

steel products alone.[12] Id. at 31–34. At base, Plaintiffs argue that that Proclamation 9772 drew an arbitrary and irrational distinction by doubling the tariff rate on Turkish steel products and was based on an impermissible purpose.[13] Id. at 34–38.

The government responds that to succeed on their equal protection claim, Plaintiffs must first show that the government "intended to discriminate against the claimant or group," and then show that the classification lacks a connection to an "identifiable state interest." Gov. Br. at 28. Because the Plaintiffs cannot show that the President intended to discriminate against any importers of Turkish steel products, the government argues that the Plaintiffs' equal protection claim fails. Id. at 28–34. The government further argues that levying additional tariffs on Turkish steel products alone was a reasonable step towards the legitimate purpose of national security, even if it was just an incremental step towards that purpose. Id. at 34–39.

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[12] Plaintiffs also cite a report from Commerce indicating that there has recently been a greater reduction of steel product imports from Turkey when compared to several other countries listed in the Steel Report. Pl. Br. at 32 (citing DEP'T OF COMMERCE, INT'L TRADE ADMIN., Global Steel Trade Monitor, Steel Imports Report: United States at 3 (June 2018) (noting that between 2017 and 2018, steel imports from Turkey decline by 59 percent by volume and 49 percent by value, whereas most top import source countries increased their exports of steel to the United States).

[13] As described in supra note 8, Plaintiffs highlight statements made by the President that supposedly indicate that Proclamation 9772 was motivated by Turkey's detention of Pastor Andrew Brunson. Pl. Br. at 36–38. In their view, the President's action was guided by impermissible animus against Turkey. Id.

Finally, it contends that Plaintiffs unjustifiably attempt to make a statutory interpretation case into a constitutional one. Id. at 38–40. In reply, Plaintiffs argue that the government has overstated their "burden to prove their equal protection claim." Pl. Reply to Def's Resp. to Pl.s' Mot. for J. on the Agency R., ECF No. 60 at 14 (Apr. 9, 2020) ("Pl. Reply"). They further point out that discrimination in this case "is clear on the face of the proclamation," and that the cases cited by the government involved facially neutral policies. Pl. Reply at 15–16.

At the outset, the government mistakes a factor sufficient to result in an Equal Protection violation for one necessary to succeed on such a claim. An intent to discriminate or "bare desire to harm a politically unpopular group" will result in a violation of the Constitution's Equal Protection clause as it "cannot constitute a legitimate government interest," Romer v. Evans, 517 U.S. 620, 634 (1996) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)) (quotation marks omitted), but this does not mean discriminatory motive is required to find a violation. The disparate impact cases cited by the government are inapposite as they do not focus on the central issue here–whether the challenged action was rationally related to a legitimate government purpose. See McCleskey v. Kemp, 481 U.S. 279, 293, 298–99 (1987) (Georgia death penalty statute disproportionately used against Black defendants); Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 273 (1979) (gender-neutral statute that had disproportionately adverse effects on women); Washington v. Davis,

426 U.S. 229, 237–39 (1976) (police officer examination that had disproportionately adverse effects on Black applicants).

The Constitution's Equal Protection guarantees apply to actions taken by the federal government through the Fifth Amendment. See Bolling v. Sharpe, 347 U.S. 497, 499 (1954). The fundamental question is whether the government's action is justified by sufficient purpose. See Romer, 517 U.S. at 635 ("[A] law must bear a rational relationship to a legitimate governmental purpose."). The Proclamation at issue here distinguishes between imports on the basis of country of origin. See Proclamation 9772. Disparate treatment alone, however, does not violate the Equal Protection Clause, if "(1) a rational purpose underlies the disparate treatment, and (2) [the governmental decisionmaker] has not achieved that purpose in a patently arbitrary or irrational way." Belarmino v. Derwinski, 931 F.2d 1543, 1544 (Fed. Cir. 1991) (citing United States R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 177 (1980). Because the purpose need not be articulated at the time, any legitimate purpose is sufficient.[14] See

[14] In prior cases, the Court has not required that the "purpose" of the law be the actual purpose because the legislature is not required to offer a rationale when enacting a statute. See F.C.C. v. Beach Comm, Inc., 508 U.S. 307, 315 (1993) ("Moreover, because we never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature."). It is unclear whether this reasoning applies with equal force to the situation before us today, as the challenge is to a presidential proclamation, rather than a legislative act, and the President is required to state his

Nordlinger v. Hahn, 505 U.S. 1, 15 (1992) ("[T]his Court's review does require that a purpose may conceivably or may reasonably have been the purpose and policy of the relevant governmental decision maker.") (citation and quotation marks omitted); see also Trump v. Hawaii, 138 S.Ct. 2392, 2420 (2018) (considering plaintiffs' extrinsic evidence, but upholding a challenged presidential proclamation "so long as it can reasonably be understood to result from a justification independent of unconstitutional grounds."). Thus, to survive rational basis review, Proclamation 9772 must be a rational way of achieving a legitimate government purpose.

National security is a legitimate purpose, see Trump v. Hawaii, 138 S.Ct. at 2421, so the court must assess whether additional tariffs on imported steel products from Turkey is a "rational means to serve" this "legitimate end." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 442 (1985). Unlike the determination made by the Court in Trump v. Hawaii, there is no "persuasive evidence" here to support that the President's proclamation "has a legitimate grounding in national security concerns." 138 S.Ct. at 2421.[15] In

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reasons for acting pursuant to Section 232. See 19 U.S.C. §§ 1862(c)(2), (c)(3)(A), (c)(3)(B). Accordingly, whether any conceivable reasonable purpose would suffice here is an open question.

[15] The government relies heavily on Trump v. Hawaii for the proposition that an Equal Protection challenge cannot succeed without evidence of animus. See Oral Argument at 57:40–58:25; see also Gov Br. at 32. Trump v. Hawaii was a case dealing with the First Amendment's Establishment Clause in the context of

that case, the "Proclamation explain[ed], in each case the determinations were justified by the distinct conditions in each country." Id. In contrast, here, Proclamation 9772 is purportedly based on the Steel Report, which evaluated the collective impact of global steel imports on national security, and not the impact of imports from Turkey individually. See Proclamation 9772 ¶ 1; see also Steel Report at 55–57 (concluding that the global excess capacity of steel and imports into the United States "threaten[s] to impair" national security). The national security concerns were characterized as "[t]he displacement of domestic steel by imports," and the resulting effect on the United States economy, and the ability to "meet national security requirements." See Steel Report at 57. Singling out steel products from Turkey is not a rational means of addressing that concern. Section 232 does not ban the President from addressing concerns by focusing on particular exporters, but the decision to increase the tariffs on imported steel products from Turkey, and

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border security in which a Proclamation was issued with a "legitimate grounding in national security concerns." Id. at 2421. That case does not stand for the proposition asserted by the government. See Trump v. Hawaii, 138 S.Ct. at 2420 (stating that rational basis review "considers whether the entry policy is plausibly related to the Government's stated objective"). A successful Equal Protection claim, at least in the context of taxes and duties, does not require a showing of animus. See Allegheny Pittsburgh Coal Co. v. County Com'n of Webster County, 488 U.S. 336, 345 (1989).

Turkey alone, without any justification, is arbitrary and irrational.[16]

This case is materially indistinguishable from Allegheny Pittsburgh Coal Co. v. Cnty Com'n of Webster Cnty, 488 U.S. 336 (1989). In that case, the Court declared irrational a county tax assessor's use of differing methods to assess property value that had been recently sold from property that had not. Id. at 338. The result was that generally "comparable properties" were assessed at vastly different rates depending on the last date of sale. Id. at 341. The Court found that the tax assessor's practice was arbitrary and that the "relative

[16] The choice is underinclusive. The Steel Report ranks Turkey as the sixth largest exporter of steel products to the United States. See Steel Report at 28, Fig. 2. Given the presence of larger steel exporters in the market, targeting Turkish steel products alone would not appear to be an effective means of remedying the national security concerns outlined in the Report. The decision may be overinclusive as well. Transpacific contends that some of the steel slated to be imported from Turkey was destined for Puerto Rico to aid in the "rebuilding in the aftermath of Hurricanes Irma and Maria," and that Transpacific is "one of the largest importers of steel into Puerto Rico." See Am. Compl. ¶ 10, Ex. 3 (Declaration of Jules Levin, CEO of Transpacific). Given the broad view of national security articulated in the Steel Report, the failure to consider the potential impact on the Puerto Rican recovery in issuing Proclamation 9772, and to exempt those shipments, may make the action overinclusive. Mot. to Dismiss. Hearing Tr., at 14, ECF No. 41 (Dec. 12, 2019). Under rational basis review, even significant over or underinclusiveness can be tolerable in some instances, see Vance v. Bradley, 440 U.S. 93, 108 (1979), but here this mismatch, particularly based on underinclusion, between Proclamation 9772's purported national security purpose and the chosen action to address that purpose is simply too great.

undervaluation of comparable property" denied the petitioners in that case equal protection. Id. at 346. The Court noted that the West Virginia Constitution establishes a general principle of uniform taxation, and held that the tax assessor's practice did not accord with the West Virginia Constitution and violated the United States Constitution's Equal Protection Clause. Id. at 345 ("The equal protection clause . . . protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class.") (quoting Hillsborough v. Cromwell, 326 U.S. 620, 623 (1946)). The situation before the court here is no different. There is no apparent reason to treat importers of Turkish steel products differently from importers of steel products from any other country listed in the Steel Report. The status quo under normal trade relations is equal tariff treatment of similar products irrespective of country of origin. See 19 U.S.C. § 1881. Although deviation from this general principle is allowable, such deviation cannot be arbitrarily and irrationally enforced in a way that treats similarly situated classes differently without permissible justification. Proclamation 9772 denies Plaintiffs the equal protection of the law.

IV. Constitutional Due Process

The Constitution's Due Process Clause provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. For Plaintiffs to succeed on their procedural due process claim, the court must first determine that

a protected property interest exists. See Town of Castle Rock v. Gonzales, 545 U.S. 748, 756 (2005) ("To have a property interest in a benefit, a person clearly must have more than an abstract need or desire") (citing Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972)). The court looks to "existing rules or understandings that stem from an independent source such as state law," in ascertaining whether a protected property interest exists. Id. (citing Paul v. Davis, 424 U.S. 693, 709) (1976)). If an interest exists, the court must then ascertain what process is required under the circumstances. See Matthews v. Eldridge, 424 U.S. 319, 335 (1976).

Plaintiffs contend that Proclamation 9772 violates the Constitution's guarantee of Due Process. Pl. Br. at 38–43. They identify the property interest as "simply that the plaintiff-imports paid large amounts of duties to the U.S. Government and incurred numerous other expenses associated with the dislocation attendant to the imposition of 50% tariffs on Turkey."[17] Id. at 38. They further identify the process owed as "at least a basic level of protection under these circumstances." Id. at 39. The government responds that Plaintiffs have failed to identify a constitutionally protected property interest. Gov. Br. at 40–43. Because Plaintiffs do not point to an independent source that gives rise

[17] Later in their brief, Plaintiffs instead characterize the property interest as "a freedom from the interference with existing contracts and business relationships, an expectation of a benefit, a level playing field, and the freedom from malignant stigma." Pl. Br. at 41.

to a property interest, the government contends that the only process owed to Plaintiffs is "whatever the statute or regulation provides." Id. at 43. Because, in the government's view, that process was afforded here, there is no violation. Id. at 43–44.

Plaintiffs have failed to fully articulate a property interest beyond various nebulous notions and do so without reference to any independent source establishing that a concrete, protected property interest exists. Further, the process Plaintiffs request is simply that the government be made to comply with the procedures laid out in the statute. Because we hold that Plaintiffs are entitled to that process under the statute, we need not also answer whether any constitutional guarantees of Due Process were violated. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288 (1936) (Brandeis, J., concurring) (noting that a court "will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of"). The court does not foreclose the possibility that a constitutionally-protected property interest may exist,[18] but declines to identify one here. Whatever constitutional minimum process might be owed, it is

[18] At oral argument, the court questioned whether "the statutory provision for Normal Trade Relations at 19 U.S.C. § 1881 and the Harmonized Tariff Schedule of the United States, which is a statute, see 19 U.S.C. §§ 1202, 3004(c), combine together to create a legitimate expectation to a certain rate that would be sufficient to trigger procedural due process protections[.]" Issues for Oral Argument, ECF No. 63 (May 26, 2020).

satisfied by requiring that the President abide by the statute's procedures.

CONCLUSION

For the foregoing reasons, the court grants Plaintiffs' motion for judgment upon the agency record. Proclamation 9772 is in violation of mandated statutory procedures and in violation of the Fifth Amendment's Equal Protection guarantees. Judgment will enter accordingly.

/s/ Jane A. Restani
Jane A. Restani, Judge

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

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

Dated: July 14, 2020
New York, New York

UNITED STATES COURT OF INTERNATIONAL TRADE

TRANSPACIFIC STEEL LLC, **Plaintiff,** **BORUSAN MANNESMANN BORU SANAYI VE TICARET A.S., ET. AL** **Intervenor Plaintiffs,** **v.** **UNITED STATES ET AL.,** **Defendants.**	**Before: Claire R. Kelly, Gary S. Katzmann, and Jane A. Restani, Judges** **Court No. 19-00009**

JUDGMENT

This case having been duly submitted for decision; and the court, after due deliberation, having rendered a decision herein; now therefore, in conformity with said decision it is hereby:

ORDERED, ADJUDGED, and DECREED that judgment is entered in favor of Plaintiff and Plaintiff-Intervenors; and it is further

ORDERED that Proclamation No. 9772 of August 10, 2018, 158 Fed. Reg. 40,429 (Aug. 15, 2018) ("Proclamation 9772"), is declared unlawful and void; and it is further

ORDERED that United States Customs and Border Protection refund Plaintiff and Plaintiff-Intervenors the difference between any tariffs collected on its

imports of steel products pursuant to Proclamation No. 9772 and the 25% ad valorem tariff that would otherwise apply on these imports together with such costs and interest as provided by law.

/s/ Jane A. Restani
Jane A. Restani, Judge

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

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

Dated: July 14, 2020
New York, New York

Slip Op. 19-142

UNITED STATES COURT OF INTERNATIONAL TRADE

TRANSPACIFIC STEEL LLC, **Plaintiff,** **v.** **UNITED STATES ET AL.,** **Defendants.**	**Before: Claire R. Kelly, Gary S. Katzmann, and Jane A. Restani, Judges** **Court No. 19-00009**

OPINION AND ORDER

[Denying Defendants' motion to dismiss Plaintiff's amended complaint for failure to state a claim for which relief may be granted. Judge Katzmann files a separate concurrence.]

Dated: November 15, 2019

Matthew Nosher Nolan and Russell A. Semmel, Arent Fox LLP, of Washington, DC, argued for plaintiff. With them on the brief were Nancy A. Noonan, Diana Dimitriuc Quaia, and Aman Kakar.

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

Joseph H. Hunt, Assistant Attorney General, Jeanne E. Davidson, Director, and Joshua E. Kurland, Trial Attorney.

Kelly, Judge: Transpacific Steel LLC ("Transpacific" or "Plaintiff") seeks a refund of the difference between the 50 percent tariff imposed on certain steel products ("steel articles") from the Republic of Turkey ("Turkey"), pursuant to Presidential Proclamation 9772, issued on August 10, 2018, and the 25 percent tariff imposed on steel articles from certain other countries. See Proclamation 9705 of March 8, 2018, 83 Fed. Reg. 11,625 (Mar. 15, 2018) ("Proclamation 9705"); Proclamation 9772 of August 10, 2018, 83 Fed. Reg. 40,429 (Aug. 15, 2018) ("Proclamation 9772"); Am. Compl. ¶¶ 2, 4, Prayer for Relief, Apr. 2, 2019, ECF No. 19 ("Am. Compl.").[1] Plaintiff contends relief is warranted because Proclamation 9772 lacks a nexus to national security as statutorily required, fails to follow mandated procedures within the statute, arbitrarily distinguishes importers of steel products from Turkey and importers of steel products from all other countries in violation of equal protection under the Fifth Amendment, and violates Fifth Amendment Due

[1] Plaintiff previously also sought declaratory and injunctive relief from the implementation of Proclamation 9772. However, on May 21, 2019, the additional tariffs imposed by Proclamation 9772 on Turkey were lifted. See Pl.'s Resp. Br. at 1; see also Defs.' Reply Supp. Mot. Dismiss at 2 n.1, July 10, 2019, ECF No. 27 ("Defs.' Reply Br.") (citing Proclamation 9886 of May 16, 2019, 84 Fed. Reg. 23,421, 23,421 (May 21, 2019)). The parties agree that the case is not moot, because Plaintiff still seeks a refund. See Pl.'s Resp. Br. at 1; Defs.' Reply Br. at 2 n.1.

Process guarantees. Am. Compl. ¶¶ 3, 70; see also Pl.'s [Transpacific] Resp. Opp'n Defs.' Mot. Dismiss, May 29, 2019, ECF No. 24 ("Pl.'s Resp. Br."). Defendants move to dismiss Plaintiff's Amended Complaint pursuant U.S. Court of International Trade ("USCIT") Rule 12(b)(6) for failure to state a claim for which relief may be granted. Defs.' Mot. Dismiss for Failure State Cl., Apr. 3, 2019, ECF No. 20 ("Defs.' Br."). Defendants' motion to dismiss is denied. Based upon the facts alleged, Plaintiff's arguments that the President failed to follow the procedure set forth in the statute and, further, that singling out importers from Turkey violated the equal protection guarantees under the U.S. Constitution, support its claim for a refund and defeat Defendants' motion to dismiss. See Ashcroft v. Iqbal, 556 U.S. 662, 678–79 (2009); see also USCIT R. 12(b)(6).

BACKGROUND

Section 232 of the Trade Expansion Act of 1962, as amended 19 U.S.C. § 1862 (2012),[2] ("section 232") delineates the particular circumstances of when and how the President may take action to address imports that threaten to impair the national security of the United States. The statute also sets forth the conduct and timing of the antecedent investigation into the potential national security threat.

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

Specifically, section 232 authorizes the Secretary of Commerce to commence an investigation "to determine the effects on the national security of imports" of any article, and to consult with the Secretary of Defense and other officials. 19 U.S.C. § 1862(b). Within 270 days, the Secretary of Commerce must then report the investigation's findings to the President. See 19 U.S.C. § 1862(b)(3)(A).[3] In that report, the Secretary must advise the President if "such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security[.]" Id. Within 90 days after receiving the Secretary's affirmative findings, the President must determine whether he or she concurs. 19 U.S.C. § 1862(c)(1)(A)(i). Should he or she concur, the statute empowers the President to act to end that threat to national security. 19 U.S.C. § 1862(c)(1)(A)(ii). In doing so, the President must "determine the nature and

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

duration of the action" that in his or her judgment "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. If, and once, the President decides to act, he or she must implement the action within 15 days. 19 U.S.C. § 1862(c)(1)(B).

On April 19, 2017, the Secretary of Commerce initiated an investigation to determine the effect of steel imports on national security. See Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19,205, 19,205 (Bureau Indus. & Sec. Apr. 26, 2017) (background). The Secretary issued his report and recommendation to the President on January 11, 2018 ("Steel Report" or "January 11 Report"), within the time frame provided under section 232. See Am. Compl. at Ex. 4 (BUREAU OF INDUS. & SECURITY, U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS ON THE NATIONAL SECURITY (2018) ("STEEL REPORT")). On March 8, 2018, within 90 days of receiving the report, the President issued Proclamation 9705 imposing a 25 percent tariff on imports of steel articles from all countries, including Turkey, effective March 23, 2018.[4] See Am. Compl. at Ex. 1.

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[4] In addition to remedial action of adjusting imports through tariff increases, section 1862(c)(3)(A) also grants the President authority to negotiate trade agreements to reduce the number of imports. 19 U.S.C. § 1862(c)(3)(A). Stemming from the January 11 Report, the President pursued negotiations with certain countries to reach an agreement that "limits or restricts the importation into . . . the United States" of steel articles, and successfully reached agreement with certain countries within the statutorily

On August 10, 2018, the President issued Proclamation 9772, which imposed a 50 percent tariff on steel articles imported from Turkey as of August 13, 2018. See Proclamation 9772, 83 Fed. Reg. at 40,429.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction under 28 U.S.C. § 1581(i)(2), (4) (2012).

The court will dismiss a complaint for failure to state a claim if it fails to allege facts "plausibly suggesting (not merely consistent with)" a showing that entitles the party to relief. Bank of Guam v. United States, 578 F.3d 1318, 1326 (Fed. Cir. 2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007)).

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prescribed 180-day period. See 19 U.S.C. § 1862(c)(3)(A). The President adjusted action accordingly and published timely notice in the Federal Register, issuing three Presidential Proclamations that announced agreements on alternate measures or deferred imposition of the tariffs on certain countries pending negotiation. See Proclamation 9711 of March 22, 2018, 83 Fed. Reg. 13,361, 13,361 (Mar. 28, 2018) (reporting ongoing negotiations with Canada, Mexico, the Commonwealth of Australia ("Australia"), the Argentine Republic ("Argentina"), the Republic of Korea ("South Korea"), the Federative Republic of Brazil ("Brazil"), and the European Union member countries and deferring the tariff on steel articles from those countries); Proclamation 9740 of April 30, 2018, 83 Fed. Reg. 20,683, 20,683–84 (May 7, 2018) (limiting the temporary exemption for Canada, Mexico, and European Union member countries until June 1, 2018 and announcing an agreement with South Korea on a range of alternative measures, including a quota); Proclamation 9759 of May 31, 2018, 83 Fed. Reg. 25,857, 25,857–58 (June 5, 2018) (exempting from the steel tariffs Argentina, Australia, and Brazil, which had reached agreement with the United States on alternative measures).

"Factual allegations must be enough to raise a right to relief above the speculative level," Twombly, 550 U.S. at 555, and "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." Iqbal, 556 U.S. at 678 (citation omitted). In deciding a motion to dismiss, the court "must accept as true the complaint's undisputed factual allegations and should construe them in a light most favorable to the plaintiff." Cambridge v. United States, 558 F.3d 1331, 1335 (Fed. Cir. 2009).

DISCUSSION

Plaintiff has stated a claim for which relief may be granted. Plaintiff's factual allegations, which appear to be undisputed, support its claim to a refund of excess duties. Plaintiff alleges facts to demonstrate that, at the very least, the President issued Proclamation 9772 in violation of the equal protection component of the Fifth Amendment and without observing the statutorily required procedure under section 232. Either theory defeats Defendants' motion to dismiss.

Plaintiff's arguments that Proclamation 9772 violates equal protection are sufficient to defeat Defendants' motion to dismiss. "[A] classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate

governmental purpose."[5] Armour v. City of Indianapolis, 566 U.S. 673, 680 (2012) (quotation marks and citation omitted). Defendants do not have a high hurdle to clear to survive a rational basis challenge—Defendants merely need to articulate any set of facts that rationally justify a distinction in classification, irrespective of whether the President himself actually justified his action at the time it was taken. See Nordlinger v. Hahn, 505 U.S. 1, 15 (1992). Especially in the area of economic regulation, this standard is forgiving. See Armour v. City of Indianapolis, 566 U.S. at 680 (noting "where 'ordinary commercial transactions' are at issue, rational basis review requires deference to reasonable underlying legislative judgments") (citations omitted); Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 469 (1981) (sustaining legislation treating plastic and non-plastic milk containers differently). Given this standard, it is difficult to imagine Presidential action in connection with section 232 where one would be at a loss to conjure a rational justification; yet, the reality of this case proves otherwise. Defendants submit no set of facts that justify identifying importers of steel from Turkey as a class of one.

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[5] Although the Fifth Amendment does not contain a formally recognized equal protection clause, the Supreme Court has recognized an implicit protection where there exists "discrimination that is so unjustifiable as to be violative of due process." Sessions v. Morales-Santana, 137 S. Ct. 1678, 1686 n.1 (2017) (citing Weinberger v. Wiesenfeld, 420 U.S. 636, 638, n.2 (1975)). This implicit protection is treated "precisely the same as equal protection claims under the Fourteenth Amendment." Id. (citations and internal quotation marks omitted) (alteration in original).

In their motion to dismiss, Defendants point to a general need to increase the tariffs. See Defs.' Br. at 17–18; Defs.' Reply Br. at 17. A general need to increase tariffs, however, does not explain the singular imposition of a 50 percent tariff on Turkish steel articles. Defendants also attempt to distinguish imports from Turkey as a class by referring to "the relatively high import volumes" of steel from Turkey and the 14 antidumping and countervailing duty ("AD/CVD") orders against its steel exports. Defs.' Reply Supp. Mot. Dismiss at 17, July 10, 2019, ECF No. 27 ("Defs.' Reply Br."); see also Defs.' Br. at 17–18, 25. However, the Steel Report identifies five countries with higher steel import volumes than Turkey.[6] See STEEL REPORT at 28. Further, the 14 AD/CVD orders on Turkish steel products do not make Turkey remarkable but typical, compared, for example, to China's 28 AD/CVD orders, India's 15 AD/CVD orders, Japan's 14 AD/CVD orders, and Taiwan's 13 AD/CVD orders. See STEEL REPORT at App. K. Defendants' contention, that it is rational to "confront the national security threat from imports from all countries by specifically targeting countries" with high import volumes or numerous AD/CVD orders, does not explain what differentiates Turkey from

[6] The President entered into negotiations with four of those countries—Canada, South Korea, Brazil, and Mexico—and reached agreements on alternative measures, thereby exempting those countries' steel exports. See Proclamation 9740, 83 Fed. Reg. at 20,683–84; Proclamation 9759, 83 Fed. Reg. at 25,857–58. With respect to Russia, which exported nearly one million metric tons of steel more than Turkey to the United States in 2017, the 25 percent tariff remains in effect. See STEEL REPORT at 28.

other similarly situated countries—for the President to target alone. Defs.' Reply Br. at 17–18; see Vill. of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (holding that plaintiff homeowner could assert an equal protection claim where village demanded a 33-foot easement, while requiring 15-foot easements from similarly situated property owners). At oral argument, when pressed on this question, counsel for Defendants offered other possible reasons but did not connect them to Turkey. Oral Arg. at 1:01:59–1:02:38 (arguing it would be appropriate for the President to differentiate countries based on anticipated increased import volumes or currency devaluation). Whatever the President's real motivation may be, it is not this court's concern.[7] See FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 315 (1993) ("[I]t is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the [decision maker]."). [8] But we also cannot sustain a classification

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[7] Plaintiff points to the President's comment on social media: "I have just authorized a doubling of Tariffs on Steel and Aluminum with respect to Turkey as their currency, the Turkish Lira, slides rapidly downward against our very strong Dollar! Aluminum will now be 20% and Steel 50%. Our relations with Turkey are not good at this time!" See Pl.'s Resp. Br. at 35; Am. Compl. at Ex. 10. The President's views of the United States' relationship with Turkey do not weigh in our analysis.

[8] Although Plaintiff and Defendants agree that the rational basis test applies, see Defs.' Br. at 23 and Pl.'s Resp. Br. at 30, the parties do not agree on the content of the rationality standard. Plaintiff asserts that the standard of rationality must have "some footing in the realities of the subject addressed by the legislation." Pl.'s Resp. Br at 30 (quoting Heller v. Doe, 509 U.S. 312, 321 (1993)). Defendant contends that a less searching standard

for which there is no offered—or even possible—rational justification tethered to the statute. See id. at 312–13.

Plaintiff also alleges facts that demonstrate that the President issued Proclamation 9772 in violation of the procedure set forth by Congress. The statute's clear and unambiguous steps—of investigation, consultation, report, consideration, and action—require timely action from the Secretary of Commerce and the President. However, the President did not issue Proclamation 9772 following this procedural path. The Secretary of Commerce submitted his report to the President on January 11, 2018, which launched a 90-day period for the President to act. The President acted on March 8, 2018 by imposing a 25 percent tariff on steel articles through Proclamation 9705. See 19 U.S.C. § 1862(c)(1)(B). However, the President issued Proclamation 9772 on August 13, 2018, far beyond the 90 days permitted to decide to act and the further 15 days allowed for implementation, to impose a 50 percent tariff on steel articles from Turkey. See id. The Secretary's January 11 Report, which serves as the

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applies, arguing that the rationality standard may be satisfied by any "reasonably conceivable state of facts," and that such facts may be based on "rational speculation unsupported by evidence or empirical data." Defs.' Reply Br. at 18 (quoting Briggs v. Merit Sys. Prot. Bd., 331 F.3d 1307, 1318 (Fed. Cir. 2003) (internal citations omitted)) (citing Nordlinger v. Hahn, 505 U.S. 1, 15 (1993)). For purposes of this motion, it is not necessary to resolve this issue. Assuming Defendants' less searching standard applies, Defendants have not proffered any facts, even those based on "rational speculation," that support the President's decision to increase tariffs on Turkish steel only.

foundation for Proclamation 9705, does not serve as the foundation for Proclamation 9772.

The attempt to justify Proclamation 9772 as a continuation or modification of Proclamation 9705 fails. See Defs.' Br. at 20–23. Defendants contend that the President retains power to modify any action taken under section 232, without conducting a new investigation or following the procedures set forth in the statute. See id.; see also Defs.' Reply Br. at 7–12, 15. Likewise, the President seems to have envisioned the Secretary of Commerce's January 11 Report as empowering him to take ongoing action. The President in Proclamation 9705 states "[t]he Secretary shall continue to monitor imports of steel articles and shall, from time to time, . . . review the status of such imports with respect to the national security. The Secretary shall inform the President of any . . . need for further action by the President." Proclamation 9705, 83 Fed. Reg. at 11,628 ¶ (5)(b). In Proclamation 9772, the President invokes Proclamation 9705 stating, "I also directed the Secretary to monitor imports of steel articles and inform me of any circumstances that in the Secretary's opinion might indicate the need for further action under section 232 with respect to such imports." Proclamation 9772, 83 Fed. Reg. at 40,429 ¶ 3.[9] The President's

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

expansive view of his power under section 232 is mistaken, and at odds with the language of the statute, its legislative history, and its purpose.

Section 232 requires that the President not merely address a threat to national security; he must do all, that in his judgment, will eliminate it. See 19 U.S.C. §§ 1862(c)(1)(A), (c)(3)(A) (instructing the President to take action "so that such imports will not threaten to impair the national security").[10] Although the statute grants the President great discretion in deciding what action to take, it cabins the President's power both substantively, by requiring the action to eliminate threats to national security caused by imports, and procedurally, by setting the time in which to act.[11]

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to reach the target level." Proclamation 9772, 83 Fed. Reg. at 40,429 ¶ 4.

[10] Presidential Proclamation 9705 seems to envision an approach that "addresses" a threat rather than removing it. "Under current circumstances, this tariff is necessary and appropriate to address the threat that imports of steel articles pose to the national security." Proclamation 9705, 83 Fed. Reg. at 11,626 ¶ 8.

[11] Although, as Defendants note, courts cannot review "the President's actions to determine whether the facts support the remedy selected by the President in his exercise of the discretion afforded to him under the statute[,]" see Defs.' Reply Br. at 6, that discretion extends only to his concurrence that a threat exists and his selection of remedial action. See also Am. Inst. for Int'l Steel v. United States, 43 CIT ___, ___, 376 F. Supp. 3d 1335, 1344–45 (Mar. 25, 2019). ("[J]udicial review would allow neither an inquiry into the President's motives nor a review of his fact-finding."). Indeed, should the Secretary of Commerce not find a threat to impair national security, the President has no basis to disagree and no authority to take action. See 19 U.S.C. § 1862(c)(1)(A).

In 1988, Congress added specific time limits to section 232, which preclude Defendants' arguments. See Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, Title I, §§ 1501(a), (b)(1), 102 Stat. 1107, 1257–60 (1988) (codified as amended at 19 U.S.C. § 1862). Those amendments now impose a 90-day limit for the President to act against imports that threaten the national security.[12] They also fix a 15-day deadline for the President to implement any action. Id. at 1258; see also H.R. REP. NO. 100-576 at 711 (1988).[13] The legislative history clarifies that Congress wanted the President to do all that he thought necessary as soon as possible. See Trade Reform Legislation: Hearings Before the Subcomm. on Trade of the H. Comm. on Ways & Means, 99th Cong., 2d Sess. 1282 (1986) (statement of Hon. Barbara B. Kennelly, former Member, H. Comm. On Ways & Means) (discussing the need to set

[12] The amendments also shortened the time limit for investigations by the Secretary of Commerce from one year to 270 days. See 102 Stat. at 1258; see also H. R. REP. NO. 100-576, at 709–10 (1988).

[13] Defendants argue that Presidents "frequently used Section 232 (and its predecessor in prior acts) to modify the means of accomplishing the necessary adjustment of imports without first receiving additional investigations and reports from the Secretary of Commerce (or predecessor advisor)." Defs.' Br. at 20. All instances cited by Defendants occurred before the 1988 amendments, which impose a 90-day deadline for action and a 15-day deadline for implementation of action. Though Defendants concede that these deadlines reflect Congress's desire that the President act "without undue delay[,]" Defs.' Br. at 22, they fail to confront the necessary implication of the 90- and 15-day deadlines. If the President has the power to continue to act, to modify his actions, beyond these deadlines, then these deadlines are meaningless.

a deadline by which the President should act); Comprehensive Trade Legislation: Hearings Before the Subcomm. on Trade of the H. Comm. on Ways & Means, 100th Cong., 1st Sess. 466–67 (1987) (statement of Phillip A. O'Reilly, Chairman and CEO of Houdaille Industries, Inc., accompanied by James H. Mack, Public Affairs Director) (discussing delays in section 232 implementation); H.R. REP. NO. 99-581, pt. 1, at 135 (1986) ("The Committee believes that if the national security is being affected or threatened, this should be determined and acted upon as quickly as possible."); H.R. REP. NO. 100-40, pt. 1, at 175 (1987) ("The Committee believes that if the national security is being affected or threatened, this should be determined and acted upon as quickly as possible.").

Defendants also argue requiring the procedures of 19 U.S.C. § 1862(b)–(c) in support of Proclamation 9772 make no sense, because, by implication, these procedures would then have to be followed "any time a tariff is reduced or an exception is made for a particular product." Defs.' Br. at 23. However, the statute specifically grants the President power to "determine the . . . duration of the action[,]" a power to end any action. 19 U.S.C. § 1862(c)(1)(A)(ii). Likewise, Defendants' arguments that each exception from the steel tariffs for a particular product would require a new set of procedures are meritless, when Proclamation 9705 authorized the Secretary of Commerce to establish the overall process to exempt particular products, under certain conditions. See Defs.' Br. at 23; Defs.' Reply

Br. at 15–16; see also Proclamation 9705, 83 Fed. Reg. at 11,629 ¶ (3).

The procedural safeguards in section 232 do not merely roadmap action; they are constraints on power. The Supreme Court has made clear that section 232 avoids running afoul of the non-delegation doctrine because it establishes "clear preconditions to Presidential action." Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 559 (1976). The time limits, in particular, compel the President to do all that he can do immediately, and tie presidential action to the investigative and consultative safeguards.[14] If the President could act beyond the prescribed time limits, the investigative and consultative provisions would become mere formalities detached from Presidential action. However, Congress affirmatively linked the investigative and consultative safeguards to Presidential action, and Congress strengthened that link when it imposed time limits on the President's discretion to take action. Congress embedded these limits within its broad delegation of power to the President. As this court has recognized, "the broad guideposts of subsections (c) and (d) of section 232 bestow flexibility on the President

[14] In addition to the investigative and consultative steps required by the Secretary of Commerce, the statute only affords the President the power to act when the Secretary of Commerce's report finds that imports of an article threaten national security. If the President concurs, he has only the power to do what he "deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security." Algonquin, 426 U.S. at 559 (citation and internal quotations omitted).

and seem to invite the President to regulate commerce by way of means reserved for Congress, leaving very few tools beyond his reach." Am. Inst. for Int'l Steel v. United States, 43 CIT ___, ___, 376 F. Supp. 3d 1335, 1344 (2019) ("AIIS"). Further, it may be the case that judicial review will be unable to reach "a gray area where the President could invoke the statute to act in a manner constitutionally reserved for Congress but not objectively outside the President's statutory authority." Id. at 14. The broad discretion granted to the President and the limits on judicial review only reinforce the importance of the procedural safeguards Congress provided, and which the President appears to have ignored.

Therefore, the Plaintiff has stated a claim for a refund because after the time periods set by Congress for Presidential action had passed, the President lacked power to take new action and issued Proclamation 9772 without the procedures as required by Congress.[15] The court need not reach Plaintiff's arguments that Proclamation 9772 is ultra vires or runs afoul of due process at this time.

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[15] Where Congress envisioned ongoing action by the President it provided for it. In subsection (c)(3), Congress provided for continuing action where the President sought to negotiate an agreement under subsection (c)(1), granting the President an additional 180 days to act. Thereafter, if such an agreement were "ineffective in eliminating the threat to the national security" the President "shall take such other actions as the President deems necessary." 19 U.S.C. § 1862(c)(3).

CONCLUSION

In support of its motion, Defendants have failed to show that Plaintiff's complaint must be dismissed for failure to state a claim for a refund of duties on which relief can be granted.

ORDERED Defendants' motion to dismiss is denied, and it is further

ORDERED, the parties shall confer and submit a joint status report as to the issues to be briefed and a proposed scheduling order by Monday, December 9, 2019.

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

/s/ Jane A. Restani
Jane A. Restani, Judge

Dated: November 15, 2019
New York, New York

Katzmann, J., concurring. I agree with my colleagues that the instant litigation can continue in the face of the Government's motion to dismiss the plaintiff's complaint, although the ultimate outcome remains for determination after further proceedings. I write separately to note what is before the court in this case—whether a statute has been violated—and what is not—whether that statute is constitutional.

The question before us at this preliminary stage is this: Has the plaintiff, an American importer of

Turkish goods containing steel articles subjected to tariffs imposed by Presidential Proclamation invoking Section 232 of the Trade Expansion Act of 1962, as amended in 18 U.S.C. § 1862 ("section 232"), countered the Government's motion by alleging sufficient facts in its complaint that those tariffs have been imposed in violation of that statute, which provides that the President may impose tariffs on imports which "threaten to impair the national security"?

Not before us now is the fundamental constitutional question: Does section 232, which provides power to the President in international trade without meaningful limitation, violate the Constitution's separation of powers, as it is Congress that exclusively has the "power To lay and collect Taxes, Duties, Imposts and Excises" and "to regulate Commerce with foreign Nations"? U.S. Const. art. 1 § 8.[1] That question was presented to this court earlier this year in American Institute for International Steel, Inc. v. United States, 43 CIT ___, 376 F. Supp. 3d 1335 (2019) ("AIIS"). There, this court unanimously concluded that it was bound by

[1] Under the Constitution, "[t]he president has no similar grant of substantive authority over economic policy, international or domestic. Consequently, international trade policy differs substantially from other foreign affairs issues, such as war powers, where the president shares constitutional authority with Congress. Where international trade policy is concerned, the president's authority is almost entirely statutory." Timothy Meyer, Trade, Redistribution, and the Imperial Presidency, 44 Yale J. Int'l L. Online 16 (2018) (footnotes omitted), http://www.yjil.yale.edu/features-symposium-international-trade-in-the-trump-era/. See Am. Inst. for Int'l Steel, Inc. v. United States, 43 CIT ___, 376 F. Supp. 3d 1335, 1352 n.8 (2019) ("AIIS").

the Supreme Court decision in Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548 (1976), which, in different circumstances involving licensing fees, stated that section 232's standards were "clearly sufficient" to confine presidential action consistent with the separation of powers.[2] In a dubitante opinion in AIIS, 376 F. Supp. 3d at 1345–52, I respectfully suggested that section 232, lacking ascertainable standards, "provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress," in violation of the separation of powers. Id. at 1352. "[T]he fullness of time" and "real recent actions" may provide an empirical basis to revisit assumptions and inform understanding of the statute. Id.

I submit that the case before us may well yield further evidence of the infirmity of the statute.[3] To so note is not to diminish, in other arrangements not involving

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[2] The Court cautioned "that the imposition of a license fee is authorized by § 232(b) in no way compels the further conclusion that any action the President might take, as long as it has even a remote impact on imports, is also so authorized." Algonquin, 426 U.S. at 571 (emphasis in original).

[3] The AIIS plaintiffs filed an appeal in the United States Court of Appeals for the Federal Circuit, appeal docketed, No. 19-1727 (Fed. Cir. Mar. 25, 2019) and also sought direct review by the Supreme Court. 379 F. Supp. 3d 1335, cert. denied, 139 S. Ct. 2748 (2019). The Supreme Court denied the petition for direct review (without addressing the appeal filed before the United States Court of Appeals for the Federal Circuit or potential appeals therefrom). Id. The AIIS appeal is now before the Federal Circuit. 379 F. Supp. 3d 1335, appeal docketed, No. 19-1727 (Fed. Cir. Mar. 25, 2019).

constitutional authority lodged exclusively in Congress, the dependence of Congress on executive officials to implement its programs. See Gundy v. United States, 139 S. Ct. 2116, 2147 (2019); AIIS, 376 F. Supp. 3d at 1352. Nor is it to diminish the flexibility allowed the President in the conduct of foreign affairs, see United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936), or, for example, the authority of the executive to impose sanctions on foreign entities which endanger American interests. See, e.g., U.S. Dep't of Treasury, Financial Sanctions: United States Statutes, https://www.treasury.gov/resource-center/sanctions/Pages/statutes-links.aspx (last visited Nov. 12, 2019) (listing a selection of sanctions statutes as identified by the U.S. Department of Treasury, Office of Foreign Asset Control).

In the end, as the case before us is framed, we proceed assuming the constitutionality of the statute. The statute's investigative and consultative steps, within prescribed time limits, are not advisory and, as my colleagues have set forth, cannot be ignored without consequence. Based on the facts alleged in the complaint, the violation of procedure and the absence of a rationale to justify differential treatment, warrant the conclusion at this preliminary stage that the Government has failed to show that plaintiff's complaint must be dismissed for failure to state a claim for a refund of duties on which relief can be granted.

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

§ 1862. Safeguarding national security

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(3)(A) If—

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

(ii) either—

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

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

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

(B) If—

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

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

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

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

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

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

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

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

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

(2) Omitted.

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

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

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

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

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

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

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

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

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

[SEAL]

SECRETARY OF DEFENSE
1000 DEFENSE PENTAGON
WASHINGTON, DC 20301·1000

MEMORANDUM FOR SECRETARY OF COMMERCE

SUBJECT: Response to Steel and Aluminum Policy Recommendations

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

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

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

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

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

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

/s/ James N. Mattis

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

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

Proclamation 9705 of March 8, 2018

Adjusting Imports of Steel Into the United States

By the President of the United States of America

A Proclamation

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

2. The Secretary found and advised me of his opinion that steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States. The Secretary found that the present quantities of steel articles imports and the circumstances of global excess capacity for producing steel are "weakening our internal economy," resulting in the persistent threat of further closures of domestic steel production facilities and the "shrinking [of our] ability to meet national security production requirements in a national emergency." Because of these risks and the risk that the United States may be unable to "meet [steel] demands for national defense and critical industries in a national emergency," and taking into account the close relation of the economic welfare of the Nation to our national security, *see* 19 U.S.C. 1862(d), the Secretary concluded that the present

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

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

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

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

5. I concur in the Secretary's finding that steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States, and I have considered his recommendations.

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

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

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

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

9. In adopting this tariff, I recognize that our Nation has important security relationships with some countries whose exports of steel articles to the United States weaken our internal economy and thereby threaten to impair the national security. I also recognize our shared concern about global excess capacity, a circumstance that is contributing to the threatened impairment of the national security. Any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country. Should the United States and any such country arrive at a satisfactory alternative means to address the threat to the

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

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

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

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

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

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

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

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

(3) The Secretary, in consultation with the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the United States Trade Representative (USTR), the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, and such other senior Executive Branch officials as the Secretary deems appropriate, is hereby authorized to provide relief from the additional duties set forth in clause 2 of this proclamation for any steel article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality and is also authorized to provide such relief based upon specific national security considerations. Such relief shall be provided for a steel article only after a request for exclusion is made by a directly affected party located in the United States. If the Secretary determines that a particular steel article should be excluded, the Secretary shall, upon publishing a notice of such determination in the *Federal Register*, notify Customs and Border Protection (CBP) of the Department of Homeland Security concerning such article so that it will be excluded from

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

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

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

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

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

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

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

/s/ Donald J. Trump

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

Proclamation 9772 of August 10, 2018

Adjusting Imports of Steel Into the United States

By the President of the United States of America

A Proclamation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

/s/ Donald J. Trump

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

Proclamation 9886 of May 16, 2019

Adjusting Imports of Steel Into the United States

By the President of the United States of America

A Proclamation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

/s/ Donald J. Trump

UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE CLAIRE R. KELLY, JUDGE THE HONORABLE GARY S. KATZMANN, JUDGE THE HONORABLE JANE A. RESTANI, SR. JUDGE

TRANSPACIFIC STEEL LLC, *Plaintiff*, v. THE UNITED STATES; DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; UNITED STATES CUSTOMS AND BORDER PROTECTION; KEVIN K. MCALEENAN, IN HIS OFFICIAL CAPACITY AS COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION; UNITED STATES DEPARTMENT OF COMMERCE; AND WILBUR L. ROSS, JR., IN HIS OFFICIAL CAPACITY AS SECRETARY OF COMMERCE, *Defendants*.	Court No. 19-00009

AMENDED COMPLAINT

(Filed Apr. 2, 2019)

Pursuant to Rule 3(a)(3) of the Rules of the United States Court of International Trade, Plaintiff Transpacific Steel LLC ("Plaintiff"), by and through its undersigned attorneys, brings this action and alleges and states as follows:

SUMMARY

1. On March 8, 2018, President Donald J. Trump issued a proclamation titled "Adjusting Imports of Steel Into the United States," Proclamation No. 9705, imposing 25% *ad valorem* tariffs on U.S. imports of certain steel products pursuant to Section 232 of the Trade Expansion Act of 1962, as amended (19 U.S.C. § 1862). *See* 83 Fed. Reg. 11625, 11625 (Mar. 15, 2018) ("*First Steel Proclamation*") (attached as **Exhibit 1**). Section 232 of the Trade Expansion Act of 1962 ("Section 232") authorizes the President to impose restrictions on certain imports following an investigation that concludes that the targeted products are being imported into the United States "in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. § 1862 (c)(1)(A).

2. On August 10, 2018, the President issued a new Proclamation titled "Adjusting Imports of Steel Into the United States," Proclamation 9772, imposing a 50% *ad valorem* duty on steel articles imported from Turkey, effective as of August 13, 2018. *See Adjusting Imports of Steel Into the United States*, Proclamation

9772 of August 10, 2018, 83 Fed. Reg. 40429 (Aug. 15, 2018) ("*Steel Proclamation on Turkey*" or "*Fifth Steel Proclamation*") (attached as **Exhibit 2**). Unlike the March 8, 2018 proclamation, which addressed steel imports globally, the *Steel Proclamation on Turkey* had the effect of doubling the tariffs on steel articles from Turkey alone, while tariffs on all other steel imports from worldwide sources remained unchanged. Acting pursuant to the *Steel Proclamation on Turkey*, U.S. Customs and Border Protection is requiring Plaintiff to pay a 50% *ad valorem* duty on steel articles imported from Turkey.

3. This appeal challenges the *Steel Proclamation on Turkey* and Defendants' actions in adopting and enforcing the proclamation as unconstitutional and contrary to the statute, 19 U.S.C. § 1862. The doubling of the tariffs on imports of steel articles from Turkey is inflicting economic and competitive harm on Plaintiff who is an importer of steel products from Turkey and is responsible for the payment of the Section 232 tariffs on its imports. First, the President's action doubling the tariffs on steel imports from Turkey violates Section 232, which requires a nexus to a national security purpose, and is therefore an action outside the statutory authority delegated to the President by the United States Congress. Second, the statute, 19 U.S.C. § 1862(b) and (c), prescribes a process and certain timelines that must be followed before any actions to adjust imports may be taken. By doubling the tariffs on steel imports from Turkey overnight without following the procedures laid out in the statute, the *Steel*

Proclamation on Turkey contravenes the statutory mandate while divesting Plaintiff of the benefits of the administrative process to which the statute entitles them. Third, the *Steel Proclamation on Turkey* is unconstitutional because it violates equal protection of the laws as guaranteed by the Fifth Amendment's due process clause. The proclamation creates an arbitrary distinction between importers of steel products from Turkey and importers of steel products from all other sources. Establishing a false distinction between importers of steel from Turkey and importers of steel from all other sources and selectively imposing additional tariffs on the basis of that distinction does not meet the standard of pursuing a legitimate government purpose employing rational means. Fourth, the *Steel Proclamation on Turkey* is unconstitutional because it violates the Fifth Amendment's due process clause.

4. Because the *Steel Proclamation on Turkey* is unconstitutional and contrary to the laws of the United States, Plaintiff seeks a Judgment that the Proclamation doubling tariffs on steel imports from Turkey is unlawful, that Defendants be permanently enjoined from implementing or otherwise giving effect to such proclamation and that U.S. Customs and Border Protection be ordered to issue refunds to Plaintiff for any tariffs paid on its imports as a result of such proclamation.

JURISDICTION

5. This Court has jurisdiction over this action pursuant to 28 U.S.C. §§ 1581(i)(2) and (4) and 28 U.S.C. § 2631.

6. Section 1581 provides that

> the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandize for reasons other than the raising of revenue,

28 U.S.C. § 1581(i)(2), and "administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section." *Id.* § 1581(i)(4).

7. The President's action of doubling the tariffs on steel imports from Turkey is subject to judicial review due to the statutory limitations imposed by Section 232, 19 U.S.C. § 1862, to determine whether there has been "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Silfab Solar, Inc. v. United States*, 892 F. 3d 1340, 1346 (Fed. Cir. 2018); *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985).

8. Section 232 of the Trade Expansion Act of 1962 is a law, "providing for . . . tariffs, duties, fees, or

other taxes on the importation of merchandise for reasons other than the raising of revenue," as well as for "administration and enforcement with respect to" such tariffs, duties and fees. *Id.* §§ 1581(i)(2) and (4). Therefore, this matter involves administration and enforcement of matters referred to in, *inter alia*, 28 U.S.C. §§ 1581(i)(2) and (4). The *Steel Proclamation on Turkey* does not constitute a determination reviewable under this Court's jurisdiction established at 28 U.S.C. § 1581(a)-(h). Accordingly, the Court has subject matter jurisdiction of this action under 28 U.S.C. § 1581(i) and may order the relief requested pursuant to 28 U.S.C. § 2643.

9. Plaintiff also challenges the constitutionality of the *Steel Proclamation on Turkey* doubling of the Section 232 tariffs on imports of steel products from Turkey alone. Plaintiff further challenges the actions taken by Defendants in the administration and enforcement of the *Steel Proclamation on Turkey*. The actions taken by U.S. Customs and Border Protection in the administration and enforcement of the doubled Section 232 tariffs on steel imports from Turkey represent final agency action as such imports continue to be subject to the 50% *ad valorem* duty since August 13, 2018.

PARTIES

10. Plaintiff Transpacific Steel LLC ("Transpacific") is a Limited Liability Company organized under the laws of Delaware with its principal place of

business in Austin, Texas. Transpacific is a U.S. importer of steel products from several countries, including Turkey. Transpacific purchased approximately 10,653 MT of steel products from Turkey in 2017 and approximately 17,000 MT of steel products in 2018 for delivery into Puerto Rico, prior to imposition of the Section 232 tariffs. Since the imposition of the 50% tariffs on steel imports from Turkey, Transpacific has not contracted to purchase steel from Turkey for entry through Puerto Rico or any other U.S. destination port because the doubled rate has placed steel imports from Turkey at a competitive disadvantage as compared to all other sources. The 11,430 MT of steel products from Turkey previously contracted for and purchased before March 23, 2018 that have been shipped to Puerto Rico will be entered subject to the 50% tariff rate. This steel was purchased for delivery to Puerto Rico in response to increased demand for steel products for rebuilding in the aftermath of Hurricanes Irma and Maria. A Declaration setting forth these facts in more detail is provided at **Exhibit 3**.

11. The defendant United States of America is the federal government to which the Section 232 tariff increases are being paid and is the statutory defendant under sections 1581(i)(2) and (4).

12. Defendant Donald J. Trump is the President of the United States. He issued the *Steel Proclamation on Turkey* that is the subject of this Complaint.

13. Defendant United States Customs and Border Protection ("CBP") is the agency that administers

and enforces the tariffs imposed under Section 232, including the 50% tariffs ordered pursuant to the *Steel Proclamation on Turkey*.

14. Defendant Kevin K. McAleenan is the Commissioner of United States Customs and Border Protection. He is sued in his official capacity only.

15. Defendant United States Department of Commerce ("Commerce") is the agency responsible for initiating and conducting an investigation under Section 232 and for providing findings and recommendations to the President of the United States.

16. Defendant Wilbur L. Ross, Jr. is the Secretary of the United States Department of Commerce. He is sued in his official capacity only.

STANDING

17. Plaintiff has standing to bring this action pursuant to 28 U.S.C. § 2631(i), which states that "[a]ny civil action of which the Court of International Trade has jurisdiction, other than an action specified in subsections (a)-(h), may be commenced in the court by any person adversely affected or aggrieved by agency action within the meaning of section 702 of title 5."

18. Plaintiff's action arises under Section 232, 19 U.S.C. § 1862, as the President has acted beyond his statutory authority, the Constitution of the United States and Section 702 of the Administrative Procedure Act ("APA"), 5 U.S.C. § 702. Section 702 states that

"[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." In an action under Section 702 of the APA, "the reviewing court shall . . . (2) hold unlawful and set aside agency action, findings, and conclusions found to be – (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . [and] (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right. . . ." 5 U.S.C. §§ 706(2)(A), (C).

19. Plaintiff has standing to challenge the Defendants' unlawful acts in adopting and implementing the *Steel Proclamation on Turkey* imposing a 50% tariff on steel products imported from Turkey but not from any other country. Plaintiff is an importer of steel products from Turkey whose imports are covered by the *Steel Proclamation on Turkey* and who is responsible for the payment of the 50% tariffs on its imports of steel products from Turkey. Therefore, Plaintiff is a "person" adversely affected or aggrieved by agency action – in this instance the imposition of additional tariffs on steel imports from Turkey alone – within the meaning of 5 U.S.C. § 702. Plaintiff is in the zone of interests to be protected or regulated by the statute or constitutional guarantees in question, and it is suffering injury caused by the unlawful imposition of tariffs through the *Steel Proclamation on Turkey*.

TIMELINESS OF THIS ACTION

20. An action under 28 U.S.C. §1581(i) must be commenced within two years after the cause of action first accrues. 28 U.S.C. § 2636(i).

21. Plaintiff is commencing this action under 28 U.S.C. § 1581(i) by concurrently filing a summons and complaint within two years after the cause of action first accrued. The claims asserted by Plaintiff accrued at the earliest on August 13, 2018, the effective date of the President's *Steel Proclamation on Turkey*. *See* 83 Fed. Reg. at 40431 (para 7), **Exhibit 2**. This action is therefore timely filed.

STATEMENT OF FACTS

I. SECTION 232 OF THE TRADE EXPANSION ACT OF 1962

22. President Trump cited his authority under Section 232 of the Trade Expansion Act of 1962, codified at 19 U.S.C. § 1862, in imposing the steel tariffs.

23. Section 232, titled "Safeguarding National Security," authorizes the President, upon a "finding" that "an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security," to take action "to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii).

24. The process for initiating a Section 232 action begins with a request for such an investigation.

The Secretary of the United States Department of Commerce ("Secretary of Commerce") "shall immediately initiate an appropriate investigation to determine the effects on the national security of imports of [an] article" after a request from "the head of any department or agency, upon application of an interested party" or on the Secretary's "own motion." *Id*. § 1862(b)(1)(A). Commerce's Bureau of Industry and Security ("BIS") conducts Section 232 investigations in accordance with the federal regulations codified at 15 C.F.R. part 705.

25. Section 232 requires that the Secretary of Commerce conduct the investigation in consultation with the Secretary of the Department of Defense ("Secretary of Defense") and other U.S. officials, as appropriate, to determine the effects of the specified imports on the national security. Specifically, the Secretary of Commerce shall "immediately provide notice to the Secretary of Defense of any investigation," shall "consult with the Secretary of Defense regarding the methodological and policy questions raised in any investigation," and if appropriate, shall "hold public hearings or otherwise afford interested parties an opportunity to present information and advice. . . ." 19 U.S.C. §§ 1862(b)(1)(B), (b)(2)(A).

26. The "Secretary of Defense shall provide the Secretary [of Commerce] an assessment of the defense requirements of any article" under investigation. *Id*. § 1862(b)(2)(B).

27. Within 270 days after initiating an investigation, the Secretary of Commerce "shall submit to the President" and publish in the *Federal Register* "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 th[e] section." *Id*. § 1862(b)(3)(A).

28. The Secretary of Commerce's report triggers a duty of the President to act. Within ninety days, the President must "determine whether the President concurs with the finding of the Secretary. . . ." *Id*. § 1862(c)(1)(A). The President may implement the recommendations contained in the Secretary of Commerce's report, take other actions or refrain from taking action.

29. If the President concurs with the Secretary of Commerce that action is necessary, the President must "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." *Id*. § 1862(c)(1)(A)(ii).

30. After making a decision, the President has 15 days to implement the action. *Id*. § 1862(c)(1)(B). An "action" under Section 232 may involve either "quantitative methods i.e., quotas" or "monetary methods i.e., license fees" or tariffs. *Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 561 (1976).

31. Alternatively, the President may choose, as "the action taken by the President under [Section 232(c)(1)]," to "negotiat[e] . . . 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. . . ." 19 U.S.C. § 1862(c)(3)(A)(i). If the President chooses to pursue the negotiation of that kind of article-specific agreement, and either "no such agreement is entered into" within 180 days or an agreement is entered into but "is not being carried out or is ineffective," then 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." *Id*. § 1862(c)(3)(A).

32. The President "shall submit to the Congress a written statement of the reasons" explaining his decision "[b]y no later than the date that is 30 days after the date on which the President makes any determinations." *Id*. § 1862(c)(2).

33. Although Section 232 does not include a definition of "national security," it includes a non-exclusive list of factors that the Secretary of Commerce and the President "shall . . . give consideration to," including:

> 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.
>
> . . .

Id. § 1862(d). Additionally, the Secretary of Commerce 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[,] . . . without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

Id.

II. COMMERCE'S INVESTIGATION UNDER SECTION 232

34. On April 19, 2017, Secretary of Commerce Wilbur Ross initiated an investigation into the effects of steel imports on the United States' national security. On April 20, 2018, the President instructed Commerce to give priority to the investigation into the national security threats posed by imports of steel and to

complete the investigation by June 2017.[1] As part of the investigation, Commerce collected written public comments, held a public hearing, and consulted with the Secretary of Defense.[2]

35. On January 11, 2018, Commerce submitted a report to the President containing its findings and recommendations on steel imports.[3]

36. Commerce explained that it analyzed the impact of steel imports using a broad definition of "national security," to include not only the term "national defense" but also to "include[ ] the 'general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, which are critical to minimum operations of the economy and government.'" *Steel Report* at 1, 13-15, **Exhibit 4** (quoting Dep't of Commerce, Bureau of Export Admin., *The Effect of Imports of Iron Ore and Semi-Finished*

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[1] *Memorandum on Steel Imports and Threats to National Security* (U.S. President, April 20, 2017) *available at* https://www.gpo.gov/fdsys/pkg/DCPD-201700259/pdf/DCPD201700259.pdf.

[2] *Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel*, 82 Fed. Reg. 19205 (BIS April 26, 2017); *see also Notice of Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Aluminum*, 82 Fed. Reg. 21509 (BIS May 9, 2017).

[3] Dep't of Commerce, Bureau of Indus. & Sec. (BIS), *The Effect of Imports of Steel on the National Security* (Jan. 11, 2018) ("*Steel Report*"), available at https://www.commerce.gov/sites/commerce.gov/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf (attached as Exhibit 4).

Steel on the National Security at 5 (Oct. 2001) ("*2001 Report*"), attached as **Exhibit 5**).[4]

37. Commerce stated that its definition of the term "national security" is consistent with the *2001 Report*, which explains that the term 'national security' can be interpreted more broadly to include the general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements that are critical to the minimum operations of the economy and government." *Steel Report* at 13, **Exhibit 4** (quoting *2001 Report* at 5, **Exhibit 5**).

38. The *Steel Report* observed that the United States' domestic steel industry was in decline; that shrinking "capacity utilization rates" were deterring capital investment; and that foreign imports had contributed to the falloffs in domestic production. *Steel Report* at 3-5, **Exhibit 4**. The *Steel Report* concluded, "the present quantities and circumstance of steel imports are 'weakening our internal economy' and threaten to impair the national security as defined in Section 232." *Id.* at 5.

39. Commerce identified global excess steel capacity as a circumstance that contributes to the "weakening of our internal economy" that "threaten[s] to impair" the national security as defined in Section 232. *Id.* at 5, 16. It explained that "U.S. steel production capacity has remained flat since 2001, while other steel

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[4] Available at https://www.bis.doc.gov/index.php/documents/section-232-investigations/81-ironore-and-semi-finished-steel-2001/file.

producing nations have increased their production capacity, with China alone able to produce as much steel as the rest of the world combined." *Id*. at 52. The *Steel Report* did not identify any excess capacity with respect to Turkey.

40. Commerce recommended that the President take immediate action to adjust the level of these imports through quotas or tariffs." *Id.* at 58-61. Commerce recommended three alternative actions, each of which had the stated objective of enabling the U.S. steel industry to operate at an 80% or better average capacity utilization rate. *Id.* at 6-9. Option one was the imposition of a global quota equal to 63% of the 2017 import level of all imported steel products. *Id.* at 7-8. Option two was a global 24% tariff on imports of all imported steel products. *Id.* at 8. Option three was a 53% tariff on all imported steel products from twelve countries (Brazil, South Korea, Russia, Turkey, India, Vietnam, China, Thailand, South Africa, Egypt, Malaysia, and Costa Rica), with all other countries being limited to 100% of their 2017 import volumes. *Id.* at 8-9.

41. On February 18, 2018, the Secretary of Defense sent a letter to Commerce providing its position on the recommendations contained in the *Steel Report*.[5] The Secretary of Defense conveyed that in his view, "U.S. military requirements for steel and aluminum each only represent about three percent of U.S.

[5] Memorandum from Sec'y of Def. to Sec'y of Commerce, re: *Response to Steel and Aluminum Policy Recommendations* (Feb. 18, 2018) ("*Steel/Aluminum Policy Recommendations Resp.*") (attached as **Exhibit 6**).

production" and "[t]herefore, DoD does not believe that the findings in the reports [by Commerce] impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements." *Steel/Aluminum Policy Recommendations Resp*. at 1, **Exhibit 6**.

42. The Secretary of Defense also shared that it "continues to be concerned about the negative impact on our key allies" of "the recommended options within the reports." *Id.*

III. THE SECTION 232 STEEL PROCLAMATIONS

43. On March 8, 2018, President Trump issued Proclamation No. 9705, *First Steel Proclamation* which imposed a 25% *ad valorem* tariff on steel articles imported from all countries, except Canada and Mexico. *See* 83 Fed. Reg. at 11626 (para. 8) (**Exhibit 1**).

44. Proclamation 9705 stated "that Canada and Mexico present a special case" given their "shared commitment [with the United States] to support[ ] each other in addressing national security concerns." *Id.* at 11626 (para. 10). Accordingly, the President "determined that the necessary and appropriate means to address the threat to national security posed by imports of steel articles from Canada and Mexico is to continue ongoing discussions with these countries" and exempt them "from the tariff, at least at this time." *Id.*

45. The new 25% steel tariffs were scheduled to take effect as to all countries other than Canada and Mexico on March 23, 2018.

46. On March 22, 2018, President Trump issued Proclamation No. 9711 which expanded the list of countries exempted from the tariffs beyond Canada and Mexico to include "the Commonwealth of Australia ('Australia'), the Argentine Republic ('Argentina'), the Republic of Korea ('South Korea'), the Federative Republic of Brazil ('Brazil'), and the European Union ('EU')." *See Adjusting Imports of Steel Into the United States*, Proclamation No. 9711 of Mar. 22, 2018, 83 Fed. Reg. 13361, 13361 (para. 4) (Mar. 28, 2018) ("*Second Steel Proclamation*") (attached as **Exhibit 7**).

47. The March 22, 2018 proclamation made the country exemptions temporary, including for Canada and Mexico. It stated that on May 1, 2018, all of "the countries listed as excepted" would be subject to the 25% steel, unless the President were to "determine by further proclamation that the United States has reached a satisfactory alternative means to remove the threatened impairment to the national security by imports" of that country. *Id.* at 13362 (para. 11). In the interim, President Trump instructed that "ongoing discussions" with the temporarily-exempted countries "continue," so that other "measures to reduce excess . . . production" abroad and "increase domestic capacity utilization" in the United States could be agreed upon. *Id.* at 13362 (para. 10).

48. On April 30, 2018, President Trump issued Proclamation No. 9740, extending the period of reprieve for Canada, Mexico, and the EU for an additional 30 days. *Adjusting Imports of Steel Into the United States*, Proclamation No. 9740 of April 30, 2018, 83 Fed. Reg. 20683 (May 7, 2018) ("*Third Steel Proclamation*") (attached as **Exhibit 8**). The Section 232 tariffs were scheduled to take effect as to Canada, Mexico, and the EU on June 1, 2018, unless the President were to "determine by further proclamation that the United States has reached a satisfactory alternative means to remove the threatened impairment to the national security by imports" from those countries. *Id.* at 20684 (para. 7).

49. Argentina, Australia, Brazil, and South Korea received different treatment in the *Third Steel Proclamation*. For Argentina, Australia, and Brazil, the proclamation noted that the United States had "agreed in principle" on "satisfactory alternative means" to address steel that would allay the United States' concerns, and that the President was therefore "extend[ing] the temporary exemption" for these countries, with no set expiration date, "in order to finalize the details of these satisfactory alternative means." *Id.* (para. 5). South Korea was removed entirely and indefinitely from the 25% steel tariff. *Id.* at 20683-84 (para. 4). The *Third Steel Proclamation* announced that the United States and South Korea had "successfully" "agreed on a range of measures" to address the level of steel imports that would sufficiently "address South Korea's contribution to the threatened impairment to

[the United States'] national security." *Id.* at 20683 (para. 4).

50. On May 31, 2018, President Trump amended the steel proclamations a fourth time. *Adjusting Imports of Steel Into the United States*, Proclamation No. 9759 of May 31, 2018, 83 Fed. Reg. 25857 (June 5, 2018) ("*Fourth Steel Proclamation*") (attached as **Exhibit 9**). The May 31 proclamation directed that the new tariffs would apply to imported steel articles from Canada, Mexico, and the EU, beginning on June 1, 2018. *Id.*

51. The *Fourth Steel Proclamation* exempted Argentina, Australia, and Brazil from the steel tariff because these countries had "agreed on a range of measures" addressing steel imports into the United States that the President determined would "provide effective, long-term alternative means to address these countries' contribution to the threatened impairment to our national security." *Id.* at 25857-58 (paras. 4 & 5).

52. On August 10, 2018 at 5:47 AM, the President released the following statement on Twitter: "I have just authorized a doubling of Tariffs on Steel and Aluminum with respect to Turkey as their currency, the Turkish Lira, slides rapidly downward against our very strong Dollar! Aluminum will now be 20% and Steel 50%. Our relations with Turkey are not good at this time!" *See* **Exhibit 10**.

53. On the same day, the President issued the *Steel Proclamation on Turkey* imposing a 50% *ad valorem* tariff on steel articles imported from Turkey. *See* **Exhibit 2**. The *Steel Proclamation on Turkey* raised

the tariffs on steel articles from Turkey only and did not raise the tariffs on imports from other countries. The increased tariffs on imports of steel articles from Turkey went into effect on August 13, 2018. *Steel Proclamation on Turkey*, 83 Fed. Reg. at 40429 (para. 6), **Exhibit 2**. To date, the President has not issued a proclamation imposing 20% tariffs on aluminum from Turkey.

54. In justifying the increase in tariffs to 50% on Turkey alone, the President explained that "while capacity utilization in the domestic steel industry has improved, it is still below the target capacity utilization level the Secretary recommended in his report." *Id.* at 40429 (para. 4). The President further noted that "it is necessary and appropriate in light of our national security interests to adjust the tariff imposed by previous proclamations" because the imports have not declined as much as anticipated and because the capacity utilization has not increased to the target level. *Id.* (para. 5).

55. The President explained that in the *Steel Report*, "[T]he Secretary recommended that I consider applying a higher tariff to a list of specific countries should I determine that all countries should not be subject to the same tariff. One of the countries on that list was the Republic of Turkey (Turkey)." *Id.* (para. 6). In order to further reduce imports of steel articles and increase domestic capacity utilization, the President "determined that it is necessary and appropriate to impose a 50% *ad valorem* tariff on steel articles imported from Turkey." *Id.* The President further explained that

the Secretary of Commerce "has advised me that this adjustment will be a significant step toward ensuring the viability of the domestic steel industry." *Id.*

56. On August 29, 2018, the President issued Proclamation No. 9777 to provide potential relief to certain steel importers. *Adjusting Imports of Steel Into the United States*, Proclamation No. 9777 of August 29, 2018, 83 Fed. Reg. 45025 (Sept. 4, 2018) (the "*Sixth Steel Proclamation*") (attached as **Exhibit 11**). In the *Sixth Steel Proclamation*, the President provided some relief from quantitative limitations set forth in the *Third Steel Proclamation* and *Fourth Steel Proclamation*.

IV. U.S. IMPORTS OF TURKISH STEEL ARTICLES

57. Based on public tariff and trade data compiled and aggregated from Commerce and the U.S. International Trade Commission websites, total import volumes from Turkey of affected steel products under Section 232 totaled 1,568,645 MT from January – July 2017. This compares with imports from Turkey of 654,339 MT for January – July 2018. The import volumes from Turkey were reduced over 58.29% between interim 2017 and 2018 as demonstrated in the import charts provided at **Exhibit 12**.

58. Based on tariff and trade data compiled and aggregated from Commerce and the U.S. International Trade Commission websites, total import volumes from Turkey of affected steel products under Section

232 totaled 879,287 MT from March through June 2017. This compares with 409,810 MT during the period March – June 2018, the period during which 25% Section 232 tariffs were in effect, but prior to imposition of the 50% tariffs. The Turkish import volumes were reduced over 53% during the interim period when Section 232 tariffs were in effect, relative to 2017. *See* **Exhibit 12**.

59. Commerce's own publications show a significant decrease in steel imports from Turkey in 2018. The Department of Commerce, International Trade Administration, published its *Global Steel Trade Monitor* report in June 2018 which discusses "Trends in Imports from Top Sources." *Global Steel Trade Monitor, Steel Imports Report: United States* at 3 (June 2018) ("*Global Steel Trade Monitor*") (attached at **Exhibit 13**). In relevant part, the report states,

> [b]etween YTD 2017 [Jan- March] and YTD 2018, imports increased from five of the United State' top 10 import source countries. Imports from Germany showed the largest volume increase in YTD 2018, up 29 percent, followed by Mexico (14%), Canada (7%), South Korea (6%), and China (5%). Some of the countries which the United States had decreases in imports from were Turkey (-59%), Russia (-10%), and Taiwan (-10%).

Id.

60. The June 2018 *Global Steel Trade Monitor* report also lists the top 10 sources of steel imports, "Imports by Top Source," in order: Canada (20%), Brazil

(13%), South Korea (11%), Mexico (11%), Russia (7%), Japan (5%), Turkey (4%), Germany (3%), Taiwan (3%), and China (2%). *Id.*

61. The *Steel Report* published by Commerce in the Section 232 investigation, estimated that U.S. steel production capacity in 2017 was approximately 113.3 million MT, with production at 81.9 million MT, for a capacity utilization rate of 72.3%. *Steel Report* at 7, **Exhibit 4**. According to the report, "[u]tilization rates of 80 percent or greater are necessary to sustain adequate profitability and continued capital investment, research and development, and workforce enhancement in the steel sector." *Id.* at 4.

62. Therefore, in order to reach the stated capacity utilization rate of 80% or higher, U.S. steel production would have to increase from 81.9 million MT to a minimum of 90.6 MT, or 8.7 + million MT. *Id.* at 7. As noted above, based on publicly available data, 2017 import volumes from Turkey of steel products covered by the Section 232 measure totaled 1,990,337 MT. Turkish Import Volumes, attached as **Exhibit 12**. The total volume of Turkish steel imports in 2017 is less than 23% of the total increase in U.S. production necessary to meet the minimum 80% capacity utilization target stated in the *Steel Report*.

63. Nor is Turkey expanding its steelmaking capacity and posing an increased threat to U.S. interests as a results of excess steel capacity. The OECD's steelmaking capacity database, relied upon by

Commerce in the *Steel Report*,[6] indicates that steelmaking capacity in Turkey has been generally flat since 2012, with a slight decrease in 2017. *Steel Report* at 41 & 47, **Exhibit 4**; *see also* Turkish Import Volumes, **Exhibit 12**.

64. In sum, Commerce's own data show that under no scenario could the doubling of the Section 232 tariffs on imports of steel products from Turkey contribute significantly to the stated goal of the measure to increase domestic capacity utilization to 80%. Prior to imposition of the 50% tariffs, Turkish imports had already declined over 50% in 2018 when compared to 2017, more than any other country subject to the 232 tariffs. The 25% tariff had more than addressed any national security concerns or goals with respect to a single country. The added 25% tariffs on a very low import volume from Turkey that was already subject to 25% tariffs could have no more but a negligible impact, if any, on domestic capacity utilization. Therefore, the doubling of the tariffs on Turkish imports was neither necessary, nor could it advance any legitimate national security needs.

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[6] *Steel Report* at 51-53, Exhibit 4. OECD data on global steelmaking capacity and by country, are attached at Exhibit 14, OECD, Dir. for Science, Tech. & Innovation Steel Comm., *Capacity Developments in the World Steel Industry*, DSTI/SC(2017)2/Final (Aug. 7, 2017) data on global steelmaking capacity and OECD, *Recent developments in steelmaking capacity*, DSTI/SC(2018)2/Final (2018).

STATEMENT OF CLAIMS

COUNT I

65. Plaintiff incorporates by reference paragraphs 1-64 of this Complaint.

66. The Constitution, Article I, Section 8 enumerates many of the legislative powers conferred on Congress. Clause 1 of Section 8 grants Congress the power "To lay and collect Taxes, Duties, Imposts and Excises" and Clause 3 of Section 8 empowers Congress to "regulate Commerce with foreign Nations." Thus, in the scheme of allocated powers established by the Constitution, Section 232 represents a delegation to the Executive by Congress of authority to exercise certain powers that otherwise are exclusively within the province of Congress.

67. Because Section 232 authority has been delegated to the President by Congress, it is inherently limited. It must be exercised as Congress directs and only for the purpose mandated by Congress. Any discretion afforded the President under Section 232 is not and cannot be without limits. *See*, *e.g.*, *Mistretta v. United States*, 488 U.S. 361, 371-373 (1989).

68. Section 232 authorizes the President to take action to "adjust" the imports of an article and its derivatives based on a finding that the article "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A). The statute requires that any action to adjust imports taken by

the President pursuant to Section 232 must be consistent with the purpose of protecting or furthering the national security.

69. The *Steel Report* states that the terms "national security" and "national defense" in Section 232 are understood to include the general security and welfare of certain industries that are deemed critical to the nation's economic well-being, as well as to meeting its defense needs. The *Steel Report* concluded that the national security requires a viable domestic steel industry, which it defined as one operating at an 80% or better average capacity utilization rate, and found that foreign imports were a significant contributor to the industry's declining production. *Steel Report* at 6. As set forth in the *Steel Report* and in the six steel proclamations to date, the alleged national security objective sought under Section 232 is the preservation of a viable domestic steel industry, with its viability defined in terms of its capacity utilization rate. The Section 232 adjustments or means chosen to achieve that purpose include tariff and other restrictions on foreign steel imports.

70. The *Steel Proclamation on Turkey* stated that in order to further reduce imports of steel and thereby increase domestic capacity utilization it was necessary and appropriate to double the existing Section 232 tariff on imports of steel from Turkey to a rate of 50% *ad valorem*. *Steel Proclamation on Turkey* at 40429 (para. 6), **Exhibit 2**. However, the facts do not support the contention that doubling the Section 232 tariffs on Turkey serves the proclaimed national security

purpose of increasing the domestic steel industry's capacity utilization rate. There is, in fact, no nexus between the President's action and achievement of the national security purpose, as defined by the President, that the action is asserted to promote.

71. 19 U.S.C. § 1862(d) sets forth factors that the President and the Secretary must consider in determining whether and how to adjust imports. Section 1862(d) states that "in the light of the requirements of national security and without excluding other relevant factors" the President must consider the capacity of domestic industries to meet projected national defense requirements and "the importation of goods in terms of their quantities, availabilities, character, and use" as they affect the capacity of the United States to meet national security requirements.

72. The President's Twitter statement that the relationship between the United States and Turkey are "not good" and the relevant trade figures available at the time demonstrate that the President's action to double the tariff on imports of steel from Turkey is based upon considerations unrelated to the factors required by Section 1862(d). The President's action is, therefore, not in accordance with the statute.

73. Neither the *Steel Report* nor the trade data support the declaration in the *Steel Proclamation on Turkey* that imposing a 50% tariff on Turkey alone would lead to the desired increase in the domestic industry's capacity utilization. None of the alternative adjustments to imports proposed in the *Steel Report*

support the proposition that action only against Turkey would be sufficient to achieve the reduction in imports to a level that would serve to promote higher domestic capacity utilization. The trade data clearly shows that elimination of all imports from Turkey and their replacement by domestic production would not by itself be enough to bring the domestic industry's capacity utilization rate to the target level.

74. Prior to imposition of the 50% tariffs, Turkish imports had already declined over 50% in 2018 as compared with 2017, more than for any other country subject to the Section 232 tariffs. The additional 25% tariff on rapidly declining volumes of imports from Turkey already subject to 25% tariffs could have no more than a negligible effect, if any, on achieving the goal of reducing imports in order to promote domestic capacity utilization. Thus, the doubling of the tariffs on Turkish imports was neither necessary nor appropriate to advancing the national security purpose proclaimed to underlie the President's actions pursuant to Section 232 to adjust steel imports.

75. The absence of a nexus between the President's action and carrying out the national security purpose of the statute mandated by Congress means that the President has acted outside the bounds of the authority delegated to him by Congress under Section 232. Accordingly, that action must be nullified as not in accordance with the authority delegated to the President by Congress under Section 232.

COUNT II

76. Plaintiff incorporates by reference paragraphs 1-64 of this Complaint.

77. A presidential action may be set aside if the President's action involves "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018); *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985); *Motion Systems Corp. v. Bush*, 437 F.3d 1356, 1361 (Fed. Cir. 2006) (en banc) (stating that courts may consider whether the President has violated an explicit statutory mandate).

78. Subsections (b) and (c) of Section 232, 19 U.S.C. § 1862(b)-(c), establish a process that must be followed before any actions to adjust imports may be taken. As discussed in the factual section of this complaint, among other procedural protections, the process devised by Congress in Section 232 includes an investigation by the Secretary of Commerce, consultation with the Secretary of Defense, a report on the findings of the investigation with respect to the effects of the targeted imports on national security and, if appropriate, a public comment and hearing process. Section 232 also requires that any actions to adjust imports must be consistent with the purpose of protecting or furthering the national security.

79. This statutory process was not followed with respect to the *Steel Proclamation on Turkey*. There was no investigation, report or consultation to determine

the effect on the national security of imports from Turkey prior to the issuance of the challenged proclamation to support the doubling of the tariffs on steel imports from that country alone. Unlike the *First Steel Proclamation* on global steel imports, there was no opportunity for interested parties to present information with respect to the national security impact of imports from Turkey. While Defendants may have sought to follow the statutory process laid out by Section 232 with respect to the initial Section 232 Proclamations affecting global steel imports, that process was not followed prior to the proclamation doubling the steel tariffs on Turkey.

80. In violation of the statutory requirements, the *Steel Proclamation on Turkey* imposed additional tariffs on imports from Turkey without following the procedures prescribed by Congress in the Trade Expansion Act of 1962, as amended. Failure to comply with the procedural requirements of Section 232 prior to issuing the *Steel Proclamation on Turkey* represents a serious procedural violation and has denied Plaintiff and similarly situated importers the benefit of the protection of their interests that inclusion of those requirements in the statute was intended to provide.

COUNT III

81. Plaintiff incorporates by reference paragraphs 1-64 of this Complaint.

82. The *Steel Proclamation on Turkey*, on its face, violates the Equal Protection Doctrine of the U.S.

Constitution by impermissibly discriminating between similarly situated domestic importers and selectively imposing an additional burden only on certain of those importers who import steel products from Turkey.

83. The equal protection of the laws of the United States is guaranteed by the Fifth Amendment's Due Process requirement, which prohibits the government from unjustifiably treating similarly situated persons differently. *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) ("[A]s this Court has recognized, discrimination may be so unjustifiable as to be violative of due process."). A classification that "neither burdens a fundamental right nor targets a suspect class" will be upheld "so long as it bears a rational relation to the some legitimate end." *Romer v. Evans*, 517 U.S. 620, 631 (1996); *Armour v. City of Indianapolis*, 566 U.S. 673, 680 (2012) ([A] classification neither involving fundamental rights nor proceeding along suspect lines . . . cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." (citation omitted))

84. Plaintiff is in all relevant aspects similarly situated to U.S. importers who import steel from countries other than Turkey and whose imports are subject to the 25% tariff set forth in the First through Fourth Presidential Proclamations. The *Steel Proclamation on Turkey* imposes a different, more burdensome treatment on U.S. importers of steel products from Turkey. There is no legitimate governmental purpose achieved by differentiating between U.S. importers based solely

on the country of origin of their steel imports and doubling the duty on imports from Turkey entered by Plaintiff and similarly situated U.S. importers. There being no legitimate governmental purpose for this discriminatory treatment, the *Steel Proclamation on Turkey* violates the Equal Protection Doctrine and is unconstitutional.

COUNT IV

85. Plaintiff incorporates by reference paragraphs 1-64 of this Complaint.

86. The Constitution's Due Process Clause provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

87. The Federal Circuit has stated that "an importer may be entitled to procedural due process regarding the resolution of disputed facts involved in a case of foreign commerce when the importer faces a deprivation of 'life, liberty, or property' by the Federal Government." *NEC Corp. v. United States*, 151 F.3d 1361, 1370 (Fed. Cir. 1998).

88. Plaintiff faces economic and competitive harm from the additional tariffs imposed by the *Steel Proclamation on Turkey* that were imposed without benefit of due process prior to the issuance of the *Steel Proclamation on Turkey* on August 10, 2018. They have in violation of the Constitution been deprived of their property without due process of law.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

(a) Enter judgment in favor of Plaintiff and declare the *Steel Proclamation on Turkey* unconstitutional, null and void;

(b) Enjoin Defendants from implementing or enforcing the *Steel Proclamation on Turkey* against Plaintiff;

(c) Order CBP to refund Plaintiff the difference between any tariffs collected by CBP on its imports of steel products pursuant to the *Steel Proclamation on Turkey* and the 25% *ad valorem* tariff that would otherwise apply on these imports; and

(d) Grant such additional relief as the Court may deem just and proper.

/s/ **Matthew Nolan**
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