APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2023-1891

HMTX INDUSTRIES LLC,
HALSTEAD NEW ENGLAND CORP., METROFLOR CORP.,
JASCO PRODUCTS COMPANY LLC,

Plaintiffs-Appellants

v.

UNITED STATES, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, JAMIESON GREER, U.S. TRADE REPRESENTATIVE, UNITED STATES CUSTOMS AND BORDER PROTECTION, RODNEY S. SCOTT, COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION,

Defendants-Appellees

Appeal from the United States Court of International Trade in Nos. 1:20-cv-00177-3JP, 1:21-cv-00052-3JP, Chief Judge Mark A. Barnett, Judge Claire R. Kelly, Judge Jennifer Choe-Groves.

Decided: September 25, 2025

PRATIK A. SHAH, Akin Gump Strauss Hauer & Feld LLP, Washington, DC, argued for plaintiffs-appellants. Also represented by MATTHEW R. NICELY, DEVIN S.

SIKES, JAMES EDWARD TYSSE, DANIEL MARTIN WITKOWSKI.

EMMA E. BOND, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellees. Also represented by SOSUN BAE, BRIAN M. BOYNTON, JOSHUA KOPPEL, PATRICIA M. MCCARTHY, JUSTIN REINHART MILLER, LOREN MISHA PREHEIM, ELIZABETH ANNE SPECK; PHILIP ANDREW BUTLER, MEGAN MICHELLE GRIMBALL, Office of the United States Trade Representative, Washington, DC; VALERIE SORENSEN-CLARK, Office of the Assistant Chief Counsel, International Trade Litigation, United States Customs and Border Protection, New York, NY.

Before LOURIE and HUGHES, *Circuit Judges*, and GILSTRAP, *District Judge*.[1]

HUGHES, *Circuit Judge*.

From 2017 to 2018, the Office of the United States Trade Representative (USTR) conducted an investigation which found that China was engaged in unreasonable or discriminatory conduct that burdens or restricts U.S. commerce. Following a period for notice and comment, USTR took discretionary action under Section 301 of the Trade Act of 1974 by imposing 25% duties on $50 billion of imports from China. This $50 billion trade action on List 1 and List 2—a reference to the list of Chinese products included in the affected Harmonized Tariff Schedules—is not challenged. After China retaliated against these

[1] Honorable Rodney Gilstrap, District Judge, United States District Court for the Eastern District of Texas, sitting by designation.

tariffs, USTR invoked Section 307 to modify its discretionary action and impose 10% duties, later increased to 25%, on an additional $200 billion of Chinese imports that fall under List 3. USTR then imposed 10% duties, later decreased to 7.5%, on approximately $120 billion in Chinese imports that fall under List 4A.

Plaintiffs-Appellants HMTX Industries, Halstead New England Corp., Metroflor Corp., and Jasco Products Co. LLC are businesses that import Chinese products subject to the List 3 and List 4A tariffs. They filed the first of over 3,600 cases at the Court of International Trade alleging that the List 3 and 4A tariffs were issued without statutory authority and in violation of the Administrative Procedure Act's requirements for notice and comment rulemaking. The main issue before this court is one of statutory interpretation, namely, whether Section 307 authorized USTR to modify its original Section 301 trade action by imposing escalatory tariffs on List 3 and List 4A.

The trial court agreed with the Government that the modifications were consistent with USTR's authority under Section 307(a)(1)(B), which allows USTR to modify an action where the burden or restriction imposed by the investigated conduct "has increased or decreased." 19 U.S.C. § 2417(a)(1)(B). Following a remand order instructing USTR to further explain how it considered significant public comments aired in response to the proposed modifications, USTR produced a remand redetermination articulating in greater detail its contemporaneous reasoning for the modified actions. On review, the trial court sustained the List 3 and List 4A tariff actions.

We decline to address the scope of USTR's authority under Section 307(a)(1)(B) and instead conclude that Section 307(a)(1)(C) independently authorized the Lists 3 and 4A tariff actions. We further conclude that USTR's remand redetermination complied with the trial court's lawful remand order and supplied the necessary clarification to meet the APA's requirements regarding notice-and-comment rulemaking. Accordingly, we affirm the trial court's final judgment and sustain USTR's challenged modifications.

I

A

We begin with a brief review of the Trade Act of 1974. Section 301 of the Act originally empowered the President to respond to unfair trade practices which burden or restrict United States commerce. Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041–43. Included in the President's powers to respond was the option to impose duties on foreign countries responsible for the harmful conduct. *Id.* at 2042. Section 141 of the 1974 Trade Act also created the agency that, in 1979, was redesignated the Office of the United States Trade Representative (USTR). *Id.* at 1999 (Section 141 is currently found at 19 U.S.C. § 2171); Reorganization Plan No. 3 of 1979, § 1(a), 93 Stat. 1381, 1381. In 1988, Congress transferred the authority to implement Section 301 from the President to USTR. Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, § 1301(a), 102 Stat. 1107 (Section 301 is currently found at 19 U.S.C. § 2411).

"[S]ubject to the specific direction, if any, of the President," Section 301 of the 1974 Trade Act empowers USTR to respond to unfair trade practices. 19 U.S.C. § 2411(a), (b)(2). Section 301 specifies the circumstances in which USTR must take either

"[m]andatory action" or may take "[d]iscretionary action" to eliminate an unfair trade practice by a foreign country. *Id.* § 2411(a), (b). Like the President prior to 1988, USTR's scope of authority to take action includes the power to "impose duties or other import restrictions on the goods of . . . such foreign country for such time as [USTR] determines appropriate." *Id.* § 2411(c)(1)(B). Before taking action under Section 301, USTR has to complete various steps. It must initiate an investigation (*id.* § 2412); consult with the foreign country regarding the practices being investigated (*id.* § 2413); determine whether the requisite conditions for action are met, and if so, publish its proposed action and the factual findings on which it is based (*id.* § 2414); and allow for public comment on the proposed action and publication of the final action (*id.* § 2412(a)(4), § 2412(b)(1)(A), § 2414(c)).

Various conditions can trigger "[m]andatory action," including "an act, policy, or practice of a foreign country" that violates a trade agreement with the United States or is "unjustifiable and burdens or restricts United States commerce." *Id.* § 2411(a)(1)(B). Mandatory actions are subject to a proportionality requirement, meaning they must "affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce." *Id.* § 2411(a)(3). Discretionary actions are not subject to the same restriction. Section 301(b) provides that,

> If the [USTR] determines under section 2414(a)(1) of this title that—
>
> > (1) an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and

> (2) action by the United States is appropriate, the [USTR] shall take all appropriate and feasible action authorized under subsection (c), subject to the specific direction, if any, of the President regarding any such action, . . . to obtain the elimination of that act, policy, or practice. . . .

Id. § 2411(b) (titled "Discretionary Action").

In other words, if an investigation leads USTR to determine that a burdensome foreign practice is "unreasonable or discriminatory"—as opposed to "unjustifiable"—and that action is appropriate, USTR's discretionary powers are activated. *Id.* At that point, USTR may take "all appropriate" action to obtain a reversal of that practice, subject to the scope of its authority. *Id.* The terms "unreasonable," "unjustifiable," and "discriminatory" are defined by Section 301 at § 2411(d)(3), § 2411(d)(4), and § 2411(d)(5) respectively, and are not at issue on appeal.

As part of the 1988 amendments to the 1974 Trade Act, Congress added Section 307, titled "Modification and termination of actions," to give USTR the authority to "modify or terminate" a Section 301 action. Pub. L. No. 100-418, § 1301(a), 102 Stat. 1107 (Section 307 is currently found at 19 U.S.C. § 2417). Section 307(a)(1) articulates the circumstances in which modification is permitted:

> The [USTR] may modify or terminate any action, subject to the specific direction, if any, of the President with respect to such action, that is being taken under section 2411 of this title if—

> (A) any of the conditions described in section 2411(a)(2) [releasing USTR from the requirement to take mandatory action] exist,
>
> (B) the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are the subject of such action has increased or decreased, or
>
> (C) such action is being taken under section 2411(b) of this title and is no longer appropriate.

19 U.S.C. § 2417(a)(1).

The operation of Section 307 is such that Section 307(a)(1)(A) applies only to mandatory action, Section 307(a)(1)(C) applies only to discretionary action, and Section 307(a)(1)(B) applies to either mandatory or discretionary actions. Section 307(a)(1)(A) refers to conditions when mandatory action is no longer required, Section 307(a)(1)(C) explicitly refers to discretionary action taken under Section 301(b), and Section 307(a)(1)(B) applies to any action taken under Section 301. Before modifying an action, USTR is also obligated to consult "with representatives of the domestic industry concerned" and to provide an opportunity for other affected parties to present their views on "the effects of the modification or termination and whether any modification or termination of the action is appropriate." *Id.* § 2417(a)(2).

B

On August 14, 2017, President Trump issued a memorandum directing USTR to determine whether to investigate "any of China's laws, policies, practices,

or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development." Addressing China's Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology, 82 Fed. Reg. 39,007, 39,007 (Aug. 17, 2017). Four days later, USTR initiated a "Section 301 Investigation" pursuant to the 1974 Trade Act and subsequently requested public comment. Initiation of Section 301 Investigation; Hearing; and Request for Public Comment: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 82 Fed. Reg. 40,213, 40,213–14 (Aug. 24, 2017). The notice of investigation explained that USTR would focus on four categories of conduct by the Chinese government: (1) practices to force or induce U.S. companies operating in China to transfer their technology and intellectual property to Chinese companies; (2) policies and regulations that deprive U.S. companies of the ability to set market-based terms in licensing with Chinese companies; (3) efforts to direct and unfairly facilitate the systematic investment in, and/or acquisition of, U.S. companies and their assets by Chinese companies in order to generate large-scale technology transfer in strategic industries; and (4) cybertheft of intellectual property, trade secrets, or confidential business information by intrusions into U.S. commercial computer networks. *Id.* Concurrently, USTR requested consultations with the government of China, which opposed the initiation of a Section 301 investigation. J.A. 01557.

After a seven-month investigation, USTR published a report detailing the factual support for its finding that the Chinese government was engaging in each of the four categories of investigated conduct in a manner that was unreasonable or discriminatory and burdened

or restricted U.S. commerce. Office of the United States Trade Representative, Findings of the Investigation into China's Acts, Policies, And Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974 (2018), https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF. It promptly issued a notice of its determination and requested public comment on an appropriate action in response to the investigated conduct. Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 14,906, 14,906–54 (Apr. 6, 2018). The notice explained that the investigated acts, policies, and practices were actionable under Section 301(b), and that, pursuant to direction from President Trump, the USTR "proposes that appropriate action would include increased tariffs on certain goods of Chinese origin." *Id.* at 14,907. USTR's proposed discretionary action was a 25% tariff on two lists of Chinese goods, specified by product subheadings from the Harmonized Tariff Schedule (HTS) of the United States, then cumulatively worth $50 billion in annual trade value. *Id.* at 14,907, 14,910–54. These two lists are referred to as List 1 and List 2. On June 20, 2018, USTR published notice of the final List 1 items, covering $34 billion in trade value, on which it would impose a 25% tariff. Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 28,710, 28,711 (June 20, 2018). On August 16, 2018, USTR published notice of the final List 2 items, covering an additional

$16 billion in trade value, that would be tariffed at the same rate. Notice of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 40,823, 40,823–24 (Aug. 16, 2018). The List 1 and List 2 tariffs are not the subject of this appeal.

In retaliation to USTR's initial action, China raised tariffs on $50 billion worth of exports from the United States. President Trump determined that China had no "intention of changing its unfair practices related to the acquisition of American intellectual property and technology" and directed the USTR to "identify $200 billion worth of Chinese goods for additional tariffs at a rate of 10 percent." J.A. 01872. Between mid-2018 and early 2020, the USTR, at the continued direction of the President, invoked Sections 307(a)(1)(B) and 307(a)(1)(C) to modify its discretionary action several times. These modifications culminated in the additional Lists 3 and 4A tariffs—imposed on at least $300 billion worth of Chinese imports—that are the subject of this appeal.

The modifications began in July 2018, when USTR published a notice of its proposal to "modify the action in this investigation by taking a further, supplemental action"—specifically, "an additional 10 percent ad valorem duty on products [from] China" with "an annual trade value of approximately $200 billion," specified in List 3. Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 33,608, 33,609 (Jul. 17, 2018) (*"List 3 NPRM"*). USTR cited to Section 307(a)(1)(C) as authority for the modification, explaining that the

modification was "appropriate" in light of (1) the 1974 Trade Act's statutory goal of obtaining the elimination of the investigated conduct, (2) China's unwillingness to "respond to action at a $50 billion level by addressing U.S. concerns," (3) the President's direction, and (4) "China's announced retaliatory action ($50 billion) and the level of Chinese goods imported into the United States ($505 billion in 2017)." *Id.* About a month later, USTR proposed increasing the tariff on List 3 items from 10% to 25% and accordingly extended the period for public comments. Extension of Public Comment Period Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 38,760, 38,760–61 (Aug. 7, 2018)). USTR received over 6,000 written comments in response to the proposed List 3 tariffs.[2]

Eleven days after the deadline for written comments had elapsed, on September 17, 2018, President Trump issued a statement announcing that USTR would proceed with a two-phase implementation of the List 3 tariffs on the subject $200 billion of imports from China. J.A. 06159. USTR accordingly published notice of the final List 3 tariff action, this time relying on both Section 307(a)(1)(B) and Section 307(a)(1)(C) as authority for the modification. Notice of Modification of Action Pursuant to Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 47,974, 47,974 (Sept. 21, 2018) (*"Final List 3"*). Paralleling the language of these provisions, USTR

[2] Although not submitted as part of the underlying docket, these comments are publicly available at https://www.regulations.gov/docket/USTR-2018-0026.

stated that "the burden or restriction on United States commerce of the acts, policies, and practices that are the subject of the Section 301 action continues to increase" and "China's response . . . has shown that the current action no longer is appropriate." *Id.* at 47,974–75. USTR also indicated that it "carefully reviewed the public comments" and accordingly decided "not to include certain tariff subheadings" in List 3. *Id.* at 47,975. The additional tariffs on List 3 products became effective September 24, 2018. *Id.*

In the months that followed, USTR modified implementation of the List 3 tariffs in response to U.S.-China trade negotiations. At first, and at the direction of the President, it delayed in increasing the tariffs on List 3 items from 10% to 25% in response to progress in discussions with China. Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 65,198, 65,198–99 (Dec. 19, 2018); Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 7,966, 7,966–67 (Mar. 5, 2019). When China decided to "retreat from specific commitments agreed to in earlier rounds" of negotiations with the United States, USTR, at President Trump's direction, increased the duties on List 3 items to 25%. Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 20,459, 20,459 (May 9, 2019).

In response to "further retaliatory action against U.S. commerce," the President directed, and USTR proposed, another modification to the discretionary action against China. Request for Comments

Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 22,564, 22,564 (May 17, 2019) (*"List 4 NPRM"*). The proposed modification took the form of an additional tariff, "of up to 25 percent," on a fourth list of Chinese imports worth $300 billion in annual trade value. *Id.* USTR again referenced Sections 307(a)(1)(B) and 307(a)(1)(C) as independent bases for the proposed List 4 tariffs. *Id.* Although the tariffs on Lists 1 through 4 would result in a duty on "essentially all products" imported from China (worth approximately $500 billion at the time, USTR explained its view that modification was reasonable "[i]n light of China's failure to meaningfully address the acts, policies, and practices that are subject to this investigation and its response to the current action being taken in this investigation." *Id.* Notice of the proposed modification again solicited comments, *id.* at 22,565, resulting in almost 3,000 additional written submissions.[3]

USTR ultimately decided to split List 4 into Lists 4A and 4B, and to begin by imposing a 10% tariff on List 4A items on September 1, 2019. Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 43,304, 43,304–05 (Aug. 20, 2019) (*"Final List 4"*). Appellants estimate that the annual trade value of the items on List 4A was then approximately $120 billion. Appellants' Opening Br. 22. Ten days later, at the President's direction, USTR increased tariffs on List 4A to 15%,

[3] Although not submitted as part of the underlying docket, these comments are publicly available at https://www.regulations.gov/docket/USTR-2019-0004.

citing additional tariff and non-tariff retaliation from China. Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 45,821, 45,822 (Aug. 30, 2019) ("China has determined to impose tariffs on a substantial majority of U.S. goods exported to China, with the goal of pressuring the United States to cease its efforts to obtain the elimination of China's unfair policies. China has further taken or threatened to take additional countermeasures, including . . . steps to devalue its currency.").

By December 2019, however, the state of diplomatic affairs had changed. USTR announced that "the United States and China reached a historic and enforceable agreement on a Phase One trade deal that requires structural reforms and other changes to China's economic and trade regime, including with respect to certain issues covered in this Section 301 investigation." Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 69,447, 69,447 (Dec. 18, 2019). Although 15% tariffs on List 4B were supposed to go into effect December 15, 2019, USTR indefinitely suspended the List 4B tariffs, finding them "no longer appropriate" in the context of the Phase One trade deal with China. *Id*. At the President's direction, USTR further reduced the tariffs on List 4A to 7.5% once the Phase One trade deal came into force. Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 85 Fed. Reg. 3,741, 3,741 (Jan. 22, 2020). Thus, by the start of 2020, USTR was imposing a 25% tariff on List 1 and List 2 items worth $50 billion (the original Section 301

action), and a 25% tariff on List 3 goods worth $200 billion as well as a 7.5% tariff on List 4A goods worth at least $100 billion (the modified Section 301 action).

The present appeal requires us to determine whether USTR had the authority to modify its original Section 301 action to impose tariffs on items enumerated in List 3 and List 4A.

C

In September 2020, Plaintiffs-Appellants, HMTX Industries, Halstead New England Corp., Metroflor Corp., and Jasco Products Co. LLC filed suit at the Court of International Trade alleging that the List 3 and 4A tariffs were issued without statutory authority and in violation of the APA. Compl. ¶¶ 65–69, 73–75, *HMTX Indus. LLC v. United States*, Case No. 20-cv-00177 (Ct. Int'l Trade Sept. 21, 2020), ECF No. 12. Appellants are all businesses that import products subject to the List 3 and List 4A tariffs. Approximately 3,500 additional suits raising substantially similar claims were brought before the trial court (the "Section 301 Cases"). In response, the trial court collected these cases into one "master case," *see In re Section 301 Cases*, Case No. 21-cv-00052 (Ct. Int'l Trade Feb. 10, 2021), ECF No. 1 at 1, and selected Appellants' case as the "the sample case for purposes of the court's initial consideration and resolution of Plaintiffs' claims," *id*., ECF No. 267 at 1. All other Section 301 Cases were stayed pending the resolution of Appellants' case. *Id*.

The trial court found that "USTR exercised its authority consistent with [S]ection 307(a)(1)(B) when it promulgated List 3 and List 4A" and declined to address whether USTR's actions were also authorized under Section 307(a)(1)(C). *In re Section 301 Cases*, 570 F. Supp. 3d 1306, 1334–35 (Ct. Int'l Trade 2022)

("*Section 301 Cases I*"). With respect to Section 307(a)(1)(B), the trial court concluded that "China's retaliatory conduct caused an increased burden on U.S. commerce from the acts, policies, and practices that constituted the subject of the [original Section 301] action," and thus justified modified action in the form of additional tariffs. *Id*. at 1332, 1334. The trial court explained that China's retaliatory measures were linked to the original Section 301 action because they were intended to maintain China's four categories of unfair conduct and to offset the original tariffs imposed to encourage their elimination. *Id*. at 1334.

Regarding the alleged APA violations, the trial court agreed with Appellants that USTR failed to adequately respond to comments as required by the APA's notice-and-comment rulemaking procedures. *Id*. at 1338. Although USTR's notices of proposed rulemaking indicated a "willingness to consider factors other than the President's direction," the contested final actions did not respond to significant issues raised in the comments—including "concerns regarding the legality and efficacy of the tariffs, the potential for damage to the U.S. economy, and whether alternative measures would be more effective"—or explain the relationship between issues raised in the comments and the President's direction. *Id*. at 1341, 1339. The trial court ordered a limited remand for USTR to reconsider or further explain its rationale for the List 3 and 4A tariffs, warning that USTR "may not identify reasons that were not previously given." *Id*. at 1345.

In a 90-page remand determination, USTR responded in more detail to the categories of comments highlighted by the trial court and further contextualized how it weighed the President's direction when taking modified actions. In March 2023, the trial court

sustained USTR's remand determination and entered a final judgment sustaining the List 3 and List 4A tariffs. *In re Section 301 Cases*, 628 F. Supp. 3d 1235, 1251 (Ct. Int'l Trade 2023) ("*Section 301 Cases II*"). The trial court was satisfied by USTR's explanation that it views the Trade Act of 1974 as affording it little discretion to diverge from the President's direction, and by USTR's account of how it balanced commenters' concerns with the Presidential direction it had received. *Id*. at 1246–49.

Appellants timely appealed on May 12, 2023. The trial court had jurisdiction over Appellant's case pursuant to 28 U.S.C. § 1581(i). We have jurisdiction under 28 U.S.C. § 1295(a)(5).

Before us, Appellants argue that "nothing in Section 307" permits USTR's List 3 and 4A tariff actions, and that USTR failed to cure its APA violations on remand. Appellants' Opening Br. 4–5. We conclude that USTR did not misconstrue Section 307(a)(1)(C) by interpreting it to independently authorize the Lists 3 and 4A tariff actions. We further conclude that USTR's remand redetermination complied with the trial court's remand order and cured its original violations of the APA's procedural requirements. Accordingly, we affirm.

II

"We review the Court of International Trade's decision de novo, applying the same standard of review applied by the Court of International Trade in its review of the administrative record." *Dongbu Steel Co. v. United States*, 635 F.3d 1363, 1369 (Fed. Cir. 2011); *see also Corus Staal BV v. Dep't of Com.*, 395 F.3d 1343, 1346 (Fed. Cir. 2005) ("We review the grant of judgment on the agency record by the Court of International Trade without deference."). Because this

case arose under 28 U.S.C. § 1581(i), the Administrative Procedure Act standard of review applies. *Shakeproof Indus. Prods. Div. of Ill. Tool Works Inc. v. United States*, 104 F.3d 1309, 1313 (Fed. Cir. 1997). The APA requires us to "decide all relevant questions of law, interpret constitutional and statutory provisions," and to "hold unlawful and set aside agency action" which is "(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; [or] (E) unsupported by substantial evidence." 5 U.S.C. § 706.

In other words, and as is relevant here, we review de novo the question of whether USTR properly exercised its authority pursuant to the Trade Act of 1974 and satisfied the statutory requirements for notice and comment procedures under the APA. Although "this court affords substantial deference to decisions of [USTR] implicating the discretionary authority of the President . . . , the judiciary is the final authority on issues of statutory construction." *Gilda Indus., Inc. v. United States*, 622 F.3d 1358, 1363 (Fed. Cir. 2010) (internal citations omitted).

III
A

As an initial matter, we reject the Government's argument that the List 3 and 4A tariffs were the outcome of the President's discretionary decisions, not agency action, and thus not reviewable under the APA. Appellees' Response Br. 15–16, 19–27; *see also Section 301 Cases I*, 570 F. Supp. 3d at 1324–25 (noting the lack to authority to support the government's position

"that *antecedent* presidential direction lacking any direct effect on relevant parties renders List 3 and List 4A non-reviewable presidential actions.").

None of the cases the Government cites support its position, as they all relate to decisions taken by the President pursuant to statutory provisions that delegate to the President, and not to an agency, the authority to take final action. *See, e.g.*, *USP Holdings, Inc. v. United States*, 36 F.4th 1359, 1362–63 (Fed. Cir. 2022); *Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1357 (Fed. Cir. 2006); *Solar Energy Indus. Ass'n v. United States*, 86 F.4th 885, 890 (Fed. Cir. 2023). In 1988, Congress transferred authority to enforce Section 301 from the President to USTR. It also expanded USTR's authority by enacting Section 307, which states that USTR—not the President—"may modify or terminate any [Section 301] action, *subject to the specific direction, if any, of the President*." 19 U.S.C. § 2417(a)(1) (emphasis added). USTR's own remand determination stated that the President's specific direction was *one of three factors* it considered in deciding to modify its action by expanding tariffs on Chinese products. J.A. 10643 ("[T]he Trade Representative considered: (1) the specific direction of the President, (2) statutory factors, and (3) the public comments and testimony.").

The trial court correctly accepted such representations and gave weight to USTR's explanation "that the judgments reflected in the construction of Final List 3 and Final List 4A were its own." *Section 301 Cases II*, 628 F. Supp. 3d at 1246 (internal citation and emphasis omitted). We affirm the trial court's well-reasoned conclusion that "'actions involving discretionary authority delegated by Congress to the President' . . . are distinct from those 'involving authority delegated by Congress to an agency,'" and that the List 3 and 4A tariffs

implicate the latter category of actions reviewable under the APA. *Section 301 Cases I*, 570 F. Supp. 3d at 1324 (quoting *Detroit Int'l Bridge Co. v. Gov't of Can.*, 189 F. Supp. 3d 85, 98–105 (D.D.C. 2016)).

B

Appellants argue that USTR exceeded its statutory authority to "modify" an action under Section 307 when it increased its original $50 billion action into an at least $350 billion action by imposing tariffs on Lists 3 and 4A. Although the trial court sustained these modified actions by reference to USTR's authority under Section 307(a)(1)(B), we affirm USTR's modified actions on alternate grounds, with reference only to Section 307(a)(1)(C). The Government agrees that Section 307(a)(1)(C) provided an independent basis for USTR's modified action. Appellees' Response Br. 28–29. As such, we need not and do not reach the question of whether the modified actions on appeal are within the scope of USTR's authority under Section 307(a)(1)(B).

"As in any case of statutory construction, our analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal citations and quotation marks omitted). Subject to the President's direction, Section 307(a)(1) allows USTR to "modify or terminate any action" being taken under Section 301, when, under subsection (C), such action is "no longer appropriate." 19 U.S.C. § 2417(a)(1), (a)(1)(C). The parties dispute both the meaning of the term "modify" and the phrase "no longer appropriate."

"When a statute includes an explicit definition of a term, we must follow that definition, even if it varies from a term's ordinary meaning." *Van Buren v. United*

States, 593 U.S. 374, 387 (2021) (internal citations and quotation marks omitted). Although the parties provide conflicting dictionary definitions of "modify"—as limited to "moderate[ ]" or "minor" change, *see* Appellants' Opening Br. 33, versus broad enough to encompass "important" change, *see* Appellees' Response Br. 38—the Trade Act of 1974 only defines "modification" as a term which "includes the elimination of any duty or import restriction," 19 U.S.C. § 2481(6). As we have previously recognized, this is "an open-ended definition [that] does not *exclude* anything." *Solar Energy*, 86 F.4th at 896 (emphasis in original). Section 307(a)(1) similarly places no limit on the scope of the term "modify." Thus, we make two observations regarding the meaning of "modify" in Section 307. The first is that "modify" is indifferent to degrees of change and contains no inherent limitations: "elimination" of a duty, the only example of a modification provided by the statute at Section 2481, encompasses major changes because the relative impact of a duty could be large. Second, "modify" is indifferent to the direction of change and encompasses both escalations and de-escalations in trade actions. This understanding is confirmed by the structure of the statute. Section 307(a)(1)(B), separately from Section 307(a)(1)(C), provides for modified action in view of "increased or decreased" burdens or restrictions on United States commerce, plainly requiring that "modify," as used in the parent clause Section 307(a)(1), covers both increases and decreases in action.

Appellants nonetheless argue that "modify" has an implied upward limit and cannot encompass a change as large as the change between USTR's original and modified Section 301 actions in this case. They rely on *Solar Energy*, where we stated that "a 'modification' must be a relatively minor adjustment," 86 F.4th at

901, and on *Biden v. Nebraska*, Appellants' Opening Br. 33, where the Supreme Court repeated that "statutory permission to 'modify' does not authorize 'basic and fundamental changes in the scheme' designed by Congress," 600 U.S. 477, 494 (2023) (quoting *MCI Telecomms. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 225 (1994)). The treatment of the term "modify" in both cases is distinguishable.

In *Solar Energy*, this Court observed that the President's power to "modify" duties to protect domestic industries from injury pursuant to Sections 201 and 204 of the Trade Act of 1974 was subject to a "phase-down requirement, preventing the modified tariff from being any higher than the tariff that was imposed in the preceding year." 86 F.4th at 901. Thus, there was an explicit upward limit to the President's power to "modify" an action under Section 204 that is not present on USTR's power to "modify" an action under Section 307. Meanwhile, in *Biden*, the Court was concerned with the power of the Secretary of Education to "modify" "statutory or regulatory provisions" promulgated by Congress, which implicates separation of powers concerns not at issue here. 600 U.S. at 494, 505. In Section 307, Congress gave USTR the power to modify its *own* agency actions, not the statute authorizing those actions. If Congress had wanted to limit the scope of that authority, it could have done so. And indeed, it did so when it limited the scope of USTR's authority to modify mandatory actions by subjecting them to a proportionality requirement. 19 U.S.C. § 2411(a)(3). Discretionary actions—and their modifications—are not subject to a proportionality requirement or any other express limit on the scale of their impact.

Discretionary actions are, however, limited with regard to their "appropriate[ness]." *Id*. § 2411(b)(2). The phrase "no longer appropriate" in Section 307(a)(1)(C) refers to Section 301(b), which uses the term "appropriate" twice. To take a discretionary action, USTR must first determine that "action by the United States is appropriate." *Id*. If so, Section 301(b) permits USTR to "take all appropriate and feasible action authorized under [Section 301(c)]," subject to the President's direction, to "obtain the elimination" of the investigated acts, policies, or practices that are unreasonable or discriminatory and burden or restrict United States commerce. *Id*.

Appellants argue that Section 307(a)(1)(C) only provides authority to reduce or terminate a Section 301(b) action. Appellants' Opening Br. 43. In contrast, the Government takes the position that Section 307(a)(1)(C)'s modification authority extends to situations in which prior, predictive action proved insufficient to its stated purpose, necessitating increased action that is more appropriate. *See* Appellees' Response Br. 36. We hold that the statute "favor[s] the government's broader view, as the statute simply does not contain the narrowing limitation the [Appellants] read into it." *Solar Energy*, 86 F.4th at 895; *see also id.* at 896–98 (holding that the President did not clearly misconstrue his authority to "modify" duties under Section 204 as permitting both trade-liberalizing *and* trade-restricting modifications because nothing in the statute expressly limits the President's authority only to reducing duties).

Appellants interpret the phrase "no longer appropriate" to mean that Section 307(a)(1)(C) only allows for modification "after changed circumstances undermine the original finding that taking responsive action was 'appropriate.'" Appellants' Opening Br. 44. They note

that this reading is consistent with USTR's own prior practice; before the action on appeal, USTR had only invoked Section 307(a)(1)(C) five times, and always to reduce or terminate an action. *See id*. at 49–51 (listing prior actions). Finally, Appellants suggest that Section 307(a)(1)(A) and (C) should be read as parallel provisions. *Id*. at 45–46. Because Section 307(a)(1)(A) only allows USTR to taper down mandatory actions, Appellants ask us to read Section 307(a)(1)(C) as functioning in the same way for discretionary actions.

We decline to do so, as Appellants' arguments are untethered from the text of the statute itself. Without more, Section 307(a)(1)(C)'s reference to discretionary action that is "no longer appropriate" does not mean that no further increases in action are appropriate. Although Sections 307(a)(1)(A) and (C) are subparts of the same statutory section on USTR's modification authority, they are constrained by different criteria. Section 307(a)(1)(A) cross-references nine situations in which mandatory action is no longer required and USTR's modification authority is triggered. 19 U.S.C. § 2411(a)(2). Section 307(a)(1)(C) makes no reference to the specific circumstances in which USTR's authority to modify discretionary actions is triggered. "[W]hen we're engaged in the business of interpreting statutes we presume differences in language like this convey differences in meaning." *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86 (2017). Because Sections 307(a)(1)(A) and (C) are not written to mirror each other, we cannot suppose they operate in the same way. Although USTR's prior actions can be insightful, they cannot be used to limit the proper interpretation of a statute where express limitations do not exist.

Although "appropriate" is a non-specific term, it is anchored by the statute to a specific purpose: an appropriate discretionary action is one that can end or reverse the investigated conduct. 19 U.S.C. § 2411(b)(2). The directive to take "all appropriate action" is broad, and what constitutes an "appropriate" action is within USTR's discretion to determine, subject to the President's direction. *Id*.[4] The statutory silence surrounding the scope of the term "modify" and the phrase "no longer appropriate" lead us to conclude that USTR has similar discretion to determine how, and by how much, to "modify" an action under Section 307(a)(1)(C). Though Appellants may have informed reasons to disagree with the methods that USTR employed to discourage China's investigated conduct, the statute does not provide for the limits on USTR's modification authority that Appellants seek to impose.

We conclude USTR acted properly when it invoked Section 307(a)(1)(C) to promulgate the Lists 3 and 4A tariffs. When announcing that it would impose the List 3 tariffs, for example, USTR explained that "[t]he judgment during the period of investigation, based on then-available information, was that a $50 billion action would be effective in obtaining the elimination of China's policies. China's response, however, has shown that the current action no longer is appropriate. China has made clear . . . that it will not change its policies in response to the current Section 301 action." *Final List 3*, 83 Fed. Reg. 47,974, 47,975. USTR repeated this logic when justifying the List 4A tariffs. *See Final List 4*, 84 Fed. Reg. 43,304, 43,304 ("As of

[4] As Appellants themselves conceded in oral argument, USTR could have properly determined that a $300 billion (as opposed to $50 billion) tariff action was an appropriate initial Section 301 action following its investigation. Oral Arg. at 2:31–2:50.

May 2019, China's statements and conduct indicated that action at a $250 billion level was insufficient to obtain the elimination of China's unfair and harmful policies.").

In *Solar Energy*, we acknowledged the importance of not interpreting "modify" in a way that would allow absurd results. *Solar Energy*, 86 F.4th at 901. Appellants express concern that interpreting Section 307(a)(1)(C) to authorize USTR's modified actions in this case amounts to "permit[ting] the Administration to prosecute a limitless trade war." Appellants' Opening Br. 4. We disagree. Any modified action taken pursuant to Section 307(a)(1)(C) is still tied to the original Section 301 action, *see* 19 U.S.C. § 2417(a)(1), and must be tailored to achieve Section 301's statutory goal of eliminating the investigated conduct, *see* 19 U.S.C. § 2411(b)(2). Nothing in the statute suggests that Section 307 can be relied upon by USTR to raise tariffs for any reason or by an amount that exceeds what USTR believes to be appropriate to achieve the ends of a discretionary Section 301(b) action. USTR appears to have responded to this limit on its modification authority throughout. For example, the List 4 tariffs were repeatedly modified to punish or reward China's willingness to address the investigated conduct and were not pursued in full when China agreed to cooperate. Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 69,447, 69,447 (Dec. 18, 2019); Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 85 Fed. Reg. 3,741, 3,741 (Jan. 22, 2020).

We also disagree with Appellants' suggestion that our construction of Section 307(a)(1)(C) renders Section 307(a)(1)(B) superfluous. We have a duty to construe a statute such that "no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (internal citations omitted). Section 307(a)(1)(B) applies to both mandatory and discretionary actions. Even if Appellants were right that USTR will always prefer Section 307(a)(1)(C) over (B) to modify a discretionary action under our construction, Appellants' Opening Br. 46–47, Section 307(a)(1)(B) maintains independent significance as the only clause which allows USTR to increase a mandatory action in view of increased burdens on commerce. 19 U.S.C. § 2417(a)(1)(B) (stating that USTR "may modify or terminate any action . . . if . . . the burden or restriction on United States commerce . . . has increased"). The Government adds that Appellants' assumption is in any case incorrect. Appellees' Response Br. 41. It is conceivable that USTR may be unable to determine that a given discretionary action has become inappropriate—in view of the President's direction or the state of trade negotiations—but nonetheless determine that the burden of the investigated conduct has increased or decreased. *Id*. In such a situation, USTR would still have to rely on Section 307(a)(1)(B) to modify its discretionary action. Thus, Appellants fail to demonstrate that superfluity results from our construction.

Now that we have determined that USTR did not misconstrue Section 307(a)(1)(C) by interpreting it to authorize its modified actions, we can consider whether Section 307(a)(1)(C) violates the Constitution. Appellants believe that USTR's reliance on Section 307(a)(1)(C) raises a non-delegation problem. *See* Appellants' Opening Br. 52–54. Not so. Where non-

delegation concerns are raised, "[t]he constitutional question is whether Congress has supplied an intelligible principle to guide the delegee's use of discretion." *Gundy v. United States*, 588 U.S. 128, 135 (2019). The standard for "intelligible principle" is "not demanding." *Id*. at 145–46. A statute will be unconstitutional where Congress "failed to articulate *any* policy or standard to confine [the delegee's] discretion," but broad delegations "to regulate in the public interest" or as "requisite to protect the public health" have been upheld. *Id*. (internal citations and quotation marks omitted). Section 307(a)(1)(C) plainly provides an intelligible principle for USTR's authority to modify a discretionary action. As the Government succinctly explains, "Section 307(a)(1)(C) authorizes only those actions that would have been permissible in the first instance under Section 301(b)—specifically, those appropriate to obtain the elimination of the foreign practices found to be unfair after a full investigation." Appellees' Response Br. 43 (citing 19 U.S.C. § 2417(a)(1); *id*. § 2411(a)–(b)).

This standard provides the specificity that is required for Congress to delegate some of its authority to USTR. And indeed, Appellants appear to concede that USTR's mandate to take "all appropriate action" to end or reverse the investigated conduct under Section 301(b) does not raise a non-delegation problem. *See* Appellants' Opening Br. 3 (describing the List 1 and 2 tariffs as "arguably within the authority Congress delegated to USTR"); Appellees' Response Br. 44. Appellants do not explain why the Government's construction of Section 307(a)(1)(C) risks placing fewer boundaries on USTR's authority than Section 301(b) itself. Their argument seems to assume that an increase in action can become divorced from the purpose of the original Section 301 action, as

informed by USTR's investigation. Appellants' Opening Br. 52–54. Though Appellants disagree with USTR that the Lists 3 and 4A tariffs were "appropriate" means to achieve Section 301's ends, we do not discern any constitutional violation in the statute.

For similar reasons, we reject Appellants' theory that USTR's challenged modifications implicate the major questions doctrine. "Agencies have only those powers given to them by Congress," and the major questions doctrine prevents agencies from claiming "[e]xtraordinary grants of regulatory authority" based on "vague" or "modest words" where there may be "reason to hesitate before concluding that Congress meant to confer such authority." *West Virginia v. EPA*, 597 U.S. 697, 721, 723 (2022) (internal citations and quotation marks omitted). Though Appellants analogize the scale and magnitude of USTR's Lists 3 and 4A tariffs to the kinds of changes unsuccessfully pursued by the EPA in *West Virginia* and the Secretary of Education in *Biden*, the agency actions at issue here could not be more different. In the cases cited by Appellants, the agencies attempted to modify the very nature of their regulatory authority. In *West Virginia*, for example, the EPA transformed the scope of Section 111 of the Clean Air Act "to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself." 597 U.S. at 724. Similarly, in *Biden*, the Secretary effectively rewrote the HEROES Act to grant itself the power to waive repayment obligations in circumstances beyond those provided for by the statute. 600 U.S. at 496 (concluding that while Congress specified in the Education Act "a few narrowly delineated situations" that could qualify a borrower for loan discharge, "the Secretary has expanded forgiveness to nearly every borrower in the country"). Likewise, this case is distinguishable from

our recent decision in *V.O.S.*, where the major questions doctrine was implicated because the tariffs at issue were "'unheralded' and 'transformative,'" the government had "never previously claimed powers of th[at] magnitude" under the relevant statute (International Emergency Economic Powers Act (IEEPA)), the "basic and consequential tradeoffs" inherent in the President's decision to impose those tariffs were "ones that Congress would likely have intended for itself," and there was "no clear congressional authorization by IEEPA for tariffs of the magnitude of [those implemented]." *V.O.S. Selections, Inc. v. Trump*, No. 2025-1812, 2025 WL 2490634, at *13–15 (Fed. Cir. Aug. 29, 2025) (en banc) (citations omitted), *cert. granted*, 2025 WL 2601020 (U.S. Sept. 9, 2025) (No. 25-250).

The Lists 3 and 4A tariffs may, at best, be a new use of USTR's regulatory authority, but they do not involve a transformation of USTR's regulatory authority. USTR has modified its own unchallenged and statutorily permissible original action in this case, not the underlying Trade Act of 1974. As we have established, the statute permits USTR to impose and modify tariffs in response to unfair foreign trade practices, and Congress afforded USTR substantial discretion in determining what trade actions are appropriate. Such "clear congressional authorization" for the challenged action means that this cannot be a major questions case. *West Virginia*, 597 U.S. at 724.

IV

Appellants contend that USTR violated the APA's rule-making requirements by failing to consider and adequately respond to significant public comments expressing concern about the Lists 3 and 4A tariffs. We affirm the trial court's holding that USTR's elaboration

on remand remedied any such procedural violations. *See Section 301 Cases II*, 628 F. Supp. 3d at 1246.

The APA requires agencies proceeding with notice and comment rulemaking to publish a notice of the proposed rule in the Federal Register, justify the rule by reference to legal authority, describe what the rule is about, and allow interested parties to submit comments. 5 U.S.C. § 553(b)–(c). "After consideration of the relevant matter presented," an agency's explanation of its final rule "shall incorporate . . . a concise general statement of [its] basis and purpose." *Id.* § 553(c). This means that "the agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal citation and quotation marks omitted). The agency must also "consider and respond to significant comments received during the period for public comment." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015); *see also City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) ("Significant comments are those which, if true, raise points relevant to the agency's decision and which, if adopted, would require a change in an agency's proposed rule." (internal citation and quotation marks omitted)). The Lists 3 and 4A tariffs are agency-made rules subject to these procedural requirements. *See Perez*, 575 U.S. at 96 ("Rules issued through the notice-and-comment process are often referred to as 'legislative rules' because they have the 'force and effect of law.'") (quoting *Chrysler Corp. v. Brown,* 441 U.S. 281, 302–03 (1979)).

Section 307 additionally requires USTR to "provide opportunity for the presentation of views by other

interested persons affected by the proposed modification" regarding "effects of the modification . . . and whether any modification . . . of the action is appropriate." 19 U.S.C. § 2417(a)(2). This requirement echoes Section 304(b), which generally requires USTR to give interested parties an opportunity to present their views before an action is taken pursuant to findings made during an investigation. *Id*. § 2414(b)(1)(A).

It is not disputed that USTR complied with the various requirements to provide opportunity to comment on the proposed modifications to its original Section 301 action. Before promulgating the Lists 3 and 4A tariffs, USTR solicited comments on "any aspect of the proposed supplemental action," including the "tariff subheadings to be subject to increased duties," "[t]he level of the increase, if any, in the rate of duty," "[t]he appropriate aggregate level of trade to be covered by additional duties," "whether imposing increased duties on a particular product would be practicable or effective to obtain the elimination of China's acts," and "whether imposing additional duties on a particular product would cause disproportionate economic harm to U.S. interests." *List 3 NPRM,* 83 Fed. Reg. at 33,609; *List 4 NPRM,* 84 Fed. Reg. at 22,565.

On appeal, the Government argues that the requirement to *respond* to comments did not apply to USTR because the subject of the challenged modifications fell within the APA's foreign-affairs exception. Appellees' Response Br. 47–53. The APA creates an exception to notice and comment procedures for proposed rulemaking "to the extent that there is involved . . . a military or foreign affairs function of the United States." 5 U.S.C. § 553(a). "The purpose of the exemption [i]s to allow more cautious and sensitive consideration of those matters which so affect

relations with other Governments that, for example, public rule-making provisions would provoke definitely undesirable international consequences." *Am. Ass'n of Exporters & Imps.-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985).

We affirm the trial court's holding that the exemption does not apply to the case before us, as "the Government's invocation of the exemption is entirely *post hoc* and inconsistent with the manner in which the USTR conducted the modification processes." *Section 301 Cases I*, 570 F. Supp. 3d at 1336. USTR published notice of its proposed modifications and the amendments to those modifications in the Federal Register, and on remand, cited public comments as a factor it considered in its rulemaking. J.A. 10643. As the trial court observed, USTR's decision to repeatedly publish its proposed modifications undermines the notion that "definitely undesirable international consequences" were at risk in public rulemaking. *Section 301 Cases I*, 570 F. Supp. 3d at 1337. Though "[r]equiring the Government to disclose its strategy in the middle of trade negotiations . . . may well have had adverse consequences for those negotiations," Appellees' Response Br. 53, that is exactly what the Government did and without expressing concern prior to Appellants' suit before the trial court. In any case, we decline to apply the exemption whenever a rule relates to ongoing trade negotiations, especially where, as here, the controlling statute explicitly requires the public to have an opportunity to comment on modifications to Section 301 trade actions. 19 U.S.C. § 2417(a)(2). It strikes us as counterintuitive to assume that Congress did not anticipate Section 301 modifications would be subject to trade negotiations when it created this requirement.

For the most part, USTR's notices of final action complied with the requirements of 5 U.S.C. § 553. As the trial court found, the "statutory factors relevant to the USTR's determination of whether and how to modify its action include ensuring that appropriate action is taken to eliminate discriminatory and burdensome acts [as required by Section 301] and the President's specific direction, if any. The notices of proposed rulemaking . . . reflected these considerations." *Section 301 Cases I*, 570 F. Supp. 3d at 1339. In both *List 3 NPRM* and *List 4 NPRM*, USTR explained that it was pursuing a modified action in response to direction from President Trump, described what the proposed modifications were about, and referenced Section 307(a)(1)(C) as legal authority for the modifications. *See List 3 NPRM,* 83 Fed. Reg. at 33,609; *List 4 NPRM,* 84 Fed. Reg. at 22,564. USTR's *Final List 3* and *Final List 4* notices offered a "general statement of their basis and purpose," 5 U.S.C.§ 553(c)—to the extent that they repeated the President's direction and why USTR considered China's conduct to be actionable—but the trial court found that they failed to address significant issues raised in the comments that USTR had solicited in *List 3 NPRM* and *List 4 NPRM*. *Section 301 Cases I*, 570 F. Supp. 3d at 1340–41. Specifically, the trial court explained that USTR's final notices "fail[ed] to apprise the court how the USTR came to its decision to act and the manner in which it chose to act, taking account of the opposition and support for the increased duties and the inclusion or exclusion of particular subheadings, the concerns raised about the impact of the duties on the U.S. economy, and the potential availability of alternative courses of action, within the context of the specific direction provided by the President." *Id*.; *see also id*., at 1338 ("[T]he opportunity to comment is meaningless

unless the agency responds to significant points raised by the public.") (citing *Sherley v. Sebelius*, 689 F.3d 776, 784 (D.C. Cir. 2012)). The trial court rejected Appellants' request for outright vacatur and instead allowed USTR to cure the defect—which it characterized as giving rise to "legal uncertainty," as opposed to "illegality," with regard to the sufficiency of USTR's reasoning—on remand. *Id*. at 1344.

Appellants argue that the decision to remand was legal error because the trial court was obligated to vacate the Lists 3 and 4A tariffs once it found that the modified actions could not be sustained by USTR's explanations on the record. Appellants' Opening Br. 64–65. As the trial court explained, however, vacatur is not always required when an agency has provided inadequate reasoning for its actions. *Section 301 Cases II*, 628 F. Supp. 3d at 1242. In *Department of Homeland Security v. Regents of the University of California*, the Supreme Court summarized that if the grounds provided by an agency for promulgating a rule are inadequate, "a court may remand for the agency to do one of two things: First, the agency can offer a fuller explanation of the agency's reasoning *at the time of the agency action*. . . . [Second], the agency can deal with the problem afresh by taking *new* agency action." 591 U.S. 1, 20–21 (2020) (internal citations and quotation marks omitted) (emphasis in original). If the agency pursues option one on remand, "the agency may elaborate" on what it had previously indicated as "the determinative reason[s] for the final action taken," but it "may not provide new ones." *Id*. (internal quotation marks and citation omitted). Consistent with this precedent, the trial court lawfully remanded for USTR to contextualize the reasons for its modified action in view of significant public comments. *See Section 301 Cases I*, 570 F. Supp. 3d at 1344 (prohibiting USTR

from offering *post hoc* reasoning for the challenged modifications on remand).

Appellants' contention that this option was not available essentially conflates failure to *address* significant comments with failure to *consider* those significant comments at all. *Regents* and the cases that followed it "do not distinguish between failures of explanation and failures of consideration." *Section 301 Cases II*, 628 F. Supp. 3d at 1243. So long as the agency indicated the factors relevant to its action in the first instance, it is allowed to elaborate on remand. *See Regents*, 591 U.S. at 20–21. USTR indicated that it considered issues relevant to the categories of comments it solicited. *Final List 3*, 83 Fed. Reg. 47,974, 47,975 (stating that USTR "reviewed the public comments and the testimony from the six-day public hearing" and "[b]ased on this review . . . determined not to include certain tariff subheadings"); *Final List 4*, 84 Fed. Reg. 43,304, 43,305 (explaining that the decision to impose 10% duties on List 4 as opposed to the 25% duties originally proposed—"takes account of the public comments" and that "[c]ertain tariff subheadings proposed in the [List 4 NPRM] have been removed from the final list of tariff subheadings subject to additional duties, based on health, safety, national security, and other factors"). Although USTR did not explain how, for example, it weighed comments raising concerns about the harm the Lists 3 and 4A tariffs would have on the U.S. economy, it is plainly implied that USTR considered the risk of such harms because it requested comments on whether additional tariffs would be appropriate, practicable, or effective and because it is the broad duty of USTR to coordinate U.S. trade policy. 19 U.S.C. § 2171(c). The trial court was not, as Appellants suggest, faced with a "total explanatory void" for USTR's *Final List 3* and *Final*

List 4 actions that failed to provide "one word" on significant factors related to the modifications. Appellants' Opening Br. 65 (citing *Bhd. of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 117 (D.C. Cir. 2020)). Thus, the trial court's remand to USTR to elaborate the basis for its action was appropriate.

The final issue we consider on appeal is whether the additional detail USTR provided on remand cured the original deficiencies in USTR's notice-and-comment procedures. We conclude that it did. As the trial court found, USTR's remand redetermination successfully "responded to significant concerns within the context of China's actionable conduct and the specific direction of the President" without the use of *post hoc* rationalization. *Section 301 Cases II*, 628 F. Supp. 3d at 1245. USTR addressed each category of significant comments the trial court identified as requiring further response—comments regarding the inclusion or exclusion of certain tariff subheadings, harm to the U.S. economy, efficacy of the tariffs, and alternatives to the tariffs—using public statements, hearing transcripts, and other documents that provided insight into USTR's reasoning prior to the issuance of the final Lists 3 and 4A tariffs. *Id.* at 1246–50. USTR also provided a more detailed account of how it weighed significant comments against the statutory factors it was required to consider—the President's direction and the "appropriate"-ness of action. *Id.* at 1248. As the trial court recited, "[t]he standard that an agency's response to comments must meet 'is not particularly demanding,'" as the agency's reasons must only "enable the court 'to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did.'" *Section 301 Cases II*, 628 F. Supp. 3d at 1246 (citing *Nat'l Mining*

Ass'n v. Mine Safety & Health Admin., 116 F.3d 520, 549 (D.C. Cir. 1997) and *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)). Upon complete review of the USTR's redetermination on remand, we agree with the trial court's determination that this standard was met. *Id*. at 1250 ("[T]he court finds that USTR has complied with the court's remand order and has supplied the necessary explanation supporting the imposition of duties pursuant to *Final List 3* and *Final List 4*.").

V

Because Section 307(a)(1)(C) authorizes USTR to take escalatory, modified trade actions, and because USTR's remand redetermination meets the APA's procedural requirements in 5 U.S.C. § 553, we affirm the trial court and sustain the challenged Lists 3 and 4A tariffs.

AFFIRMED

COSTS

No costs.

APPENDIX B

Slip Op. 22-32

UNITED STATES COURT OF
INTERNATIONAL TRADE

Court No. 21-00052-3JP

IN RE SECTION 301 CASES

Before: Mark A. Barnett, Claire R. Kelly, and
Jennifer Choe-Groves, Judges

OPINION AND ORDER

[Remanding the Office of the United States Trade Representative's determinations with respect to List 3 and List 4A; granting in part and denying in part Defendants' Motion to Correct the Administrative Record.]

Dated: April 1, 2022

Pratik Shah, Akin Gump Strauss Hauer & Feld LLP, of Washington, D.C., argued for Plaintiffs HMTX Indus. LLC, Halstead New England Corp., Metroflor Corp., and Jasco Prods. Co. LLC. With him on the brief were Matthew R. Nicely, James E. Tysse, Devin S. Sikes, Daniel M. Witkowski, and Sarah B. W. Kirwin.

Justin R. Miller, Attorney-In-Charge, International Trade Field Office, Elizabeth A. Speck, Trial Attorney, and Jamie L. Shookman, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., argued for Defendants.

With them on the brief were Brian M. Boynton, Acting Assistant Attorney General, Patricia M. McCarthy, Director, L. Misha Preheim, Assistant Director, Sosun Bae, Senior Trial Counsel, and Ann C. Motto, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C. Of Counsel on the brief were Megan Grimball, Associate General Counsel, Philip Butler, Associate General Counsel, and Edward Marcus, Assistant General Counsel, Office of General Counsel, Office of the U.S. Trade Representative, of Washington, D.C., and Paula Smith, Assistant Chief Counsel, Edward Maurer, Deputy Assistant Chief Counsel, and Valerie Sorensen-Clark, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, N.Y.

Joseph R. Palmore, Morrison & Foerster LLP, of Washington, D.C., argued for Amici Curiae Retail Litigation Center, *et al.* With him on the brief was Adam L. Sorensen.

Christine M. Streatfeild, Baker McKenzie LLP, of Washington, D.C., argued for Amici Curiae Am. Trailer World Corp., *et al.* With her on the brief was Kevin M. O'Brien, as well as Nancy A. Noonan and Angela M. Santos, Arent Fox LLP, of Washington, D.C.

George W. Thompson, Thompson & Associates, PLLC, of Washington, D.C., for Amici Curiae Ecolab Inc., et al.

Barnett, Chief Judge: Plaintiffs HMTX Industries LLC, Halstead New England Corporation, Metroflor Corporation, and Jasco Products Company LLC commenced the first of approximately 3,600 cases (the

"Section 301 Cases")[1] contesting the imposition of a third and fourth round of tariffs by the Office of the United States Trade Representative ("the USTR" or "the Trade Representative") pursuant to section 301 of the Trade Act of 1974 ("the Trade Act"), 19 U.S.C. § 2411, *et seq*. *See generally* Am. Compl., HMTX Indus. LLC v. United States, Court No. 20-cv-00177 (CIT Sept. 21, 2020), ECF No. 12 ("20-177 Am. Compl.").

Defendants United States, *et al.* ("the Government") move to dismiss Plaintiffs' claims as non-justiciable pursuant to U.S. Court of International Trade ("USCIT") Rule 12(b)(6) or, alternatively, for judgment on the agency record pursuant to USCIT Rule 56.1. Defs.' Mot. to Dismiss or, Alternatively, Mot. for J. on the Agency R. ("Defs.' Mot."), ECF No. 314. Plaintiffs cross-move for judgment on the agency record. Pls.' Cross-Mot. for J. on the Agency R., and accompanying Mem. in Supp. of Pls.' Cross-Mot. for J. on the Agency R. and Resp. to Defs.' Mot. to Dismiss/Mot. for J. on the Agency R. ("Pls.' Cross-Mot. & Resp."), ECF No. 358.

The Government also moves to correct the administrative record. Defs.' Mot. to Correct the R. ("Defs.' Mot. Correct R."), ECF No. 441. Plaintiffs oppose that motion, in part. Pls.' Partial Opp'n to Defs.' Mot. to Correct the Agency R. ("Pls.' Opp'n Correct R."), ECF No. 442.

For the following reasons, the court remands the contested USTR determinations and grants in part and denies in part the Government's motion to correct the record.

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[1] This figure reflects the approximate number of cases assigned to this panel. As of March 31, 2022, there are approximately 318 unassigned cases raising similar claims that are stayed pursuant to Administrative Order 21-02.

BACKGROUND

I. Legal Framework

Article I, Section 8 of the U.S. Constitution vests Congress with the "Power To lay and collect Taxes, Duties, Imposts and Excises" and to "regulate Commerce with foreign Nations." U.S. Const. art. I, § 8, cl. 1, 3. Section 301 of the Trade Act, which governs actions taken in response to a foreign country's violation of a trade agreement or conduct that is otherwise harmful to U.S. commerce, constitutes a congressional delegation of some of that authority to the Executive Branch. *See* 19 U.S.C. § 2411 (2018).[2] Specifically, section 301 sets out the circumstances under which action by the USTR is mandatory (subject to certain exceptions), *see id.* § 2411 (a)(1)–(2),[3] and when such action is discretionary, *see id.* § 2411(b).

This case concerns the latter scenario. Pursuant to section 301(b), the USTR has discretion to act when it determines that "(1) an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and (2) action by the United States is appropriate." *Id.* When both conditions are met, the USTR

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[2] Citations to the United States Code are to the 2018 version, unless otherwise specified.

[3] When the USTR finds that "the rights of the United States under any trade agreement are being denied" or that "an act, policy, or practice of a foreign country--(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or (ii) is unjustifiable and burdens or restricts United States commerce," the USTR "shall take action," 19 U.S.C. § 2411(a)(1), unless an exception exists pursuant to section 301(a)(2), *id.* § 2411(a)(2).

> shall take all appropriate and feasible action authorized under subsection (c), subject to the specific direction, if any, of the President regarding any such action, and all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice. Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country.

Id. § 2411(b)(2).

Subsection (c) describes the actions the USTR may take in order to implement mandatory or discretionary actions under subsections (a) and (b). *Id.* § 2411(c). For investigations not involving a trade agreement, the USTR must make its determination as to whether conduct is actionable under section 301(a) or (b) and, if so, what action to take, no later than "12 months after the date on which the investigation [was] initiated." *Id.* § 2414(a)(2)(B). Generally, such actions must then be implemented within 30 days of the date of the determination. *Id.* § 2415(a)(1).

Central to this litigation, section 307 of the Trade Act governs the modification or termination of the USTR's actions taken pursuant to section 301. *See generally id.* § 2417. The statute provides, *inter alia*:

> (a) In general
>
> (1) The Trade Representative may modify or terminate any action, subject to the specific direction, if any, of the President

> with respect to such action, that is being taken under section 2411 of this title if—
>
> (A) any of the conditions described in section 2411(a)(2) of this title exist,
>
> (B) the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are the subject of such action has increased or decreased, or
>
> (C) such action is being taken under section 2411(b) of this title and is no longer appropriate.

Id. § 2417(a)(1).

II. Factual Background

On August 14, 2017, the President of the United States issued a memorandum instructing the USTR to consider, consistent with section 302(b) of the Trade Act, initiating an investigation addressing the Government of the People's Republic of China's ("China") "laws, policies, practices, or actions that may be unreasonable or discriminatory and that may be harming American intellectual property rights, innovation, or technology development." *Addressing China's Laws, Policies, Practices, and Actions Related to Intellectual Property, Innovation, and Technology*, 82 Fed. Reg. 39,007, 39,007 (Aug. 17, 2017). The USTR initiated such an investigation on August 18, 2017. *Initiation of Section 301 Investigation; Hearing; and Request for Public Comment: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation,* 82 Fed. Reg. 40,213 (Aug. 24, 2017) ("*Initiation Notice*").

On March 22, 2018, the USTR published a report announcing the results of the investigation. OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, FINDINGS OF THE INVESTIGATION INTO CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION UNDER SECTION 301 OF THE TRADE ACT OF 1974 (2018) ("USTR Report" or "the Report"), https://ustr.gov/sites/default/files/ Section 301 FINAL.PDF. The Report summarizes the ways in which China's conduct in the areas subject to the investigation was unreasonable and burdened U.S. commerce. *See id.* Also on March 22, 2018, the President issued a memorandum directing the USTR, *inter alia*, to "take all appropriate action" pursuant to section 301 "to address the acts, policies, and practices of China that are unreasonable or discriminatory and that burden or restrict U.S. commerce" and to "consider whether such action should include increased tariffs on goods from China." *Actions by the United States Related to the Section 301 Investigation of China's Laws, Policies, Practices, or Actions Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 13,099, 13,100 (Mar. 27, 2018). In that memorandum, the President further instructed the USTR to "publish a proposed list of products and any intended tariff increases within 15 days of the date of this memorandum," subject to notice and comment pursuant to section 304(b), and, "after consultation with appropriate agencies and committees," to "publish a final list of products and tariff increases, if any, and implement any such tariffs." *Id.*

On April 6, 2018, the USTR published notice of its determination "that the acts, policies, and practices of the Government of China related to technology transfer, intellectual property, and innovation covered in the investigation are unreasonable or discrimina-

tory and burden or restrict U.S. commerce." *Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 14,906, 14,906 (Apr. 6, 2018) ("*USTR Determination*"). Accordingly, the USTR proposed tariffs on products worth "approximately $50 billion in terms of estimated annual trade value" in 2018. *Id.* at 14,907. The USTR considered the size of the action to be "appropriate both in light of the estimated harm to the U.S. economy, and to obtain elimination of China's harmful acts, policies, and practices." *Id.*

On June 20, 2018, the USTR published notice of a final list of products "with an approximate annual trade value of $34 billion" that would be subject to an additional duty of 25 percent *ad valorem*, referred to as "List 1." *Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 28,710, 27,711 (June 20, 2018) ("*Final List 1*"). On August 16, 2018, the USTR published notice of an additional list of products with an approximate annual trade value of $16 billion that would be subject to an additional duty of 25 percent *ad valorem*, referred to as "List 2." *Notice of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 40,823, 40,823–24 (Aug. 16, 2018).

During the time between the USTR's finalization of List 1 and List 2, the President directed the USTR to identify $200 billion worth of Chinese goods on which

to impose an additional duty of 10 percent *ad valorem* "after the legal process is complete" if China refused to change its practices. Statement from the President Regarding Trade with China (June 18, 2018) ("June 2018 Presidential Statement"), ECF No. 441-1; *see also* USTR Robert Lighthizer Statement on the President's Additional China Trade Action (June 18, 2018), PR 27.[4] In accordance with that direction, the USTR identified 6,031 tariff subheadings comprising goods imported from China, referred to as "List 3." *Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 33,608, 33,608–09 (July 17, 2018) ("*List 3 NPRM*"). In proposing the additional duties, the USTR relied on its authority to modify the action pursuant to section 307(a)(1)(C) of the Trade Act. *Id*. at 33,609. The USTR explained that China had responded "to the initial U.S. action in the investigation by imposing retaliatory tariffs on U.S. goods[] instead of addressing U.S. concerns" regarding the unfair practices identified in the investigation. *Id.* at 33,608. The USTR also explained that "a supplemental $200 billion action is appropriate" because China had failed to respond favorably to the $50 billion action and instead imposed "retaliatory duties" in the amount of $50 billion on U.S. products. *Id.* at 33,609.

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[4] The administrative record associated with the contested List 3 and List 4A duties is divided into a Public Administrative Record ("PR"), ECF No. 297, and a Confidential Administrative Record ("CR"), ECF No. 298. For record documents available online, the indices contain hyperlinks to their location. *See* PR; CR. The Government also filed an appendix of record documents provided to the court in advance of oral argument. *See* [Partial] Index to the Admin. R., ECF Nos. 447, 447-1 (PR 1–12), 447-2 (PR 13–20), 447-3 (PR 21–25), 447-4 (PR 26–36).

The USTR later extended the public comment period concerning the List 3 duties after the President directed the USTR "to consider increasing the proposed level of the additional duty from 10 percent to 25 percent." *Extension of Public Comment Period Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 38,760, 38,760–61 (Aug. 7, 2018) ("*List 3 Cmt. Extension*").

On September 17, 2018, the President directed the USTR to impose an additional duty of 10 percent *ad valorem* on $200 billion worth of Chinese goods, to take effect on September 24, 2018, and to increase the additional duty to 25 percent *ad valorem* on January 1, 2019. Statement from the President (Sept. 17, 2018) ("Sept. 2018 Presidential Statement"), PR 4. On September 21, 2018, the USTR published final notice of List 3 duties at a rate of 10 percent *ad valorem* with an effective date of September 24, 2018. *Notice of Modification of Action Pursuant to Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 47,974 (Sept. 21, 2018) ("*Final List 3*"). In accordance with the President's direction, the rate of additional duty on products covered by List 3 was set to increase to 25 percent *ad valorem* on January 1, 2019. *Id.* at 47,974.

As authority for the List 3 duties, the USTR relied on section 307(a)(1)(B) and (C). *See id.* at 47,974–75. The USTR explained that "the burden or restriction on United States commerce of the acts, policies, and practices that are the subject of the Section 301 action continues to increase" and, further, that "China's unfair acts, policies, and practices include not just its

specific technology transfer and IP polices [*sic*] referenced in the notice of initiation in the investigation, but also China's subsequent defensive actions taken to maintain those policies." *Id.* at 47,974. The USTR noted that China had "impose[d] approximately $50 billion in tariffs on U.S. goods" to persuade the United States to end the section 301 action and to protect the investigated practices, which led to "increased harm to the U.S. economy." *Id.*

With respect to subsection (C), the USTR explained that "[t]he term 'appropriate'" used in that provision links to section 301(b), which authorizes the USTR to "take all appropriate and feasible action" in order "to obtain the elimination of [the] act, policy, or practice." *Id.* (quoting 19 U.S.C. § 2411(b)). According to the USTR, the action that will achieve that aim "is a matter of predictive judgment, to be exercised by the [USTR], subject to any specific direction of the President." *Id.* at 47,974–75. While the USTR previously judged that "a $50 billion action would be effective in obtaining the elimination of China's policies[,] China's response . . . ha[d] shown that the current action no longer [was] appropriate." *Id.* at 47,975.

The USTR also explained that, during the public comment period, it had received more than 6,000 written submissions and held a six-day public hearing. *Id.* at 47,974. The USTR stated that it had "carefully reviewed the public comments and the testimony from the six-day public hearing" and, consequently, removed "certain tariff subheadings" from the list. *Id.* at 47,975. The final list identified "5,745 full and partial tariff subheadings." *Id.*

After several extensions of the effective date of the increase in List 3 duties issued in connection with

ongoing trade negotiations, List 3 duties increased to 25 percent *ad valorem* in May or June of 2019, based on the date of export. *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 20,459 (May 9, 2019); *Implementing Modification to Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 21,892 (May 15, 2019); *Additional Implementing Modification to Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 26,930 (June 10, 2019).

After the List 3 duties increased to 25 percent, the USTR established an exclusion process pursuant to which importers could request exclusion of their products from List 3 duties. *Procedures for Requests to Exclude Particular Products From the September 2018 Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 29,576 (June 24, 2019). Plaintiffs obtained exclusions for certain of their imports, effective September 24, 2018, through August 7, 2020. *See, e.g.*, *Notice of Product Exclusions: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 61,674, 61,675–76. (Nov. 13, 2019); 20-177 Am. Compl. ¶¶ 49–50.

On May 17, 2019, the USTR announced its intent, at the direction of the President, to modify again the section 301 action by imposing additional duties of up to 25 percent *ad valorem* on products from China covered by 3,805 additional tariff subheadings, referred to as "List 4." *Request for Comments*

Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 84 Fed. Reg. 22,564 (May 17, 2019) ("*List 4 NPRM*"); *see also* Statement by U.S. Trade

Representative Robert Lighthizer on Section 301 Action (May 10, 2019), PR 30. The USTR explained that the United States and China had engaged in several rounds of negotiation regarding issues covered by the section 301 investigation, but that China had "retreated from specific commitments made in previous rounds" and "announced further retaliatory action against U.S. commerce." *List 4 NPRM*, 84 Fed. Reg. at 22,564. The USTR proposed modifying the action pursuant to section 307(a)(1)(B) and (C). *Id.*

On August 20, 2019, the USTR published final notice of the List 4 duties in the amount of 10 percent *ad valorem* on certain products identified in *List 4 NPRM*. *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation,* 84 Fed. Reg. 43,304 (Aug. 20, 2019) ("*Final List 4*"). Within *Final List 4*, the tariff subheadings were segregated into List 4A and List 4B with separate effective dates (September 1, 2019 and December 15, 2019, respectively). *Id.* at 43,305.

Referencing the language of section 307(a)(1)(B), the USTR explained that "[t]he burden or restriction on United States commerce of the acts, policies, and practices that are the subject of the Section 301 action continues to increase." *Id.* at 43,304. The USTR also explained that "China's unfair acts, policies, and practices include not just its technology transfer and IP polices [*sic*] referenced in the notice of initiation in the investigation, but also China's subsequent defensive

actions taken to maintain those unfair acts, policies, and practices." *Id.* (referencing China's retaliatory imposition of "tariffs on approximately $110 billion worth of U.S. goods" and other "non-tariff measures").

In reference to section 307(a)(1)(C), the USTR stated that "China's response has shown that the current action no longer is appropriate." *Id.* The USTR noted China's retreat from certain negotiated commitments, retaliatory actions, and currency devaluation. *Id.* at 43,305.

Lastly, the USTR stated that it had considered "the public comments" it had received "and the testimony from the seven-day public hearing, as well as the advice of the interagency Section 301 committee and appropriate advisory committees." *Id.* In response to that information, the USTR removed "[c]ertain tariff subheadings" from the final List 4 duties "based on health, safety, national security, and other factors," and staggered the effective dates for the List 4A and List 4B duties. *Id.* Thereafter, the USTR provided notice of its intent to increase the additional duty rate applicable to List 4A and List 4B from 10 percent *ad valorem* to 15 percent *ad valorem*. *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 45,821 (Aug. 30, 2019).

On December 18, 2019, the USTR indefinitely suspended the additional duties of 15 percent *ad valorem* on List 4B, but not List 4A, "[i]n light of progress in the negotiations with China." *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 84 Fed. Reg. 69,447, 69,447 (Dec. 18, 2019).

On January 22, 2020, the USTR halved the additional duty on products covered by List 4A from 15 percent *ad valorem* to 7.5 percent *ad valorem*. *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 85 Fed. Reg. 3741 (Jan. 22, 2020).

III. Procedural History

On September 10, 2020, Plaintiffs commenced an action challenging the section 301 duties imposed pursuant to List 3 and List 4A. Summons, Compl., *HMTX Indus. LLC v. United States*, Court No. 20-cv-00177 (CIT Sept. 10, 2020), ECF Nos. 1, 2. Count one alleges that the USTR exceeded its authority pursuant to section 307 of the Trade Act when it imposed the duties and seeks a declaratory judgment to that effect. 20-177 Am. Compl. ¶¶ 63–70. Count two alleges violations of the Administrative Procedure Act ("APA"). *Id.* ¶¶ 71–75. Specifically, Plaintiffs allege that USTR exceeded its authority "in promulgating List 3 and List 4A," *id.* ¶ 73, and "promulgated List 3 and List 4A in an arbitrary and capricious manner," *id.* ¶ 75.

On February 5, 2021, Plaintiffs' action, among others, was assigned to this panel. *See, e.g.*, Order, *HMTX Indus. LLC v. United States*, Court No. 20-cv-00177 (CIT Feb. 5, 2021), ECF No. 43. On February 10, 2021, the panel designated a "master case" under the name "*In Re* Section 301 Cases" to function as the primary vehicle by which the court would manage the litigation of the Section 301 Cases. Std. Procedural Order No. 21-01 (Feb. 10, 2021), ECF No. 1. After receiving input from the Parties, on March 31, 2021, the court designated Plaintiffs' case as "the sample case for purposes of the court's initial consideration and resolution of Plaintiffs' claims." Std. Procedural

Order 21-04 (Mar. 31, 2021), ECF No. 267. The court stayed all other Section 301 Cases and appointed a Plaintiffs' Steering Committee to aid the court's adoption of case management procedures and coordinate the preparation of consolidated briefs and court submissions. *Id.*; *see also* Std. Procedural Order 21-02 (Feb. 16, 2021), ECF No. 82 (explaining the duties of the steering committee). On April 12, 2021, the Parties filed a Joint Status Report with a proposed briefing schedule governing disposition of the merits of the sample case. Joint Status Report (Apr. 12, 2021), ECF No. 274. The following day, the court entered a Scheduling Order. *See* Scheduling Order (Apr. 13, 2021), ECF No. 275.[5]

On June 1, 2021, the Government filed its opening motion. Defs.' Mot. On August 2, 2021, Plaintiffs filed their cross-motion and response to the Government's motion. Pls.' Cross-Mot. & Resp. On August 9, 2021, several interested parties that are plaintiffs in actions that were stayed behind this sample action filed an *amicus* brief on whether any potential relief is limited

[5] On July 6, 2021, a divided panel granted Plaintiffs' motion for a preliminary injunction suspending liquidation of unliquidated entries subject to the contested tariffs. *In re Section 301 Cases*, 45 CIT __, __, 524 F. Supp. 3d 1355, 1357–72 (2021); *see also id.* at 1372–83 (Barnett, C.J., dissenting); Order (July 6, 2021), ECF No. 330 (temporarily restraining liquidation; establishing a process for implementing the preliminary injunction; and allowing the Government to instead "stipulate to refund any duties found to have been illegally collected"). On September 8, 2021, the court acknowledged the Government's acceptance of "the option to stipulate" to a refund of unlawfully collected duties "without prejudice to the issue of whether . . . refunds will be limited to [importers of record]" and ordered Defendants to liquidate subject entries "in the ordinary course." Order (Sept. 8, 2021) at 1–2, ECF No. 408.

to an importer of record. Amicus Br. of Interested Parties ("Interested Parties' Br."), ECF No. 362. On August 31, 2021, the court granted two additional motions for leave to file an *amicus* brief. Order (Aug. 31, 2021), ECF No. 396; Order (Aug. 31, 2021), ECF No. 397; *see also* Proposed Br. of Amici Curiae Retail Litigation Center, Inc., *et al*. ("RLC's Br."), ECF No. 373-2; Br. of Proposed Amici Curiae Ecolab Inc., *et al*. in Supp. of the Cross-Mot. for J. on the Agency R. Submitted by Pls.' HMTX Indus. LLC *et al*. ("Ecolab's Br."), ECF No. 374. On October 1, 2021, the Government filed its joint response to Plaintiffs' cross-motion and the *amicus* briefs and a reply in support of its opening motion. Defs.' Reply in Supp. of Their Mot. to Dismiss, Resp. to Pls.' Cross-Mot. for J. on the Agency R., and Resp. to *Amicus Curiae* Supporting Brs. ("Defs.' Resp. & Reply"), ECF No. 412.[6] On November 15, 2021, Plaintiffs filed their reply. Pls.' Reply in Supp. of Their Cross-Mot. for J. on the Agency R. ("Pls' Reply"), ECF No. 425. The court heard oral argument on February 1, 2021. Docket Entry, ECF No. 440.

Following oral argument, on February 15, 2022, the Government filed a partial consent motion to correct the administrative record. Defs.' Mot. Correct R. On February 16, 2022, Plaintiffs filed their response. Pls.' Opp'n Correct R.

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[6] On October 18, 2021, the court granted the Government's motion to correct citation errors in their opening and reply briefs. Order (Oct. 18, 2021), ECF No. 415; *see also* Defs.' Consent Mot. to Correct Minor Citation Errors, Ex. B, ECF No. 413-2 (corrected pages).

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(i)(1)(B) (2018 & Supp. II 2020), which grants the court "exclusive jurisdiction of any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue."

The court may properly dismiss a claim pursuant to USCIT Rule 12(b)(6) when the plaintiff's factual allegations, assumed to be true, fail to raise a legally cognizable claim. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–56 (2007); *United Pac. Ins. Co. v. United States*, 464 F.3d 1325, 1327 (Fed. Cir. 2006). USCIT Rule 56.1 provides for judgment on the agency record in an action that is before the court pursuant to 28 U.S.C. § 1581(i). The APA directs the court to "decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action." 5 U.S.C. § 706; *see also* 28 U.S.C. § 2640(e). Additionally, the "court shall . . . 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; [or] . . . (C) in excess of statutory . . . authority; [or] . . . (E) unsupported by substantial evidence." 5 U.S.C. § 706(2).

DISCUSSION

The court first considers the Government's motion to dismiss Plaintiffs' claims based on non-justiciability. As discussed below, because the court finds that the claims are reviewable, the court turns next to the cross-motions concerning the USTR's authority pursuant

to section 307 of the Trade Act and alleged procedural violations. Lastly, the court considers the Government's partial consent motion to correct the administrative record.

I. Reviewability of Plaintiffs' Claims

1. Whether List 3 and List 4A Constitute Unreviewable Presidential Action

a. Parties' Contentions

The Government contends that Plaintiffs seek to challenge presidential—as opposed to agency—action because at each step in the modification process, "the USTR acted at 'the specific direction . . . of the President.'" Defs.' Mot. at 22 (quoting 19 U.S.C. § 2417(a)(1)). When the President "exercise[s] his discretion to direct action" pursuant to section 307(a)(1), the Government contends, "the action constitutes presidential action." Defs.' Resp. & Reply at 5. Thus, the Government contends, Plaintiffs' claims arising out of the APA must fail "because the President is not an 'agency' within the meaning of the APA." Defs.' Mot. at 22 (citing, *inter alia*, *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992)).

Plaintiffs contend that the promulgation of List 3 and List 4A constitute final agency action because sections 301 and 307 of the Trade Act authorize the USTR—not the President—to act, and relevant *Federal Register* notices reflect the USTR's determination to take the specified actions. Pls.' Cross-Mot. & Resp. at 47 (citing *Final List 3*, 83 Fed. Reg. at 47,974, and *Final List 4*, 84 Fed. Reg. at 43,304). Plaintiffs also point to legislative history accompanying the 1988 amendments to the Trade Act that transferred authority from the President to the USTR. *Id.* (citing H.R. REP. NO. 100-576 at 511 (1988) (conf. report)).

Plaintiffs further contend that judicial precedent supports reviewing the USTR's actions even when taken pursuant to Presidential direction. *Id.* at 48–49 (citing, *inter alia*, *Invenergy Renewables LLC v. United States*, 43 CIT __, __, 422 F. Supp. 3d 1255, 1282–83, 1294 (2019), and *Gilda Indus., Inc. v. United States* ("*Gilda II*"), 622 F.3d 1358, 1363 (Fed. Cir. 2010)).

b. List 3 and List 4A Implicate Agency Actions That Are Judicially Reviewable

While "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review," 5 U.S.C. § 704, presidential action is non-reviewable under the APA, *Franklin*, 505 U.S. at 800–01. The Government's arguments for dismissal raise the question whether agency action taken in accordance with presidential direction pursuant to section 307 constitutes non-reviewable presidential action.

For purposes of this case, the answer to that question is "no." *Franklin* held that the APA did not apply to a challenge to reapportionment because the President, not the Secretary of Commerce, sent the final apportionment to Congress and thus took the final step "affecting the States." 505 U.S. at 796–801. Accordingly, *Franklin*'s bar on judicial review generally is "limited to those cases in which the President has final constitutional or statutory responsibility for the *final step* necessary for the agency action directly to affect the parties." *Pub. Citizen v. USTR*, 5 F.3d 549, 552 (D.C. Cir. 1993) (emphasis added)[7] (declining APA review

[7] The opinions of the U.S. Court of Appeals for the D.C. Circuit are not binding on this court. However, the court finds judicial precedent from the D.C. Circuit instructive in light of the court's expertise in the area of administrative law. *See, e.g.*, *Vt. Yankee*

over a challenge to the North American Free Trade Agreement ("NAFTA") because Congress gave the President "the discretion to renegotiate NAFTA before submitting to Congress or to refuse to submit it at all" and it was, therefore, the President's action, not the USTR's, that affected members of the plaintiff-organization).[8]

Here, the Government extends *Franklin* beyond its holding when it argues, in effect, that *antecedent* presidential direction lacking any direct effect on relevant parties renders List 3 and List 4A non-reviewable presidential actions. The Government cites no authority to support such a broad reading. Indeed, in an analogous context, courts review agency action taken to implement Presidential proclamations and Executive orders—each of which are forms of presi-

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Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 535 n.14 (1978) (observing that "the vast majority of challenges to administrative agency action are brought to the [D.C. Circuit]"); s*ee generally* Richard J. Pierce, Jr., *The Special Contributions of the D.C. Circuit to Administrative Law*, 90 GEO. L.J. 779 (2002). The U.S. Court of Appeals for the Federal Circuit has also relied on D.C. Circuit precedent. *See Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affs.*, 260 F.3d 1365, 1379–81 (Fed. Cir. 2001) ("*NOVA*") (following *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 151 (D.C. Cir. 1993)).

[8] In *Franklin*, the Court considered the importance of the President's role in the "integrity of the [reapportionment] process" in reaching its decision. 505 U.S. at 800. Likewise, in *Public Citizen*, the appellate court noted that the President was considered "essential to the integrity of international trade negotiations" as evidenced by "the requirement that the President, and not [the USTR], initiate trade negotiations and submit trade agreements and their implementing legislation to Congress." 5 F.3d at 552. The D.C. Circuit left open the possibility that "APA review of otherwise final agency actions may well be available" when "the President's role is not essential to the integrity of the process." *Id.*

dential direction—pursuant to the APA. *See, e.g.*, *Sherley v. Sebelius*, 689 F.3d 776 (D.C. Cir. 2012) (conducting APA review over agency action taken to implement an Executive order); *Chamber of Commerce of United States v. Reich*, 74 F.3d 1322, 1326–27 (D.C. Cir. 1996) (surmising that agency regulations based on an Executive order issued by the President would be reviewable under the APA had plaintiffs brought such a claim); *Tate v. Pompeo*, 513 F. Supp. 3d 132 (D.D.C. 2021) (reviewing agency action taken to implement a Presidential proclamation). Thus, although "actions involving discretionary authority delegated by Congress to the President" may be non-reviewable under the APA, such cases are distinct from those "involving authority delegated by Congress to an agency." *See Detroit Int'l Bridge Co. v. Gov't of Can.*, 189 F. Supp. 3d 85, 98–105 (D.D.C. 2016).[9]

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[9] The *Detroit International* court declined to review the U.S. Department of State's ("USDS") issuance of a permit to build a bridge across an international boundary because Congress had vested discretionary authority over bridge approvals in the President, who had, in turn, delegated certain ministerial responsibilities to USDS by Executive Order). 189 F. Supp. 3d 85, 98–105. In noting the significance of the recipient of Congress' delegation, however, the court explained that "an unreviewable presidential action must involve the exercise of discretionary authority *vested in the President*; an agency acting on behalf of the President is not sufficient by itself" to avoid APA review. 189 F. Supp. 3d at 104 (emphasis added). For this proposition, the court cited Justice Elena Kagan, then Visiting Professor at Harvard Law School, who wrote:

> When the challenge is to an action delegated to an agency head but directed by the President, . . . the President effectively has stepped into the shoes of an agency head, and the review provisions usually applicable to that agency's action should govern. Nothing in *Franklin*'s interpretation of the APA or in

This case concerns the latter circumstance. Congress delegated to the USTR authority over modifications to section 301 actions. *See* 19 U.S.C. § 2417(a)(1); H.R. REP. NO. 100-576 at 551 (recognizing the USTR's authority to decide and implement section 301 actions and noting that "[t]he President would not retain separate authority to take action").[10] Consistent with

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> its—or any other case's—underlying discussion of separation of powers issues is to the contrary.

Id. (quoting Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2351 (2001)).

[10] When Congress transferred authority over section 301 actions from the President to the USTR in the 1988 amendments to the Trade Act and gave the USTR the authority to modify section 301 actions, Congress gave some indication of its reasons for preserving a role for the President. Addressing the phrase "subject to the direction, if any, of the President," which did not include the term "specific" as ultimately enacted, the House Ways and Means Committee Report recognized "that the President could provide broad policy direction or endorse the USTR decision," but that the "details of particular actions would remain with the USTR, including modification and termination of prior retaliatory action." H.R. Rep. No. 100-40 at 59 (1987). Additionally, the Committee Report "recognize[d] that if there is a policy issue of major magnitude, the President could direct the USTR to take a different course of action." *Id.* at 59–60. However, "[t]he Committee expect[ed] that the interagency committee advisory process prior to the decision by the USTR [would] virtually eliminate the instances in which any specific direction from the President would be appropriate." *Id.* at 59–60. Thus, although Congress envisioned the President retaining a role with respect to broad policy direction or directing the USTR to take action relating to issues of extraordinary importance, *see id.*, Congress generally gave the USTR authority over the detailed decision-making process required by statute, *see* 19 U.S.C. § 2411, *et seq*.

Of course, what Congress envisioned is not as important as what the statute allows. At least in this case, however, and with respect to List 3, the evidence of record is consistent with the

the statute, the USTR engaged in a rulemaking process, the results of which—List 3 and List 4A—"directly affect[ed] the parties." *Franklin*, 505 U.S. at 797.

The court thus concludes that Plaintiffs' claims are not non-reviewable pursuant to the APA by virtue of the President's involvement.[11] Accordingly, the court denies the Government's motion to dismiss Plaintiffs' claims on this basis.

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legislative history (the record lacks evidence of presidential direction with respect to List 4A beyond the USTR's assertions in the relevant notices). While the President offered "broad policy direction," and specifically directed the USTR regarding the size of the modification, the level of tariffs, and the date of implementation and directed the USTR to take the final action, *see* June 2018 Presidential Statement; Sept. 2018 Presidential Statement, at the hearing, the Government acknowledged that the record does not contain evidence that the President had final authority in the process of approving the final list of tariff subheadings covered by the determinations, Oral Arg. 7:50–9:40, available at https://www.cit.uscourts.gov/sites/cit/files/020122-2100052-3JP.mp3 (time stamp from the recording). Thus, while the USTR's modification authority is subject to the specific direction of the President, it is still the USTR that is acting for purposes of the APA.

[11] While the Parties dispute the applicability of *Gilda II*, that case is not dispositive of the issues raised by the Government. *Gilda II* addressed the automatic termination provision set forth in section 307(c)(1). 622 F.3d at 1362–67. That provision does not preserve a role for presidential direction. *See* 19 U.S.C. § 2417(c)(1). Further, in that case, the appellate court addressed the effect on section 307(c)(1) of the USTR's *failure to act* in accordance with the notice requirement set forth in section 307(c)(2). *Gilda II*, 622 F.3d at 1364–65. The court did not address whether any action by the USTR, had it occurred, would be subject to the APA.

2. Political Question Doctrine

a. Parties' Contentions

The Government contends that Plaintiffs' claims are non-justiciable pursuant to the political question doctrine because they implicate the President's discretionary determinations that modification of the original section 301 action was merited. Defs.' Mot. at 25. Specifically, the Government contends, Plaintiffs seek to challenge the President's determinations (1) that the original action "was 'no longer appropriate'" and "whether new tariffs [are] 'appropriate'"; and (2) that China's retaliatory conduct "increased the burden on the United States economy." *Id.* at 26–27 (citations omitted). According to the Government, the "highly discretionary nature of what is 'appropriate'" under the circumstances means that "the statute lacks a 'judicially discoverable and manageable standard[].'" *Id.* at 27 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)) (alteration in original); *see also id.* at 28 (discussing *Almond Bros. Lumber Co. v. United States*, 721 F.3d 1320, 1326–27 (Fed. Cir. 2013)); Defs.' Resp. & Reply at 9–10. The Government also contends that "prudential considerations" disfavor judicial review. Defs.' Mot. at 29. To that end, the Government contends that "[P]laintiffs invite competing policies and statements regarding United States trade policy from the Judicial Branch, potentially disrupting the conduct of United States foreign relations," such as ongoing trade negotiations with China. *Id.*

Plaintiffs contend that their claims implicate matters of statutory interpretation and compliance with the APA, both of which present judicially manageable standards. Pls.' Cross-Mot. & Resp. at 50–51. Thus, Plaintiffs contend, their claims neither "challenge discretionary determinations committed to the Executive

Branch," *id.* at 51, nor seek judicial pronouncements on trade policy, *id.* at 52. Plaintiffs rely on *Almond Brothers* to contend that the court may resolve arguments regarding statutory interpretation while declining to address discretionary USTR determinations. *Id.* (citing *Almond Bros.*, 721 F.3d at 1326–27).

b. Plaintiffs' Claims Do Not Implicate a Non-Justiciable Political Question

A controversy may involve a political question when there is:

> a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker, 369 U.S. at 217. While the doctrine precludes judicial review of "controversies which revolve around policy choices and value determinations constitutionally committed" to the Legislative or Executive Branches, "it goes without saying that interpreting congressional legislation is a recurring and accepted task for the federal courts." *Japan Whaling Ass'n v. American Cetacean Soc'y*, 478 U.S. 221, 230 (1986). The court may not "shirk [its] responsibility" to ascertain

the proper interpretation of a statute "merely because [its] decision may have significant political overtones." *Id.*; *see also Zivotofsky ex rel. Zivotofsky v. Clinton*, 566 U.S. 189, 196 (2012) (explaining that resolution of the plaintiff's claim did not turn on "the courts' own unmoored determination of what United States policy toward Jerusalem should be," but instead on the "familiar judicial exercise" of deciding whether the plaintiff's "interpretation of the statute is correct, and whether the statute is constitutional," such that the political question doctrine did not apply).

The "decision that a question is nonjusticiable is not one courts should make lightly." *El-Shifa Pharm. Indus. Co. v. United States*, 378 F.3d 1346, 1362 (Fed. Cir. 2004). Here, however, the court readily concludes that Plaintiffs' claims do not raise non-justiciable political questions.

Plaintiffs allege, *inter alia*, that the USTR exceeded the authority provided by section 307(a)(1)(B) and (C) of the Trade Act when it promulgated List 3 and List 4A. 20-177 Am. Compl. ¶¶ 68–70, 73. It is clear from the court's discussion, *infra*, that such claims require the court to engage in the "familiar judicial exercise" of statutory interpretation in order to ascertain whether the factual predicate for the modifications fell within the purview of subsection (B), and whether subsection (C) is limited to reductions in, or termination of, trade actions. *See Zivotofsky*, 566 U.S. at 196.

The court is not questioning the USTR's determination that China's subsequent defensive conduct increased the burden on U.S. commerce, Defs.' Mot. at 27–28, indeed, Plaintiffs concede that it did, Pls.' Cross-Mot. & Resp. at 31. Instead, the issue before the court is whether that conduct increased the burden on U.S. commerce *in a legally relevant way*. That inquiry

requires the court to interpret the meaning of the statutory terms, "the acts, policies, and practices[] that are the subject of such action," in relation to this modification action. 19 U.S.C. § 2417(a)(1)(B). Likewise, the court is not reviewing the USTR's discretionary decisions regarding the appropriateness of certain actions pursuant to subsection (C). *See* Defs.' Mot. at 26.

For these reasons, the Government's reliance on *Almond Brothers* is misplaced. Resolution of that case turned on the appellate court's application of the APA's narrow exception to judicial review for "agency action [that] is committed to agency discretion by law," 5 U.S.C. § 701(a)(2), to the plaintiff's challenges to the terms of an agreement the USTR entered into with Canada, *see Almond Bros.*, 721 F.3d at 1322, 1325–27. While finding the substance of the terms of the agreement to fall within the USTR's discretionary authority such that there was "no law to apply," *id.* at 1327 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)), the court nevertheless considered, and rejected, the plaintiff's argument that the agreement failed to meet other applicable statutory requirements, *id.*

The Government's motion does not discuss the political question doctrine in relation to Plaintiffs' claims concerning the USTR's compliance with the procedural requirements set forth in the APA. *See* Defs.' Mot. at 25–30; 20-177 Am. Compl. ¶¶ 74–75. In its reply brief, the Government asserts that, "[i]f a case presents an unreviewable political question, then *no* review of those claims is available under the APA." Defs.' Resp. & Reply at 10 (citing *Heckler v. Chaney*, 470 U.S. 821, 828 (1985), and *Mobarez v. Kerry*, 187 F. Supp. 3d 85, 97 (D.D.C. 2016)) (emphasis added). The cited cases are inapposite because each addressed the

unavailability of APA review of substantive—as opposed to procedural—claims. *See Heckler*, 470 U.S. at 837–38 (finding that an agency's discretionary decision not to undertake an enforcement action was not subject to judicial review pursuant to 5 U.S.C. § 701(a)(2)); *Mobarez*, 187 F. Supp. 3d at 92 (declining to undertake APA review of the plaintiff's claim that the U.S. government failed to fulfill its alleged duty to evacuate U.S. citizens from Yemen and distinguishing such claims from reviewable "garden-variety" claims requiring statutory interpretation).

Simply put, the policy-laden questions to which the USTR directed its discretionary authority are not before the court. *See* Defs.' Mot. at 29 (arguing that "plaintiffs invite competing policies and statements regarding United States trade policy from the Judicial Branch"). Matters of statutory interpretation and compliance with procedural requirements are independent questions the court is well-equipped to answer. Thus, the court is not risking "the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker*, 369 U.S. at 217. Accordingly, the court denies the Government's motion to dismiss Plaintiffs' claims based on purported non-justiciability and now turns to the merits of those claims.

II. Whether the USTR Exceeded its Modification Authority Pursuant to Section 307 of the Trade Act

1. Standard of Review

a. Parties' Contentions

The Government contends that, even if the contested actions are those of the USTR, a heightened standard of review applies, namely, whether there has been "a

clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." Defs.' Mot. at 30–31 (quoting *Gilda II*, 622 F.3d at 1363). The Government asserts that the USTR conducts "'[a]ll functions . . . under the direction of the President,'" *id.* at 30,[12] meaning that the court must "afford[] substantial deference to decisions of the [USTR] implicating the discretionary authority of the President in matters of foreign relations," *id.* (quoting *Gilda II*, 622 F.2d at 1363).

Plaintiffs contend that the court "is the final authority on issues of statutory construction," Pls.' Cross-Mot. & Resp. at 39 (quoting *Gilda II*, 622 F.3d at 1363), and resolving this case requires applying the *Chevron* framework, *id.* at 39–40 (citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n. 9 (1984)). Plaintiffs further contend that the statute is unambiguous, but that even if it were not, the USTR's interpretation merits no deference. *Id.* at 41–42. Plaintiffs also contend that the Government has misconstrued the authorities upon which it seeks to rely. Pls.' Reply at 3–5.

b. Analysis

In cases arising under the court's jurisdiction pursuant to 28 U.S.C. § 1581(i), the court applies the standard of review set forth in the APA. 28 U.S.C. § 2640(e). The "court must 'decide all relevant questions of law, interpret constitutional and statutory provisions,' and 'hold unlawful and set aside agency

[12] The Government identifies 19 U.S.C. § 2171(a) as the source for this quotation, but the phrase is instead found in *Reorganization Plan No. 3 of 1979*, 44 Fed. Reg. 69,273, 69,274 (1979) (reorganization of functions relating to international trade, section 1(b)(4)).

action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Gilda II*, 622 F.3d at 1363 (quoting 5 U.S.C. § 706) (alteration in original).

While the Government seeks to distinguish *Gilda II* based on the underlying statute at issue,[13] *see* Defs.' Resp. & Reply at 6, that distinction is inapposite here. *Gilda II* recognizes that although the "court affords substantial deference to decisions of the Trade Representative implicating the *discretionary authority* of the President in matters of foreign relations," *id.* (citing *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) (emphasis added), "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent," *id.* (quoting *Chevron*, 467 U.S. at 843 n.9 (1984)) (alteration in original). Thus, when "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Chevron*, 467 U.S. at 842–43).

Accordingly, the appellate court distinguished matters implicating presidential discretion from those requiring statutory interpretation. *See Gilda II*, 622 F.3d at 1363.

Here, resolving Plaintiffs' substantive claims requires the court first to interpret the relevant statutory provisions; thus, the court "must first carefully inves-

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[13] *Gilda II* addressed the USTR's interpretation of 19 U.S.C. § 2417(c)(1), the statutory provision governing automatic termination of retaliatory duties. 622 F.3d at 1362. That provision does not involve presidential direction.

tigate the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable." *Timex V.I., Inc. v. United States*, 157 F.3d 879, 881 (Fed. Cir. 1998). Accordingly, the court turns to its examination of "the statute's text, structure, and legislative history," applying, if necessary, "the relevant canons of interpretation." *Gazelle v. Shulkin*, 868 F.3d 1006, 1010 (Fed. Cir. 2017) (quoting *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012)).[14]

Because the court finds that the statute is unambiguous, the court need not and does not address what, if any, deference the USTR's interpretation of the statute would be given if the statute was ambiguous.

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[14] The Government's reliance on *Maple Leaf Fish Co.*, 762 F.2d 86, *Silfab Solar, Inc. v. United States*, 892 F.3d 1340 (Fed. Cir. 2018), and *Transpacific Steel LLC v. United States*, 4 F.4th 1306 (Fed. Cir. 2021), *cert. denied*, 2022 WL 892108 (U.S. Mar. 28, 2022), is also unpersuasive. *See* Defs.' Mot. at 30–31; Defs.' Resp. & Reply at 11–13. *Silfab Solar* and *Maple Leaf Fish Co.* address, respectively, the extent to which the court may review findings of fact by the President or the U.S. International Trade Commission in preparation for presidential action. *Silfab Solar*, 892 F.3d at 1349; *Maple Leaf Fish Co.*, 762 F.2d at 89–90. In *Transpacific*, the appellate court addressed the timeliness of presidential action pursuant to section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862. 4 F.4th at 1318–19. That inquiry required the court to interpret the meaning of the term "action" pursuant to 19 U.S.C. § 1862(c)(1)(B). *Id.* at 1322. In so doing, the court considered the statute's ordinary meaning, *id.* at 1319–22, "relevant statutory context," *id.* at 1322, and the statute's "legal and historical backdrop," *id.* at 1324 (citation omitted), before concluding that Congress' intent was plain with respect to the operative term. These cases thus lend support for the distinction between review of discretionary decisions and statutory interpretation recognized in *Gilda II*.

2. The USTR's Authority Pursuant to Section 307(a)(1)(B)

a. Parties' Contentions

The Government contends that "China's subsequent actions"—retaliatory tariffs and other measures such as currency devaluation—"were not separate and distinct from their unfair trade practices investigated under section 301" but "were directly related" to the investigation and intended to permit and defend the continuation of the investigated practices. Defs.' Mot. at 32.[15] The Government further contends that Plaintiffs' interpretation of the statute would prevent the President and the USTR from "respond[ing] to a trading partner's refusal to eliminate its unfair trade practices" and retaliatory actions. *Id.* at 33. Such an interpretation, the Government contends, is inconsistent with both the USTR's authority to take "all 'appropriate and feasible action' within the power of the President" to eliminate the unfair practices pursuant to section 301(b)(2), *id.*, and legislative history surrounding the 1988 amendments to section 301 indicating congressional desire for vigorous action in response to unfair trade practices, *id.* at 37–38.

Drawing a temporal line in the sand, Plaintiffs contend that the phrase "the subject of such action" in subsection (B) cannot encompass China's defensive

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[15] Indeed, the Government contends that China's defensive actions permitted the USTR to modify the section 301 action under both subsections (B) and (C). Defs.' Mot. at 33. The Government asserts, and Plaintiffs agree, that each subsection—(B) and (C) constitutes "an independent basis for action" and failure as to one is not a basis to overturn the action. Defs.' Mot. at 36 n.6; Oral Arg. 1:55:10–1:55:30 (colloquy with Plaintiffs during which they agreed that each statutory basis provides independent authority for the modifications).

actions "because those actions had not yet transpired when the investigation was initiated or when USTR determined that remedial action was 'appropriate.'" Pls.' Cross-Mot. & Resp. at 31. Thus, Plaintiffs contend, "[t]he increased burden cannot come from other subsequent 'defensive' actions." *Id.* at 32; *cf.* Ecolab's Br. at 8–12 (advancing similar arguments). Plaintiffs contend that any congressional intent to permit the USTR "to prosecute a limitless trade war" would have been stated in clearer terms, "not through the tailored language of Section 307(a)(1)(B)." Pls.' Cross-Mot. & Resp. at 31–32. Plaintiffs also contend that the existence of explicit retaliation authority pursuant to section 306(b)(2) disfavors interpreting subsection (B) to allow the USTR to retaliate against a trading partner's actions under the guise of modification. *See id.* at 32–33.

The Government counters that the USTR "made the required finding that the burden on U.S. commerce had increased as a result of China's unfair trade practices, *and* its 'subsequent defensive actions taken to maintain' those practices." Defs.' Resp. & Reply at 14 (citing *Final List 3*, 83 Fed. Reg. at 47,974, and *Final List 4*, 84 Fed. Reg. at 43,304) (emphasis added).[16] The Government contends that the court should reject Plaintiffs' characterization of the initial investigation as "limited and discrete," *id.* at 16, because the investigated practices covered "China's massive 'top-down national strategy[]' unfairly to acquire U.S. technology," which required "the mobilization and participation of all sectors of [Chinese]

[16] In that regard, the Government also points to a statement regarding China's acquisition of hybrid vehicle technology from Toyota. Defs.' Resp. & Reply at 15 (quoting Mem. from USTR General Counsel Stephen Vaughn to USTR Robert Lighthizer (Sept. 17, 2018) ("Sept. 2018 Vaughn Mem.") at 6, PR 1).

society," *id.* at 15–16 & n.4 (quoting USTR Report at 11). The Government also contends that section 306(b)(2) applies in different circumstances and "is irrelevant here." *Id.* at 16. While recognizing that resort to legislative history is unnecessary when a statute is plain, Defs.' Mot. at 5 n.2, the Government contends that the legislative history behind the 1988 amendments to the Trade Act supports interpreting subsection (B) to allow the USTR to respond to defensive conduct, Defs.' Resp. & Reply at 18 (citing 133 CONG. REC. 20,486 (1987) (statement of Sen. Lautenberg); S. REP. NO. 100-71 (1987), at 73–74).

In their Reply, Plaintiffs contend that the Government's assertions of an increased burden on U.S. commerce from the investigated practices are conclusory and unavailing. Pls.' Reply at 7–8. Plaintiffs contend that the Government's "true argument" for reliance on subsection (B) remains China's subsequent defensive conduct that is distinct from the "the four discrete categories of intellectual property and technology transfer conduct that USTR actually investigated." *Id.* at 8. Plaintiffs further contend that the Government's reliance on the USTR Report constitutes a *post hoc* rationalization for the USTR's action. *Id.* at 10. Lastly, Plaintiffs contend that the Government's dismissal of the relevance of section 306 misses the point. *Id.* at 10 n.3. Plaintiffs argue that the existence of "section 306 shows that Congress understood how to authorize 'retaliation' explicitly against another country's response to trade proceedings or actions where it wanted to." *Id.*

b. In Promulgating List 3 and List 4A, the USTR Properly Exercised Its Authority Pursuant to Section 307(a)(1)(B)

The court begins with the language of the statute. The statute permits the USTR to "modify or terminate *any action*, subject to the specific direction, if any, of the President with respect to such action, that is being taken under section 2411 of this title if—. . . the *burden or restriction* on United States commerce . . . of the *acts, policies, and practices*, that are the *subject of such action* has increased or decreased." 19 U.S.C. § 2417(a)(1)(B) (emphasis added). This case requires the court first to interpret the meaning of the phrase, "the subject of such action," because the Parties disagree about whether retaliatory actions taken by China can be the source of burden from the acts, policies, and practices that were the subject of the original action.

Plaintiffs contend that the relevant phrase refers to the subject of the original investigation. Pls.' Cross-Mot. & Resp. at 32; Pls.' Reply at 7–9. The plain meaning of the terms supports that interpretation. Black's Law Dictionary[17] defines "subject," when used as a noun, as "[t]he matter of concern over which something is created; something about which thought or the constructive faculty is employed," for example, "the subject of the statute." Black's Law Dictionary at 1465 (8th Ed. 2004); *cf.* Subject (noun), The Oxford English Dictionary, Vol. XVII at 29 (2nd Ed. 1989) ("A thing affording matter for action of a specified kind; a

[17] Courts have long considered dictionary definitions to discern the ordinary meaning of a term. *See, e.g.*, *Nix v. Hedden*, 149 U.S. 304, 306–07 (1893); *Gumpenberger v. Wilkie*, 973 F.3d 1379, 1382 (Fed. Cir. 2020).

ground motive or cause."). The phrase "such action," when read in context, refers to the "action" referenced in the introductory clause of section 307(a)(1). *See* 19 U.S.C. § 2417(a)(1)(B); *cf. Solar Energy Indus. Ass'n v. United States*, Slip Op. 21-154, 2021 WL 5320790, at *9 (Nov. 16, 2021) (stating that the term "'such' is typically read to 'refer[ ] back to something indicated earlier in the text'") (citation omitted) (alteration in original). The term "action," in the introductory clause, constitutes a reference to the action taken pursuant to section 301, i.e., the initial action. *See* 19 U.S.C. § 2417(a)(1) (cross-referencing 19 U.S.C. § 2411). Thus, to rely on the authority provided by subsection (B), the USTR must act based on increased harm to U.S. commerce from the acts, policies, and practices that constituted the subject of the original investigation. Indeed, the Government does not present a different textual view of the provision. The court thus finds the text of the statute plain with respect to subsection (B) and need not resort to legislative history or other tools of statutory interpretation.

Interpreting the meaning of the phrase does not, however, end the inquiry. Instead, the Parties dispute what *was* the subject of the action and whether China's defensive conduct, occurring subsequent to the original investigation, can properly be considered the basis for an increase in the harm stemming from the subject of the action. *See, e.g.*, Pls.' Cross-Mot. & Resp. at 32; Defs.' Resp. & Reply at 15–16. Plaintiffs argue that the subject of the action must be limited to "the investigated intellectual property practices themselves." Pls.' Cross-Mot. & Resp. at 25 (emphasis omitted); *see also* Pls.' Reply at 8 (distinguishing China's retaliation from the conduct "that USTR actually investigated"). The Government argues that China's retaliatory conduct was "not separate and distinct from" the

investigated acts and was instead "directly related" to the acts, policies, and practices that were the subject of the investigation. Defs.' Mot. at 32; Defs.' Resp. & Reply at 15.

Upon review of the record of the agency's proceedings and the arguments of the Parties, the court finds that the link between the subject of the original section 301 action and China's retaliation is plain on its face. The USTR's initial determination was statutorily required to be designed to lead to the elimination of the unfair acts, policies, and practices, but without any requirement for the action to be focused on the same or similar industries. *See* 19 U.S.C. § 2411(b)(2). Thus, by imposing duties on $50 billion in trade, the USTR intended to disrupt the trade flow into the United States in such amount necessary to lead to the elimination of China's unfair practices. By directly offsetting the duties on the $50 billion in trade with its own duties on $50 billion in trade from the United States, China directly connected its retaliation to the U.S. action and to its own acts, policies, and practices that the U.S. action was designed to eliminate. *See Final List 3*, 83 Fed. Reg. at 47,974; *cf. Final List 4*, 84 Fed. Reg. at 43,304 (noting China's decision to impose tariffs on $110 billion worth of U.S. goods).

Plaintiffs' arguments that China's retaliatory conduct cannot be part of "the subject of" the action because that conduct post-dates the initial investigation and determination are not persuasive. Pls.' Cross-Mot. & Resp. at 31; *see also* Pls.' Reply at 8 ("As a temporal and logical matter, the 'subject of' the section 301 action does not encompass all 'subsequent defensive measures' China might take in retaliation for U.S. tariffs."). Modifications are based on activity increasing (or decreasing) the burden on U.S. commerce after the

initial determination. 19 U.S.C. § 2417(a)(1)(B). Plaintiffs' argument thus turns on whether the USTR found that China's retaliatory conduct caused an increased burden on U.S. commerce from the acts, policies, and practices that constituted the subject of the action. Because, as discussed below, the court concludes that it did, Plaintiffs' timing-based argument must fail.[18]

In determining whether the USTR reasonably considered China's retaliatory actions to be within the purview of the "subject of the action," the court "may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947)). Nevertheless, the court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman*

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[18] Plaintiffs also argue that "[t]he magnitude of the responsive List 3 and List 4A actions . . . underscores their distinct nature." Pls.' Reply at 8. According to Plaintiffs, the USTR deemed $50 billion "'commensurate' to the harms" resulting from the "investigated practices." *Id.* The USTR explained that a $50 billion action was initially "appropriate both in light of the estimated harm to the U.S. economy, and to obtain elimination of China's harmful acts, policies, and practices." *USTR Determination*, 83 Fed. Reg. at 14,907. The USTR is not, however, statutorily required to quantify any increase in burden or otherwise show that the increase in tariffs is commensurate to the increased harm. *See* 19 U.S.C. § 2417(a)(1)(B); *compare id.* § 2411(a)(3) (stating that mandatory actions taken pursuant to section 301(a)(1) "shall be devised so as to affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce"), *with id.* § 2411(b) (governing discretionary actions taken pursuant to section 301(b), which does not contain any such limitation).

Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 286 (1974).

Beyond the clear connection between the defensive, retaliatory actions and the acts, policies, and practices they seek to defend, List 3 and List 4A reference the USTR's prior determinations concerning the investigation and subsequent actions. *See Final List 3*, 83 Fed. Reg. at 47,974; *Final List 4*, 84 Fed. Reg. at 43,304. Given that List 3 and List 4A constitute modifications to those actions, the court also looked to the cited determinations to consider further the USTR's position regarding the scope of the subject of the original action. The USTR broadly defined the investigation as addressing "China's Acts, Policies, and Practices *Related to* Technology Transfer, Intellectual Property, and Innovation." *Initiation Notice*, 82 Fed. Reg. at 40,213 (emphasis added). Thus, the investigation covered China's conduct *related to* the identified matters and not simply, as Plaintiffs contend, the acts *constituting* the identified matters. *See id.* Additionally, while the USTR specified four categories of acts, policies, and practices that it deemed actionable in its initial determination, the USTR described the Report as a "comprehensive" account of "the acts, policies, and practices under investigation." *USTR Determination*, 83 Fed. Reg. at 14,907. The Report, which is both public and contemporaneous with the USTR's initial section 301 determination, may also be considered. *See United States v. Sci. Applications Int'l Corp.*, 502 F. Supp. 2d 75, 78 (D.D.C. 2007) ("Generally, 'when a document incorporates outside material by reference, the subject matter to which it refers becomes a part of the incorporating document just as if it were set out in full.'") (quoting *Air Line Pilots Ass'n, Int'l v. Delta Air Lines*, 863 F.2d 87, 94 (D.C. Cir. 1988)).

In addition to summarizing the specific acts, policies, and practices related to technology transfer, intellectual property, and innovation under investigation, the USTR Report provided the historical context in which those actions arose. The Report explained that "[c]oncerns about a wide range of unfair practices of the Chinese government . . . related to [those matters] are longstanding." USTR Report at 4. The Report noted that the investigation covered the Chinese government's use of "a variety of tools, including opaque and discretionary administrative approval processes, joint venture requirements, foreign equity limitations, procurements, *and other mechanisms* to regulate or intervene in U.S. companies' operations in China, in order to require or pressure the transfer of technologies and intellectual property to Chinese companies." *Id.* at 5 (emphasis added). Indeed, as noted by the Government, China's "top-down national strategy" for acquiring technology "requires the mobilization and participation of all sectors of [Chinese] society." *Id.* at 11.

In addition to these concerns, the Report specifically explained the reluctance among U.S. companies to "complain about China's unfair trade practices" because of concerns about "Chinese retaliation." *Id.* at 9. "Other mechanisms" used to regulate U.S. companies' operations in China thus included the lack of "effective recourse" for U.S. companies wanting to report "informal pressures for fear of retaliation and the potential loss of business opportunities." *Id.* at 21. According to the USTR, "concerns about retaliation have enabled China's technology transfer regime to persist for more than a decade." *Id.*; *see also id.* at 21 n.106.

The foregoing discussion of retaliation in the USTR Report provides context and explanation regarding the reasons why individual companies were unable and unwilling to pursue their own complaints against the underlying Chinese practices. This recognition of the challenges faced by individual companies led the USTR, consistent with the direction of the President, to initiate the section 301 action in order to protect U.S. companies without them filing their own petitions and incurring the consequences of targeted retaliation. *See id.* at 10. Thus, even if the retaliatory actions by China were not otherwise clearly related to the acts, policies, and practices that China sought to defend from the USTR's section 301 action, the USTR Report provides a basis for regarding China's retaliatory actions as within the scope of the acts, policies, and practices that were the subject of the original action.

The USTR's rationale for List 3 and List 4A reflects this understanding of the agency's authority pursuant to subsection (B). As the USTR explained, China's retaliation against the initial imposition constitutes conduct that is related to the specified unfair trade policies because it is intended to "maintain those policies." *Final List 3*, 83 Fed. Reg. at 47,974; *see also Final List 4*, 84 Fed. Reg. at 43,304. That retaliation consisted of China's imposition of tariffs on $50 billion worth of U.S. goods, *Final List 3*, 83 Fed. Reg. at 47,974, later increased to $110 billion worth of U.S. goods, *Final List 4*, 84 Fed. Reg. at 43,304, and "non-tariff measures," *id.*, including devaluing China's currency, *id.* at 43,305. China's retaliation also caused increased harm to U.S. commerce; a point that Plaintiffs concede. *See, e.g.*, Pls.' Cross-Mot. & Resp. at 31. Together, these notices reflect the USTR's recognition that Chinese retaliation was similarly directed against the effort to challenge its unfair acts, policies, practices, just as the

threats to retaliate against individual companies were directed at maintaining those same practices. Accordingly, the USTR properly found an increased burden on U.S. commerce arising from the acts that formed part of the subject of the original action.[19]

For these reasons, the court finds that the USTR exercised its authority consistent with section 307(a)(1)(B) when it promulgated List 3 and List 4A. Because subsections (B) and (C) each provided an independent basis for the determinations, the court need not and does not reach the Parties' arguments concerning the USTR's authority to issue the determinations pursuant to section 307(a)(1)(C).

III. Procedural Claims Pursuant to the APA

The court first addresses the Government's arguments that the promulgation of List 3 and List 4A is exempt from the APA's procedural requirements and, finding those arguments non-meritorious, next addresses Plaintiffs' APA claims.

1. Foreign Affairs Exemption

a. Parties' Contentions

The Government contends that the promulgation of List 3 and List 4A falls under the foreign affairs exception to the APA because they "were part of the negotiation of an international trade agreement" and "relate[d] to the President's 'overall political agenda concerning relations with another country.'" Defs.' Mot.

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[19] For the same reasons, the court rejects Plaintiffs' argument that the USTR violated the substantive provisions of the APA by failing to point to evidence of an "increased burden" from the investigated practices. *See* Pls.' Reply at 23–24.

at 42–43 (quoting *Am. Ass'n of Exps. & Imps. v. United States*, 751 F.2d 1239, 1249 (Fed. Cir. 1985)).

Plaintiffs contend that the promulgation of List 3 and List 4A does not fall under the foreign affairs exception because "the public rulemaking" process "would [not] 'provoke definitively undesirable international consequences.'" Pls.' Cross-Mot. & Resp. at 61–62.

b. The Foreign Affairs Exemption Does Not Apply

The APA exempts a rulemaking from notice and comment procedures when the agency action involves a "foreign affairs function of the United States." 5 U.S.C. § 553(a)(1) (stating that section 553 applies, "except to the extent that" a foreign affairs function "is involved").[20] In other words, the foreign affairs exemption is intended to allow an agency to "*dispense with* [the] notice-and-comment procedures" set forth in section 553. *E.B. v. U.S. Dep't of State*, 2022 WL 343505, at *4 (D.D.C. 2022) (emphasis added); *see also* H.R. REP. NO. 79-1980 at 257 (1946) (foreign affairs functions are "exempt[] from *all* of the requirements" set forth in section 553) (emphasis added).

When invoked, the exemption "will be construed narrowly and granted reluctantly," and "only to the extent that the excepted subject matter is clearly and directly involved in a foreign affairs function." *Mast Indus., Inc. v. Regan*, 8 CIT 214, 231, 596 F. Supp. 1567, 1582 (1984) (quotations and citation omitted). "The

[20] The Government concedes that, in the event the court finds the promulgation of List 3 and List 4A to constitute agency action, the USTR's actions are subject to informal rulemaking procedures set forth in 5 U.S.C. § 553(b)–(c) unless the court finds that the foreign affairs exception applies. Defs.' Mot. at 39.

purpose of the exemption [is] to allow more cautious and sensitive consideration of those matters which 'so affect relations with other Governments that, for example, public rule-making provisions would provoke definitely undesirable international consequences.'" *Am. Ass'n of Exps. & Imps.*, 751 F.2d at 1249 (quoting H.R. REP. NO. 79-1980 at 257).[21]

In this case, the USTR did not invoke the foreign affairs exemption to relieve the agency from any rulemaking procedures that may apply in addition to the requirements of section 307.[22] *See Final List 3*, 83

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[21] Consistent with its use as an example, meeting the "definitely undesirable international consequences" standard may be enough to invoke the foreign affairs exemption but is not necessary. *See Mast*, 8 CIT at 230, 596 F. Supp. 2d at 1581 (noting that such a finding "has not been considered necessary by courts" and, if it were, "would render the 'military or foreign affairs function' superfluous since the 'good cause' exception [set forth in section] 553(b)(B), would apply").

[22] The foreign affairs exemption "[does] not relieve an agency from any requirements imposed by law apart from this bill. H.R. REP. NO. 79-1980 at 257. Section 307(a)(2) and (b) require the USTR to "consult with the petitioner, if any, and with representatives of the domestic industry concerned" and to "provide [an] opportunity for the presentation of views by other interested persons affected by the proposed modification or termination" before publishing "the reasons [for]" any modification in the *Federal Register* and providing a report to Congress. 19 U.S.C. § 2417(a)(2)–(b). At the hearing, the Government suggested that the only additional requirement found in the APA as compared to section 307 is the requirement for a reasoned explanation, such that applying the foreign affairs exemption would relieve the court from analyzing the sufficiency of the USTR's response to public comments. Oral Arg. 59:15–1:01:00. In other words, the Government appears to interpret section 307 to provide at least some opportunity for public comment without requiring the USTR to engage with the comments it receives to the extent required by the APA.

Fed. Reg. at 47,974–75; *Final List 4*, 84 Fed. Reg. at 43,304–05. Indeed, at each step in the processes that resulted in List 3 and List 4A, the USTR, generally consistent with both 19 U.S.C. § 2417(a)(2)–(b) and 5 U.S.C. § 553(b)–(c), published notices of its intended actions, accepted comments from the public, and held public hearings prior to publishing its determinations. *See supra* Background Sec. II. Thus, the Government's invocation of the exemption is entirely *post hoc* and inconsistent with the manner in which the USTR conducted the modification processes.[23]

While the statute does not explicitly require an agency to invoke the foreign affairs exemption in a final rule, the USTR's failure to make such an invocation combined with the manner in which the USTR conducted these processes suggests that the USTR did not intend to invoke the exemption and, at best, provides the court with an unclear record as to whether the USTR in fact intended to invoke the exemption. *Cf., e.g.*, *Mast*, 8 CIT at 229, 596 F. Supp. at 1580 (documenting explicit invocation of the foreign affairs exemption). The court, however, need not decide whether the foreign affairs exemption may properly be invoked solely by counsel *post hoc*, because the court finds unconvincing the Government's argument that USTR's actions "fall squarely within the foreign affairs . . . exception." Defs.' Mot. at 44. Unlike in *Mast*, for example, on which the Government seeks to rely in connection with the implementation of international agreements, the United States and China did not enter into any trade agreement until after the USTR promulgated *Final List 3* and *Final List 4*. *See* Defs.'

[23] Plaintiffs do not allege facial non-compliance with section 553 but, rather, deficiencies with respect to the USTR's notice-and-comment procedures. *See* 20-177 Am. Compl. ¶¶ 74–75.

Mot. at 41 (citing *Mast*, 8 CIT at 232, 596 F. Supp. 3d at 1582).[24]

Moreover, courts have recognized that the foreign affairs exemption does not apply simply because a rule relates to ongoing negotiations. *See, e.g.*, *East Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 776 (9th Cir. 2018) (holding that the foreign affairs exemption did not apply to an interim rule suspending asylum for certain persons when the government claimed that the rule "directly related to ongoing negotiations with Mexico" absent any explanation why immediate publication of the rule furthered the negotiations). This is particularly true when, as here, some form of notice, opportunity to comment, and explanation is otherwise required. *See* 19 U.S.C. § 2417(a)(2)–(b). The Government has failed to explain how the foreign affairs exemption would "allow more cautious and sensitive consideration of [the] matters" addressed in the contested determinations. *See Am. Ass'n of Exps. & Imps.*, 751 F.2d at 1249.

While the court recognizes the circuit split as to whether an agency action must have "definitely undesirable international consequences" to qualify for the foreign affairs exemption, *see Mast*, 8 CIT at 230 & n.20, 596 F. Supp. at 1581 & n.20, the court is bound by Federal Circuit precedent, which at least considers whether an action would have such consequences in

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[24] While *Mast* states that "the negotiation of agreements with foreign governments . . . 'clearly and directly' involve[d] a 'foreign affairs function,'" that statement was made in the context of negotiations under section 204 of the Agricultural Act of 1956, which expressly granted the President power to issue regulations in conjunction with the negotiation of international agreements limiting certain imports. 8 CIT at 217, 232, 596 F. Supp. at 1570, 1582.

determining whether the foreign affairs exception should apply, *see Am. Ass'n of Exps. & Imps.*, 751 F.2d at 1249. The Government has not pointed to any such consequences, which would prove difficult given the considerable public airing of the proceedings.[25] *See supra* Background Sec. II; *Zhang v. Slattery*, 55 F.3d 732, 744–745 (2d Cir. 1995) (holding that the foreign affairs exemption did not apply to an interim immigration rule because the record lacked evidence that subjecting the rule to notice and comment would have undesirable international consequences and because the focus of the rule had been at the center of a national debate for more than six months prior to the issuance of the rule).

Accordingly, the court turns to the merits of Plaintiffs' APA claims.

2. Response to Comments

a. Parties' Contentions

Plaintiffs contend that the USTR failed to respond to comments in a reasoned manner using two lines of argument. *See* Pls.' Cross-Mot. & Resp. at 59–60; Pls.' Reply at 25–27. First, Plaintiffs assert that the USTR's failure to address the "'overwhelming[]' opposition" to the imposition of List 3 and List 4A was arbitrary and capricious. Pls.' Reply at 26 (quoting Defs.' Resp. & Reply at 38) (alteration in original). Second, Plaintiffs fault the USTR for failing to explain "which comments, and what concerns raised in those comments, caused

[25] At the hearing, the Government argued that responding to each of the thousands of comments would provoke undesirable international consequences but did not explain why or specify the nature of the consequences. Oral Arg. 1:00:30–1:01:00. As discussed below, however, a "comment-by-comment" response is not the standard required by the APA.

it to withdraw certain tariff headings and products but not others." Pls.' Cross-Mot. & Resp. at 59–60.

Amici Curiae Retail Litigation Center, Inc. and others (collectively, "RLC") likewise contend that the USTR neither considered, nor took sufficient time to consider, substantial objections to the modifications. RLC's Br. at 12–15. While framing its arguments in terms of the APA, RLC contends that the USTR's actions are more troubling given the statutory requirement to provide opportunity for the public to comment. *Id.* at 13–14 (citing 19 U.S.C. § 2417(a)(2)). RLC argues that the USTR failed to engage meaningfully with comments expressing concerns that the modification actions would harm the U.S. economy, "act[] as a hidden tax for consumers on everyday products," *id.* at 14, and disrupt "the supply chains of U.S. retailers, manufacturers, and producers," *id.* at 15.

The Government contends that the USTR considered the factors relevant to the statutory determinations pursuant to section 307(a)(1)(B) and (C). Defs.' Mot. at 46–47, 58–59. The Government further contends that the *Federal Register* notices associated with List 3 reflect the USTR's consideration of comments in its determinations to omit certain tariff subheadings, delay the onset of the increase in the level of List 3 duties from 10 percent to 25 percent, and establish an exclusion process. *Id.* at 58–59. With respect to List 4A, the Government contends that the USTR responded to comments by stating the bases upon which it removed certain tariff subheadings, separating the subheadings into two lists and staggering the effective date of List 4B, and establishing an exclusion process. *Id.* at 59; *see also* Defs.' Resp. & Reply at 41. The Government also contends that policy issues raised by RLC fail to

provide a basis to "overturn[] the tariffs." Defs.' Resp. & Reply at 42.

b. The USTR Failed to Respond Adequately to Comments

The APA requires agencies conducting notice and comment rulemaking to "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). An agency's explanation of the basis and purpose for its action must demonstrate a "consideration of the relevant factors," *State Farm*, 463 U.S. at 43 (citation omitted), and "must offer a rational connection between the facts found and the choice made," *id.* at 52 (quotations and citation omitted). The standard that an agency's response must meet "is not particularly demanding." *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 116 F.3d 520, 549 (D.C. Cir. 1997) (per curiam) (quotations and citation omitted). A court will not, however, undertake a "laborious examination of the record, formulate in the first instance the significant issues faced by the agency and articulate the rationale of their resolution." *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968). For "judicial review . . . to be meaningful," the agency's explanation must enable the court "to see *what major issues of policy were ventilated* by the informal proceedings and why the agency reacted to them as it did." *Id.* (emphasis added). Conclusory statements that do not explain how a determination was reached are therefore insufficient. *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010).

The enabling statute informs the court's examination of an agency's basis and purpose statement and the relevance of comments received by an agency. Agency action through notice and comment rulemaking must

be tethered to the statute. *See, e.g.*, *State Farm*, 463 U.S. at 43 (explaining that an agency cannot rely on factors "which Congress has not intended it to consider"). Additionally, "[t]he basis and purpose statement is inextricably intertwined with the receipt of comments." *Action on Smoking & Health v. C.A.B.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983) (footnote citation omitted). An agency "must respond in a reasoned manner to those [comments] that raise significant problems." *City of Waukesha v. EPA*, 320 F.3d 228, 257 (D.C. Cir. 2003) (quotations and citation omitted). "Significant comments are those 'which, if true, raise points relevant to the agency's decision *and which, if adopted, would require a change in an agency's proposed rule*.'" *City of Portland, Oregon v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977)). "[F]ailure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not based on a consideration of the relevant factors." *Sherley*, 689 F.3d at 784 (quotations and citations omitted). "[T]he opportunity to comment is meaningless unless the agency responds to significant points raised by the public." *Id.* (quotations and citation omitted).

The statute permits the USTR to "modify or terminate any action" that is being taken pursuant to section 301 "subject to the specific direction, if any, of the President." 19 U.S.C. § 2417(a)(1). Thus, in accordance with *State Farm*, 463 U.S. at 43, the President's specific direction, if any, is a statutory consideration for which the agency must account. The statute also requires the USTR to consider whether the burden on U.S. commerce for which action was taken pursuant to section 301 has increased or decreased, or whether the prior action taken pursuant

to section 301(b) is no longer appropriate. *See* 19 U.S.C. § 2417(a)(1)(B), (C). Relatedly, section 301(b) informs the agency's rationale by providing that the USTR is to exercise its discretionary authority to take all "appropriate and feasible action" when a foreign country is engaging in "an act, policy, or practice" that is "unreasonable or discriminatory and burdens or restricts United States commerce" with the aim of obtaining the elimination of the unfair act, policy, or practice. *Id.* § 2411(b). Thus, statutory factors relevant to the USTR's determination of whether and how to modify its action include ensuring that appropriate action is taken to eliminate discriminatory and burdensome acts and the President's specific direction, if any.

The notices of proposed rulemaking ("NPRM(s)") reflected these considerations. In *List 3 NPRM*, the USTR explained that the proposed supplemental action accorded with the President's direction as reflected in his statement "direct[ing] the United States Trade Representative to identify $200 billion worth of Chinese goods for additional tariffs at a rate of 10 percent" that would "go into effect" following completion of "the legal process." 83 Fed. Reg. at 33,609 (citing June 2018 Presidential Statement). The notice also requested public comments:

> with respect to *any* aspect of the proposed supplemental action, including
>
> - The specific tariff subheadings to be subject to increased duties, including whether the subheadings listed in the Annex should be retained or removed, or whether subheadings not currently on the list should be added.

- The level of the increase, *if any*, in the rate of duty.
- The appropriate *aggregate level* of trade to be covered by additional duties.

Id. (emphases added); *see also List 3 Cmt. Extension*, 83 Fed. Reg. at 38,761 (extending comment period following President's direction to consider increasing the tariff rate to 25 percent and specifically seeking comment on "the possible increase in the rate of additional duty"). In *List 4 NPRM*, the USTR likewise explained that the proposed supplemental action accorded with the President's direction and requested public comments on "any aspect" of the proposal, including the abovementioned points. 84 Fed. Reg. at 22,564–65.

Consistent with the NPRMs, submitted comments raised concerns regarding the legality and efficacy of the tariffs, the potential for damage to the U.S. economy, and whether alternative measures would be more effective. *See, e.g.*, Pls.' Cross-Mot. & Resp. at 14–15, 20–21 (citing comments); RLC's Br. at 14–16 (same); Comments of Nat'l Foreign Trade Council, USTR-2018-0026-1843 (Aug. 22, 2018), PR 1891 (arguing that the tariffs will not be effective and will "create a new status-quo of higher trade barriers");[26] Comments of U.S. Chamber of Com., USTR-2018-0026-1391 (Aug. 20, 2018), PR 1439; Comments of HP Inc., USTR-2019-0004-1701 (June 17, 2019), PR 7877 (citing section 337 of the Tariff Act of 1930 as an

[26] The court cites the date of the record document, which is not necessarily the same as the date the USTR associates with the document on the administrative record indices filed with the court.

alternative tool for accomplishing the administration's goals without the economic costs of section 301 tariffs).

Some comments also argued that certain products should be added to or removed from the proposed lists. *See, e.g.*, Comments of Ams. for Free Trade Coal., USTR-2018-0026-6132 (Sept. 26, 2018), PR 6163 (noting that List 3 needed an exclusion process and that "the criteria for inclusion or removal from the final list were not made public"); Comments of Rheem Mfr'g Co., USTR-2018-0026-3884 (Sept. 5, 2018), PR 3930 (supporting the retention of subheadings for air conditioners on List 3 while urging the USTR to add a subheading covering "parts" under which the indoor and outdoor components of air conditioners enter when shipped separately, even if fully assembled); Comments of Retail Indus. Leaders Ass'n, USTR-2018-0026-5887 (Sept. 6, 2018), PR 5924 (urging the removal of parts used in U.S. manufacturing); Comments of U.S. Steel Corp. USTR-2018-0026-5447 (undated), PR 5492 (arguing for the inclusion of advanced steel products (tin mill plate) as an appropriate response to the cyber-hacking covered by the USTR Report, including of U.S. Steel itself).

Other comments requested no increased duties on imported parts and inputs while supporting the duties on finished goods that compete with domestically manufactured goods. *See, e.g.*, Comments of Whirlpool Corp., USTR-2018-0026-3867 (Sept. 5, 2018), PR 3913 (requesting the removal of several subheadings for parts that it uses in its U.S. manufacturing operations and the addition of a subheading for completed dishwashers competing with Whirlpool's products).

The statute, the NPRMs, and the comments responsive to the NPRMs frame this court's review of the USTR's concise statements of basis and purpose. While "[a]n

agency need not respond to every comment," it must explain how it "resolved any significant problems raised by the comments." *Action on Smoking*, 699 F.2d at 1216. Thus, the USTR was required to address comments regarding any duties to be imposed, the aggregate level of trade subject to the proposed duties, and the products covered by the modifications, all in light of section 301's statutory purpose to eliminate the burden on U.S. commerce from China's unfair acts, policies, and practices and subject to the specific direction of the President, if any.

With respect to the "wisdom of the enterprise," i.e., whether to proceed with any increase in duties, the USTR explained its decisions by way of reference to China's unfair practices and stated that the increase in duties and level of trade affected by the modifications are consistent with the specific direction of the President. *See Final List 3*, 83 Fed. Reg. at 47,974–75; *Final List 4*, 84 Fed. Reg. at 43,304–05. The September 2018 Presidential Statement, in turn, provided relevant context, stating that China's unfair policies and practices relating to U.S. technology and intellectual property "plainly constitute a grave threat to the long-term health and prosperity of the United States economy." Sept. 2018 Presidential Statement.

The USTR's statements of basis and purpose thus indicate why the USTR deemed China's ongoing and retaliatory conduct actionable; however, those statements fail to apprise the court how the USTR came to its decision to act and the manner in which it chose to act, taking account of the opposition and support for the increased duties and the inclusion or exclusion of particular subheadings, the concerns raised about the impact of the duties on the U.S. economy, and the potential availability of alternative courses of action,

within the context of the specific direction provided by the President.

While the USTR pointed to the specific direction of the President in September 2018 in *Final List 3* and the specific direction of the President more generally in *Final List 4*, and, while the President's direction is statutorily significant, the USTR's invocation of the President's direction does not obviate the USTR's obligation to respond to significant issues raised in the comments. *Cf. Sherley*, 689 F.3d at 784–85.[27] In *List 3*

[27] *Sherley* involved a challenge to the National Institutes of Health's ("NIH") issuance of guidelines concerning embryonic stem-cell ("ESC") research and its failure to address comments objecting to ESC research. 689 F.3d at 784. The D.C. Circuit held that because the guidelines implemented an Executive Order with the primary purpose of removing limitations on funding human ESC research, it was not arbitrary and capricious for the NIH not to respond to comments "diametrically opposed to the direction of the Executive Order." *Id.* at 784–785. *Sherley* is, however, distinguishable. There, the NIH explicitly stated its overarching position that comments "advocating a blanket ban on all funding for [human ESC] research" were "not relevant" to the issuance of the guidelines. *Id.* at 790 (Brown, J., concurring). The NIH's dismissal of such comments was consistent with its notice of proposed rulemaking, which requested comments specific to the guidelines' implementation of the Executive order, not the wisdom of human ESC research generally. *See Draft [NIH] Guidelines for Human Stem Cell Research Notice*, 74 Fed. Reg. 18,578 (Apr. 23, 2009). Thus, the NIH did not arbitrarily ignore comments that attempted to "reopen a debate that, as a practical matter, has been foreclosed for more than a decade." *Sherley*, 689 F.3d at 790 (Brown, J., concurring). Here, however, the NPRMs characterized the imposition of List 3 and List 4 tariffs as "propos[als]" and expressly invited comments on "any aspect of the proposed supplemental action," including several points that arguably go to whether to impose additional duties at all. *List 3 NPRM*, 83 Fed. Reg. at 33,609; *List 4 NPRM*, 84 Fed. Reg. 22,564. Thus, the USTR treated the imposition of increased duties at the

NPRM, for example, the USTR noted the President's desire for a 10 percent tariff on $200 billion worth of Chinese imports, 83 Fed. Reg. at 33,609 (citing June 2018 Presidential Statement), but did not treat that direction as dispositive in light of the USTR's solicitation of comments on a broad range of issues that could—and, indeed, did—result in comments at odds with the President's direction, *see id.*; *cf. List 4 NPRM*, 84 Fed. Reg. at 22,564–65. In other words, although the USTR indicated its willingness to consider factors other than the President's direction in the respective NPRMs, the final determinations do not explain whether or why the President's direction constituted the only relevant consideration nor do those determinations address the relationship between significant issues raised in the comments and the President's direction.[28] Having requested comments on a range of issues, the USTR had a duty to respond to the comments in a manner that enables the court to understand "why the agency reacted to them as it did." *Auto. Parts & Accessories Ass'n*, 407 F.2d at 338. The USTR could have explained its rationale with respect the comments in light of the specific Presidential directives it was given. What the USTR could not do was fail to provide a response to the comments it solicited when providing the rationale for its final determinations.

NPRM stage as an open question, and not one that was predetermined based on the direction of the President. *See id.*

[28] Indeed, it would be anomalous to find that *Final List 3* and *Final List 4A* constitute agency actions subject to the APA's procedural requirements while finding that references invoking the President's direction, without more, satisfy the APA's requirement for a concise statement of basis and purpose.

With respect to List 3, the USTR indicated that it chose the products subject to the tariffs at the direction of the President. *Final List 3*, 83 Fed. Reg. at 47,975 (noting that the USTR, "at the direction of the President, has determined not to include certain tariff subheadings listed in the Annex to the [List 3 NPRM]"). At Oral Argument, however, the Government acknowledged that the record does not reflect the President's final approval of the list of products covered by the determinations. Oral Arg. 7:50–9:40. The Government argues that the USTR's response to comments also is evidenced by the USTR's subsequent decisions to delay the List 3 increase from 10 percent to 25 percent and to establish an exclusion process. Defs.' Mot. at 58–59. Those arguments cannot prevail, however, because neither of the referenced decisions are contained in *Final List 3*, which constitutes the "final agency action" at issue in this case. *See* 5 U.S.C. § 704; *Final List 3*, 83 Fed. Reg. at 47,974–95 (stating a definitive date for the increase to 25 percent and providing no indication of an exclusion process).[29] The USTR's assertion that it removed certain products from List 3 following its review of the comments and hearing testimony fails to apprise the court of the rationale for the product selection and how that rationale is responsive to the comments.

With respect to List 4A, the USTR stated that "[c]ertain tariff subheadings proposed in the [List 4

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[29] While the USTR stated that it is "maintaining the prior action," *Final List 3*, 86 Fed. Reg. at 47,975, when read in context, that statement appears to mean that it is imposing the additional duties while maintaining the List 1 and List 2 duties already in place. That statement does not clearly indicate to the public or the court that the USTR will establish an exclusion process specific to the List 3 duties.

NPRM] have been removed from the final list of tariff subheadings subject to additional duties, based on health, safety, national security, and other factors." *Final List 4*, 84 Fed. Reg. at 43,305. The USTR also segregated the tariff subheadings into two lists with staggered effective dates and indicated that an exclusion process would be forthcoming. *See id.* While the USTR explained that it separated the tariffs based on "China's share of U.S. imports," *id.*, that statement does not address the composition of the list of subheadings in the first place. As with List 3, the USTR also failed to connect the removal of subheadings to the comments or address comments that, for example, urged the USTR to distinguish between parts and finished goods.[30]

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[30] The Government also argued that the USTR's rationale for modifying the section 301 action can be ascertained by examination of certain internal memoranda between USTR General Counsel and USTR Lighthizer. *See* Defs.' Mot. at 58–59 (citing Mem. from USTR General Counsel Joseph Barloon to USTR Robert Lighthizer (Aug. 14, 2019) at 1, 5–6, PR 9; Mem. from USTR General Counsel Joseph Barloon to USTR Robert Lighthizer (May 7, 2019) at 2, PR 8; Mem. from USTR General Counsel Stephen Vaughn to USTR Robert Lighthizer (Dec. 14, 2018) at 2, PR 6; and Sept. 2018 Vaughn Mem. at 7–9); *see also* Oral Arg. 2:45:00–2:50:00. The APA requires the USTR to "incorporate *in the rules adopted* a concise general statement of their basis and purpose." 5 U.S.C. § 553(c) (emphasis added). While the statute does not preclude the court from reviewing an agency's explanation that is external to the *Federal Register* notice, *see, e.g.*, *Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 711 (D.C. Cir. 1977) (explaining that "[t]he enquiry must be whether the rules and statement are published close enough together in time so that there is no doubt that the statement accompanies, rather than rationalizes the rules"), the USTR did not incorporate by reference the cited memoranda in the contested determinations and the public was not alerted to the reasoning offered therein given the nonpublic nature of the

Thus, *Final List 3* and *Final List 4* require reconsideration or further explanation regarding the USTR's rationale for imposing the tariffs and, as necessary, the USTR's reasons for placing products on the lists or removing products therefrom.[31]

c. Remedy

During the hearing, Plaintiffs opined that the Government has waived any request for a remand instead of outright vacatur, a position with which the Government disagreed. Oral Arg. 2:36:30–2:37:00, 2:38:53–2:43:43, 2:46:42–2:46:59. For their part, Plaintiffs did not present arguments for vacatur until filing a notice of supplemental authority and, even then, only summarily discussed vacatur in reference to a prior court opinion. *See* Pls.' Suppl. Authority at 2 (discussing *Invenergy Renewables LLC v. United States*, 45 CIT __, __, 552 F. Supp. 3d 1382, 1400, 1404 (2021)). The Government, in turn, sought to distinguish that case and, in so doing, argued for a different outcome. *See* Defs.' Resp. Suppl. Authority at 2–3. In a case arising under the APA, the court may—

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memoranda. If, on remand, the USTR seeks to rely on the contents of the memoranda as evidence of the USTR's reasons for acting when and how it did such that a future rationale is not *post hoc*, the USTR must explain why that reliance is justified in light of *Invenergy Renewables LLC v. United States*, 44 CIT __, __, 476 F. Supp. 3d 1323, 1347 (2020) (holding that a contemporaneous but nonpublic memorandum "cannot be considered as part of the grounds invoked by the [USTR] when it acted" because "adequate explanation of the agency's decision has to be made public somewhere or in some manner allowing interested parties to review and scrutinize it").

[31] To the extent the USTR decides, on remand, that certain products should have been added to or omitted from the determinations from the beginning, the USTR should also establish and describe a lawful process for implementing that decision.

and regularly will—remand for reconsideration deficient agency action when further explanation is required. *See* 5 U.S.C. § 706(2)(A); *see also, e.g.*, *NOVA*, 260 F.3d at 1379–80. Thus, the court declines to find that the doctrine of waiver precludes remand here.

The court turns next to the question whether vacatur is merited in the interim notwithstanding remand to the USTR. In certain circumstances, the court may remand agency action for further consideration while allowing the action to remain in effect. *See NOVA*, 260 F.3d at 1367–68, 1379–81. In *NOVA*, the Federal Circuit adopted the standard first set forth by the D.C. Circuit as to whether agency action should remain in effect when the action is remanded for further consideration. *id.* at 1380 ("[A]n inadequately supported rule . . . need not necessarily be vacated.") (second alteration in original) (quoting *Allied-Signal*, 988 F.2d at 151). In deciding whether to vacate, the court considers "the seriousness of the [rule's] deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal*, 988 F.2d at 150–51 (quotations and citation omitted); *see also NOVA*, 260 F.3d at 1380 (declining to vacate when the "validity" of the contested action was "open to question" and given the "disruptive consequences" of vacatur).

While the USTR's failure to explain its rationale in the context of the comments it received leaves room for doubt as to the legality of its chosen courses of action, as in *NOVA*, the court weighs heavily the disruptive consequences of (potentially interim) vacatur. *Final List 3* and *Final List 4* constitute modifications of a prior section 301 action taken to exert leverage on China to cease unfair trade actions burdening U.S.

commerce and to do so in a manner that China may no longer attempt to offset that leverage with retaliatory measures of its own. Thus, they are part of a continuum of actions taken in conjunction with ongoing negotiations with China. In addition to impacting the United States' ability to impose and retain List 3 and List 4A duties, vacating the determinations would disrupt a complex and evolving process that was designed by Congress to allow for ongoing negotiations. For now, the court declines to try to unscramble this egg. *Cf. Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 97–98 (D.C. Cir. 2002) (declining to vacate unlawful agency action when it was possible for the relevant agency to cure the defect).

At the hearing, Plaintiffs invoked *Dep't of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), to argue that the court must vacate USTR's List 3 and List 4 determinations. Oral Arg. 2:38:53–2:43:43; 2:51:15–2:51:37. In *Regents*, the U.S. Supreme Court held that the Department of Homeland Security's ("DHS") Acting Secretary Duke's explanation of her decision to rescind the Deferred Action for Childhood Arrivals ("DACA") program relied only on the Attorney General's explanation that DACA's provision of entitlement benefits to certain categories of aliens was unlawful; however, that explanation was insufficient to justify DHS's rescission of DACA's grant of forbearance of enforcement of removal proceedings against the covered classes of persons.[32] 140 S. Ct. at

[32] The Supreme Court declined to address the adequacy of DHS's explanation that it relied on the Attorney General's decision that DACA was unlawful because Acting Secretary Duke was statutorily bound by that decision. *See Regents*, 140 S. Ct. at 1910–11. Instead, the Supreme Court found that Duke failed to

1912–14. The twin prongs of DACA, i.e., benefits and forbearance, were established by DHS's implementation of DACA, and, therefore, in rescinding DACA, DHS had to address both prongs. *See id.* at 1913. The Court refused to consider subsequent reasoning provided by Acting Secretary Duke's successor, Secretary Nielsen, after concluding that the Secretary's reasoning was almost entirely *post hoc*. *See id.* at 1908–09. While Acting Secretary Duke's contemporaneous explanation rested solely upon illegality, Secretary Nielsen pointed to the need to foster confidence in the rule of law by rejecting "legally *questionable*" policies and a preference for legislative solutions in addition to DACA's illegality. *See id.* at 1908.

Regents, like *State Farm,* requires the court to review the USTR's statements of basis and purpose to ensure that important policy issues are ventilated and to understand the USTR's determinative reasons for its actions. *Regents* also constitutes a warning to agencies regarding the impermissibility of *post hoc* reasoning as much as it constrains the court's review of such reasoning provided pursuant to a remand. 140 S. Ct. at 1908 (citing *Overton Park*, 401 U.S. at 420, for the proposition that a subsequent explanation "must be viewed critically" for impermissible *post hoc* reasoning and noting that, for example, while "[l]egal uncertainty is, of course, related to illegality[,] . . . the two justifications are meaningfully distinct"). "When an agency's initial explanation 'indicate[s] the determinative reason for the final action taken,' the agency may elaborate later on that reason (or reasons) but may not provide new ones." *Id.* (citing *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam)). Thus,

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address the portion of DACA's legality (forbearance) that was within Duke's discretion. *See id.*

while we may remand to the USTR to further explain its determinations, *Regents* cautions that the USTR may only further explain the justifications it has given for the modifications. *See id.* It may not identify reasons that were not previously given unless it wishes to "deal with the problem afresh" by taking new agency action. *Id.* (quoting *Chenery*, 332 U.S. at 201).[33]

3. Plaintiffs' Remaining Arguments[34]

Plaintiffs also raise arguments regarding the extent of notice provided with respect to List 3, the deadlines set for the submission of comments and the permissible scope of those comments, and the amount of time the USTR allowed interested parties to testify at the hearings. None of these arguments present additional grounds for remand or vacatur.

a. Notice of the Legal Basis for List 3

Plaintiffs first argue that the USTR failed to provide adequate notice of the legal basis for List 3 because although the NPRM cited to section 307(a)(1)(C) exclusively, the USTR ultimately relied on section 307(a)(1)(B) and (C). Pls.' Cross-Mot. & Resp. at 55–56;

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[33] Plaintiffs also argue that the USTR failed to consider factors relevant to the statute when it based List 3 and List 4A on China's retaliatory conduct. Pls.' Cross-Mot. & Resp. at 60–61. Because the court finds that China's conduct was relevant to the USTR's determinations pursuant to section 307(a)(1)(B), *see supra*, Plaintiffs' related procedural argument must fail.

[34] Because the court is remanding *Final List 3* and *Final List 4*, the court need not further address the issue of remedy in relation to Plaintiffs or *Amici Curiae* at this time. *See generally* Interested Parties' Br. (arguing that non-importer plaintiffs in other cases that bore the cost of the section 301 duties have both constitutional and statutory standing to challenge the USTR's actions and the court's authority to provide relief is not limited to importers of record).

Pls.' Reply at 24–25. The Government argues that the NPRM for List 3 complied with statutory requirements. Defs.' Resp. & Reply at 35–37.

Section 553(b) requires an agency engaged in rulemaking to publish in the *Federal Register* a "reference to the legal authority under which the rule is proposed" and "either the terms or substance of the proposed rule or a description of the subjects and issues involved." 5 U.S.C. § 553(b)(2)–(3).[35] This notice "need not specify every precise proposal" that an agency "may ultimately adopt," but must "fairly apprise interested parties of the issues involved." *Mid Continent Nails Corp. v. United States*, 846 F.3d 1364, 1373 (Fed. Cir. 2017) (quotations and citations omitted). Notice is deemed adequate for purposes of the APA if "an agency's final rule is a 'logical outgrowth'" of the agency's notice of proposed rulemaking. *Id.* (citation omitted). "A final rule is a logical outgrowth of [a] proposed rule 'only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period.'" *Veteran Justice Grp., LLC v. Sec'y of Veterans Affairs*, 818 F.3d 1336, 1344 (Fed. Cir. 2016) (citation omitted) (alteration in original).

The USTR's failure to cite to section 307(a)(1)(B) in *List 3 NPRM* as an additional or alternative authority for the modification is not fatal to its rulemaking. The notice is clear that the USTR proposed to modify the

[35] Plaintiffs do not specify the precise subsection of section 553(b) they believe the USTR violated. Because the NPRM contained a "reference to the legal authority under which the rule is proposed," i.e., section 307(a)(1)(C), Plaintiffs appear to argue that the USTR's failure to cite section 307(a)(1)(B) rendered the NPRM deficient pursuant to section 553(b)(3).

section 301 action by setting increased duties on additional specified imports from China and requested comments on various aspects of the proposal. *See List 3 NPRM*, 83 Fed. Reg. at 33,609. In explaining the basis for the modification, the USTR also explained that China had failed to "address[] U.S. concerns with the unfair practices found in the investigation," *id.* at 33,608, and "refus[ed] to change its acts, policies, and practices," such that "it ha[d] become apparent that U.S. action at this level is not sufficient to obtain the elimination of China's acts, policies, and practices covered in the investigation," *id.* at 33,609. Anyone wanting to comment on such findings, either to support or rebut the notion that China's unfair practices continued to burden U.S. commerce, and whether such burden continued apace or had increased or decreased relative to the investigation, had notice of the opportunity to do so.

Thus, Plaintiffs argument that the "USTR's defective notice . . . left a record-vacuum" rings hollow. *See* Pls.' Cross-Mot. & Resp. at 56. The USTR "fairly apprise[d] interested parties of the issues involved," and the USTR's reliance on subsection (B) in addition to subsection (C) in the final rule constituted a "logical outgrowth" of the proposed rule. *See Mid Continent*, 846 F.3d at 1373.

b. Comment Deadlines and Time to Testify

Plaintiffs next argue that the USTR failed to provide meaningful opportunity to comment on List 3 by setting a simultaneous deadline for written and post-hearing rebuttal comments and limiting testimony at the public hearings to five minutes per person. *See* Pls.' Cross-Mot. & Resp. at 56–57. Plaintiffs raise similar arguments with respect to List 4A, while noting that, for that proceeding, post-hearing rebuttal comments

were due one week after the hearing. *See id*.; *cf.* RLC's Br. at 10–12 (advancing similar arguments). Plaintiffs also argue that, by explicitly limiting rebuttal comments to "rebutting or supplementing testimony at the hearing" in the NPRM for List 4A, the USTR arbitrarily departed from its practice with respect to List 1, List 2, and List 3. Pls.' Cross-Mot. & Resp. at 57–58 (citation omitted); *see also List 4 NPRM*, 84 Fed. Reg. at 22,565.

The Government argues that the simultaneous deadlines with respect to List 3 resulted from the USTR providing an extension of time for all comments, Defs.' Mot. at 52 (citing *List 3 Cmt. Extension*, 83 Fed. Reg. at 38,761), and the USTR intended the post-hearing rebuttal comments to be responsive to arguments raised at the hearing, not the written submissions, Defs.' Mot. at 53; Defs.' Resp. & Reply at 38. In any event, the Government contends, the APA does not require any opportunity for the submission of rebuttal comments or an in-person hearing during informal rulemaking proceedings; thus, the USTR's procedures in that regard could not have violated the APA. Defs.' Mot. at 53–54.

Plaintiffs' arguments lack merit. The APA did not require the USTR to provide interested parties with an opportunity to submit rebuttal comments. *See* 5 U.S.C. § 553(c). More importantly, the NPRM for List 3 clearly limited rebuttal comments to "post-hearing rebuttal comments." *List 3 NPRM*, 83 Fed. Reg. at 33,609. Thus, the USTR was within its discretion to set simultaneous deadlines for "written" and "post-hearing rebuttal comments" when it extended the deadlines for all List 3 comments. *See Vt. Yankee*, 435 U.S. at 543 ("Absent constitutional constraints or extremely compelling circumstances the administra-

tive agencies should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties.") (quotations and citations omitted).

The USTR's decision to limit oral testimony to five minutes per person also did not violate the APA, which gives agencies discretion as to whether a rulemaking will involve an "opportunity for oral presentation." 5 U.S.C. § 553(c). Absent a statutory directive, the amount of time allowed for each person to testify is the type of line-drawing exercise best left to the USTR. *See, e.g., Vt. Yankee*, 435 U.S. at 543. The public hearings for List 3 and List 4 ran for six and seven days, respectively, demonstrating ample opportunity for public participation. *See Final List 3*, 83 Fed. Reg. at 47,975; *Final List 4*, 84 Fed. Reg. at 43,304.

The USTR also did not arbitrarily depart from past practice when it cautioned that post-hearing rebuttal comments for List 4 "should be limited to rebutting or supplementing" hearing testimony. *List 4 NPRM*, 84 Fed. Reg. at 22,565. The *Federal Register* notices for List 1, List 2, and List 3 likewise provided for "post-hearing rebuttal comments" and, thus, did not explicitly provide for replies to written comments. *See List 3 NPRM*, 83 Fed. Reg. at 33,609; *Final List 1*, 83 Fed. Reg. at 28,712; *USTR Determination*, 83 Fed. Reg. at 14,908. Indeed, with respect to List 3, given the simultaneous deadlines for written and post-hearing rebuttal comments, there was no need for the USTR to have articulated such a limitation. *See List 3 Cmt. Extension*, 83 Fed. Reg. at 38,761.

Accordingly, the USTR did not have an established practice of allowing replies to written comments that it departed from with respect to List 4. *See Ranchers–Cattlemen Action Legal Found. v. United States*, 23 CIT

861, 884–85, 74 F. Supp. 2d 1353, 1374 (1999) (explaining that identification of an "agency practice" is predicated upon the existence of "a uniform and established procedure . . . that would lead a party, in the absence of notification of a change, reasonably to expect adherence to the established practice or procedure"). Even if the USTR had such a practice, the USTR's cautionary language used nonmandatory terms. *See List 4 NPRM*, 84 Fed. Reg. 22,565 (post-hearing rebuttal comments for List 4 "*should be* limited to rebutting or supplementing" hearing testimony) (emphasis added); *see also AT&T v. United States*, 307 F.3d 1374, 1379–80 (Fed. Cir. 2002) (stating that "[a] caution, however, is not a prohibition"). Thus, interested parties were not explicitly precluded from responding to another party's written submission.

Courts, recognizing that "[w]ith more time most parties could improve the quality of their comments," ask whether there is evidence that a party would provide more meaningful comments if given more time or opportunity. *Sichuan Changhong Elec. Co. v. United States*, 30 CIT 1886, 1892, 466 F. Supp. 2d 1323, 1328 (2006); *see also Omnipoint Corp. v. FCC*, 78 F.3d 620, 630 (D.C. Cir. 1996) (finding that seven-day comment period did not violate APA where plaintiff "failed to identify any substantive challenges it would have made had it been given additional time"). Plaintiffs have pointed to no such evidence in connection with the foregoing arguments. Indeed, as the Government asserts, Plaintiffs fail to "explain *why* they would need to rebut any of the initial written comments (or, for that matter anything discussed at the hearing), when, as the administrative record demonstrates, the written commenters and hearing participants overwhelmingly

agreed with the plaintiffs' position, that the tariffs should not go into effect." Defs.' Resp. & Reply at 38.[36]

Thus, for the reasons discussed above, Plaintiffs' additional procedural arguments do not provide any further basis to remand or vacate the USTR's determinations.

IV. The Government's Motion to Correct the Administrative Record

The Government seeks to correct the administrative record by adding two documents (and provide an accompanying certification): The June 2018 Presidential Statement and a supplemental section 301 report titled UPDATE CONCERNING CHINA'S ACTS, POLICIES, AND PRACTICES RELATED TO TECHNOLOGY TRANSFER, INTELLECTUAL PROPERTY, AND INNOVATION (2018) ("Supplemental 301 Report"). Defs.' Mot. Correct R. at 1, Ex. B. The Government contends that "[t]he U.S. Trade Representative was aware of the contents of both of these documents and they would have been considered when making the challenged decisions." *Id.* at 2–3.[37] Plaintiffs "take no position on the motion with respect to [the June 2018 Presidential Statement]" given the Parties' and the USTR's respective references

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[36] Because the court finds that Plaintiffs' arguments lack merit, the court does not reach the Government's argument that the court should account for the asserted "urgent need for action" when examining the adequacy of the USTR's procedures. See Defs.' Mot. at 55; Defs.' Resp. & Reply at 39–40.

[37] The Government also states that "the USTR considered . . . the facts contained in the [Supplemental 301 Report]," Defs.' Mot. Correct R. at 3, but that assertion goes further than the declaration attached to the Government's motion, which asserts that the USTR "was aware of the contents of [the Supplemental 301 Report]" and it "would have been considered" by the USTR. Decl. by Megan Grimball ¶ 6 (Feb. 15, 2022), ECF No. 441–3.

to that document. Pls.' Opp'n Correct R. at 1. Plaintiffs contend that the court should deny the motion with respect to the Supplemental 301 Report because it post-dates the USTR's consideration of the List 3 duties, was not cited by the USTR in the contested determinations or by the Parties in their litigation briefs, and the Government failed to demonstrate the USTR's consideration of the document. *Id.* at 1–2.

The court will grant the Government's motion with respect to the June 2018 Presidential Statement and the accompanying certification but will deny the motion with respect to the Supplemental 301 Report.

For purposes of APA review, the administrative record consists of "all documents and materials directly or indirectly considered by agency decisionmakers." *Ammex, Inc. v. United States*, 23 CIT 549, 555, 62 F. Supp. 2d 1148, 1156 (1999) (quoting *Thompson v. U. S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)). The obvious corollary to this rule is that "materials that were neither directly *nor* indirectly considered by agency decisionmakers," even if relevant, "should not be included" in the record. *Id.* (citation omitted). To correct the record, the movant must "show that the documents to be included were before the agency decisionmaker." *Pac. Shores Subdivision, Cal. Water Dist. v. U.S. Army Corps of Eng'rs*, 448 F. Supp. 2d 1, 6 (D.D.C. 2006). That showing requires the movant to "put forth concrete evidence and identify reasonable, non-speculative grounds for [its] belief that the documents were considered by the agency." *Fort Sill Apache Tribe v. Nat'l Indian Gaming Comm'n*, 345 F. Supp. 3d 1, 9 (D.D.C. 2018) (quotations and citation omitted) (alteration in original) (granting motion to correct the record to include 39 documents indirectly considered

by an agency when the documents were referenced in a letter directly considered by the agency in reaching its final decision).

The Supplemental 301 Report could not have been directly or indirectly considered by the USTR in reaching its decision to issue *Final List 3* because the document did not exist at the time. The Government argues instead, with respect to both List 3 and List 4A, that the "contents" of the Supplemental 301 Report "*would have been* considered" by the USTR. Defs.' Mot. Correct R. at 1–2 (emphasis added). The Government offers no authority for including in the record a document that was not, itself, directly or indirectly considered by the USTR, even if its "contents" were, in some unexplained fashion, considered. On that point, however, the Government makes no showing that the contents of the Supplemental 301 Report *were* considered by the USTR; the Government merely surmises that they "would have been."[38]

Thus, the court will grant the Government's motion with respect to the June 2018 Presidential Statement and the accompanying certification and deny the Government's motion with respect to the Supplemental 301 Report.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that the Government's motion to dismiss (ECF No. 314) is DENIED; it is further

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[38] That the Supplemental 301 Report was published on the USTR's website in November 2018, *see* Defs.' Mot. Correct R. at 2, alone does not demonstrate the USTR's direct or indirect consideration of the facts contained therein when deciding whether to impose the List 3 or List 4A duties.

ORDERED that the Government's motion for judgment on the agency record (ECF No. 314) and Plaintiffs' cross-motion for judgment on the agency record (ECF No. 358) are each GRANTED IN PART and DENIED IN PART; it is further

ORDERED that *Final List 3* and *Final List 4* are remanded to the USTR for reconsideration or further explanation consistent with this opinion; it is further

ORDERED that the USTR shall file its remand results on or before June 30, 2022; it is further

ORDERED that, within 14 days of the USTR's filing of the remand results, the Parties shall file a joint status report and proposed schedule for the further disposition of this litigation; and it is further

ORDERED that the Government's partial consent motion to correct the administrative record (ECF No. 441) is GRANTED IN PART and DENIED IN PART.

/s/ Mark A. Barnett
Mark A. Barnett, Chief Judge

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

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

Dated: April 1, 2022
New York, New York

APPENDIX C

Slip Op. 23-35

UNITED STATES COURT OF INTERNATIONAL TRADE

Court No. 21-00052-3JP

IN RE SECTION 301 CASES

Before: Mark A. Barnett, Claire R. Kelly, and Jennifer Choe-Groves, Judges

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OPINION AND ORDER

[Sustaining *Final List 3* and *Final List 4* as amended on remand by the Office of the United States Trade Representative; granting Defendants' second motion to correct the administrative record.]

Dated: March 17, 2023

Pratik Shah, Akin Gump Strauss Hauer & Feld LLP, of Washington, DC, argued for Plaintiffs HMTX Industries LLC, et al. With him on the brief were Matthew R. Nicely, James E. Tysse, Devin S. Sikes, Daniel M. Witkowski, and Sarah B. W. Kirwin.

Elizabeth A. Speck, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendants United States, et al. With her on the brief were Brian M. Boynton, Principal Deputy Assistant Attorney General, Patricia M. McCarthy, Director, L. Misha Preheim, Assistant Director, Justin R. Miller,

Attorney-In-Charge, International Trade Field Office, Sosun Bae, Senior Trial Counsel, and Jamie L. Shookman, Trial Attorney. Of Counsel on the brief were Megan Grimball, Associate General Counsel, Philip Butler, Associate General Counsel, and Edward Marcus, Assistant General Counsel, Office of General Counsel, Office of the U.S. Trade Representative, of Washington, DC, and Paula Smith, Assistant Chief Counsel, Edward Maurer, Deputy Assistant Chief Counsel, and Valerie Sorensen-Clark, Attorney, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, of New York, NY.

Alexander W. Koff, Venable LLP, of Baltimore, MD, argued for Amici Curiae VeriFone, Inc., et al. With him on the brief were Ashleigh J. F. Lynn and Nicholas M. DePalma, Venable LLP, of Tysons Corner, VA.

Joseph R. Palmore and Adam L. Sorensen, Morrison & Foerster LLP, of Washington, DC, for Amici Curiae Retail Litigation Center, et al.

Barnett, Chief Judge: Plaintiffs HMTX Industries LLC, Halstead New England Corporation, Metroflor Corporation, and Jasco Products Company LLC commenced the first of approximately 3,600 cases[1] ("the Section 301 Cases") contesting the imposition of a third and fourth round of tariffs by the Office of the United States Trade Representative ("USTR" or "the Trade Representative") pursuant to section 307 of the Trade Act of 1974 ("the Trade Act"), 19 U.S.C. § 2417

[1] This figure reflects the approximate number of cases assigned to this panel. Cases raising similar claims filed on or after April 1, 2021, are stayed without an order of assignment. *See* U.S. Ct. of Int'l Trade Admin. Order 21-02.

(2018).[2] *See generally* Am. Compl., *HMTX Indus. LLC v. United States,* No. 20-cv-177 (CIT Sept. 21, 2020), ECF No. 12 ("20-177 Am. Compl."). USTR imposed the contested duties, referred to herein as "List 3" and "List 4A," in September 2018 and August 2019, respectively. *See Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 47,974 (Sept. 21, 2018) ("*Final List 3*"); *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation,* 84 Fed. Reg. 43,304 (Aug. 20, 2019) ("*Final List 4*").[3] Plaintiffs alleged that USTR exceeded its

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[2] Citations to the United States Code are to the 2018 version, unless otherwise specified. Section 307 provides, *inter alia*:

> (a) In general
>
> (1) The Trade Representative may modify or terminate any action, subject to the specific direction, if any, of the President with respect to such action, that is being taken under section 2411 of this title if—
>
> (A) any of the conditions described in section 2411(a)(2) of this title exist,
>
> (B) the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are the subject of such action has increased or decreased, or
>
> (C) such action is being taken under section 2411(b) of this title and is no longer appropriate.

19 U.S.C. § 2417(a)(1). The Section 301 Cases are named in recognition of the fact that claims raised therein contest modifications of tariffs initially imposed pursuant to section 301 of the Trade Act, 19 U.S.C. § 2411.

[3] Within *Final List 4*, USTR segregated the tariff subheadings into List 4A and List 4B with staggered effective dates

statutory authority and violated the Administrative Procedure Act ("APA"), 5 U.S.C. § 706(2), when it promulgated List 3 and List 4A. 20-177 Am. Compl. ¶¶ 63–75.

In *In Re Section 301 Cases*, 46 CIT __, 570 F. Supp. 3d 1306 (2022), the court rejected Defendants' ("the Government") argument that Plaintiffs' claims were non-justiciable and addressed Plaintiffs' substantive and procedural challenges.[4] Although the court sustained USTR's statutory authority to impose the tariffs pursuant to section 307(a)(1)(b) of the Trade Act, *id.* at 1323–35, the court remanded the matter for USTR to comply with the APA requirement for a reasoned response to comments submitted during the List 3 and List 4A rulemaking proceedings. *Id.* at 1335–45.[5]

(September 1, 2019, and December 15, 2019, respectively). 84 Fed. Reg. at 43,305. USTR promulgated List 3 and List 4A as modifications of two prior rounds of tariffs, referred to herein as "List 1" and "List 2." *See Notice of Action and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation*, 83 Fed. Reg. 28,710 (June 20, 2018) (promulgating List 1); *Notice of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation*, 83 Fed. Reg. 40,823 (Aug. 16, 2018) (promulgating List 2).

[4] The court presumes familiarity with *In Re Section 301 Cases,* which sets forth in detail background on the imposition of List 3 and List 4A duties, and the case management procedures the court employed to handle the Section 301 Cases.

[5] Finding authority pursuant to section 307(a)(1)(B), the court declined to address USTR's authority pursuant to section 307(a)(1)(C). *In Re Section 301 Cases*, 570 F. Supp. 3d at 1334–35. The court rejected Plaintiffs' remaining APA claims and granted

This matter is now before the court following USTR's filing of its remand redetermination. *See* Further Explanation of the Final List 3 and Final List 4 Modifications in the Section 301 Action: China's Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation, Pursuant to Ct. Remand Order ("Remand Results"), ECF No. 467. In the Remand Results, USTR (1) identified the documents underlying its response to comments; (2) provided additional explanation supporting the removal or retention of certain tariff subheadings from List 3 and List 4A; (3) addressed comments concerning the level of duties to be imposed and the aggregate level of trade subject to the duties; and (4) addressed comments concerning potential harm to the domestic economy, the legality and efficacy of the tariffs, and suggested alternative measures. *See id.* at 23–89.

Plaintiffs and *Amici*[6] filed comments opposing the Remand Results and seeking vacatur of List 3 and List 4A. *See* Pls.' Cmts. on the [USTR's Remand Results] ("Pls.' Cmts."), ECF No. 474; Pls.' Reply Regarding the Remand Determination ("Pls.' Reply Cmts."), ECF No. 482; Br. of Amici Curiae Retail Litig. Ctr., Inc., Nat'l Retail Fed'n, Am. Apparel and Footwear Assoc., Consumer Tech. Assoc., Footwear Distributors and Retailers of Am., Juvenile Prods. Mfrs. Assoc., and Toy Assoc. ("RLC's Br."), ECF No. 472; Br. of Amici Curiae Verifone, Drone Nerds, and Specialized in Supp. of Pls.' Cmts. on the [Remand Results] ("Verifone's Br."), ECF No. 471-2. The Government filed responsive comments

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in part the Government's motion to correct the record. *Id.* at 1345–49.

[6] The court authorized additional plaintiffs in the Section 301 Cases to participate in this litigation as *amici curiae*. Std. Procedural Order 21-02 at 4, ECF No. 82.

in support of the Remand Results. *See* Defs.' Resp. to Cmts. on the [Remand Results] ("Defs.' Resp. Cmts."), ECF No. 479. The Government also filed its second motion to correct the record. Defs.' Second Mot. to Correct the R. ("2nd Mot. Correct R."), ECF Nos. 466, 466-1. The court heard oral argument on February 7, 2023. Docket Entry, ECF No. 488.

For the following reasons, the court sustains *Final List 3* and *Final List 4* as amended by the Remand Results and grants the Government's second motion to correct the record.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction pursuant to 28 U.S.C. § 1581(i)(1)(B) (2018 & Supp. II 2020), which grants the court "exclusive jurisdiction of any civil action commenced against the United States . . . that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue."

The APA directs the court to "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; [or] . . . (C) in excess of statutory . . . authority; [or] . . . (E) unsupported by substantial evidence." 5 U.S.C. § 706(2).

DISCUSSION

Plaintiffs and *Amici* challenge the Remand Results on two grounds. They first assert that USTR's Remand Results constitute impermissible *post hoc* reasoning pursuant to *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020). Next, to the extent that USTR's Remand

Results survive *Regents*, Plaintiffs challenge the substantive adequacy of USTR's response to certain comments. Following disposition of these issues, the court addresses the Government's second motion to correct the record.

I. The Rule Against *Post Hoc* Rationalization

A. Parties' Contentions

Plaintiffs contend that USTR contravened the court's remand order by undertaking a new review and analysis of the comments. Pls.' Cmts. at 9–10. Plaintiffs argue that, instead, judicial precedent limits USTR to elaborating on a "prior response to comments" located somewhere in the administrative record. *Id.* at 10; *see also id.* at 13–14 (arguing that USTR failed to demonstrate consideration of comments contemporaneous with the issuance of *Final List 3* and *Final List 4* upon which it now seeks to elaborate). Having failed to do so, Plaintiffs assert that vacatur is merited. Pls.' Reply Cmts. at 2–4.

The Government contends that Plaintiffs' view of the permissible limits of the remand finds no support in *Regents* or subsequent cases remanding actions for an agency to respond to comments. Defs.' Resp. Cmts. at 10; *see also id.* at 11–12 (citing *Bloomberg L.P. v. SEC*, 45 F.4th 462, 477 (D.C. Cir. 2022); *Env't Health Trust v. FCC*, 9 F.4th 893, 909, 914 (D.C. Cir. 2021)). The Government further contends that taking Plaintiffs' argument to its logical conclusion would require any agency that fails to address significant comments to undertake a new agency action on remand. *Id.* at 11. Instead, the Government maintains that USTR's Remand Results constitute permissible elaboration on the underlying justifications for the actions taken, namely, "the President's direction and [the Trade

Representative's] predictive judgment that the tariffs were 'appropriate' within the meaning of the statute." *Id.* at 12; *see also id.* at 20.

B. USTR's Response to Comments is Not Impermissibly *Post Hoc*

The APA requires agencies conducting notice and comment rulemaking to "incorporate in the rules adopted a concise general statement of their basis and purpose." 5 U.S.C. § 553(c). "The basis and purpose statement is inextricably intertwined with the receipt of comments." *Action on Smoking & Health v. Civ. Aeronautics Bd.*, 699 F.2d 1209, 1216 (D.C. Cir. 1983) (footnote citation omitted). An agency "must respond in a reasoned manner to those [comments] that raise significant problems." *City of Waukesha v. EPA*, 320 F.3d 228, 257 (D.C. Cir. 2003) (quotations and citation omitted). "Significant comments are those 'which, if true, raise points relevant to the agency's decision *and which, if adopted, would require a change in an agency's proposed rule*.'" *City of Portland v. EPA*, 507 F.3d 706, 715 (D.C. Cir. 2007) (quoting *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 n.58 (D.C. Cir. 1977)).

The court previously found that "USTR's statements of basis and purpose . . . indicate why the USTR deemed China's ongoing and retaliatory conduct actionable," namely, "China's unfair practices" and "the specific direction of the President." *In Re Section 301 Cases*, 570 F. Supp. 3d at 1340 (citing *Final List 3*, 83 Fed. Reg. at 47,974–75; *Final List 4*, 84 Fed. Reg. at 43,304–05). The court further found, however, that although USTR's notices of proposed rulemaking ("NPRMs")[7] indicated the Trade Representative's

[7] For the NPRMs, see *Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's*

"willingness to consider factors other than the President's direction," the contested final actions "do not explain whether or why the President's direction constituted the only relevant consideration nor do those determinations address the relationship between significant issues raised in the comments and the President's direction." *Id.* at 1341.[8] In explaining its decision to remand without vacatur, the court observed that "*Regents* . . . constitutes a warning to agencies regarding the impermissibility of *post hoc* reasoning as much as it constrains the court's review of such reasoning provided pursuant to a remand." *Id.* at 1344 (citing *Regents*, 140 S. Ct. at 1908).

When "reviewing agency action, a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record." *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573 (2019). When the grounds invoked by an agency "are inadequate, a court may remand for the agency" to

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Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation, 83 Fed. Reg. 33,608 (July 17, 2018) ("*List 3 NPRM*"), and *Request for Comments Concerning Proposed Modification of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation*, 84 Fed. Reg. 22,564 (May 17, 2019) ("*List 4 NPRM*").

[8] *Final List 3* referenced the removal of tariff subheadings in response to comments. 83 Fed. Reg. at 47,975 (noting that USTR, "at the direction of the President, has determined not to include certain tariff subheadings listed in the Annex to the [List 3 NPRM]"). *Final List 4* asserted that "The Trade Representative's determination takes account of the public comments and the testimony from the seven-day public hearing, as well as the advice of the interagency Section 301 committee and appropriate advisory committees." 84 Fed. Reg. at 43,305.

pursue one of two options. *Regents*, 140 S. Ct. at 1907.[9] Option one permits the agency to provide "a fuller explanation of the agency's reasoning *at the time of the agency action*." *Id.* (quoting *Pension Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654 (1990)). Option one "has important limitations," such that "[w]hen an agency's initial explanation 'indicate[s] the determinative reason for the final action taken,' the agency may elaborate later on that reason (or reasons) but may not provide new ones." *Id.* at 1908 (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (per curiam)) (second alteration in original). Option two permits an agency to "'deal with the problem afresh' by taking *new* agency action." *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 201 (1947)). An agency acting in accordance with option two "is not limited to its prior reasons but must comply with the procedural requirements for new agency action." *Id.*

Plaintiffs argue that USTR's response to comments is impermissibly *post hoc* pursuant to *Regents* insofar

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[9] *Regents* concerns the U.S. Department of Homeland Security's ("DHS") rationale for rescinding the program referred to as "Deferred Action for Childhood Arrivals," or "DACA." 140 S. Ct. at 1901. DHS did not engage in "notice and comment" rulemaking pursuant to 5 U.S.C. § 553(b)–(c). Instead, DHS attempted to rescind DACA through the issuance of two consecutive executive memoranda. *Id.* at 1901, 1903–04. After the D.C. District Court held that the first memorandum, issued by DHS Acting Secretary Elaine C. Duke, was too "conclusory . . . to explain the change in [DHS's] view of DACA's lawfulness," the Acting Secretary's "successor, Secretary Kirstjen M. Nielsen," issued a new memorandum purporting to elaborate on the reasoning provided in Acting Secretary Duke's Memorandum. *Id.* at 1904. Despite this characterization, the Court held that "Secretary Nielsen's reasoning bears little relationship to that of her predecessor" and was instead "impermissible post hoc rationalization[]." *Id.* at 1908–09.

as USTR undertook a new review and analysis of the comments on remand and failed to identify analysis of the comments contemporaneous with the issuance of *Final List 3* and *Final List 4*. *See, e.g.*, Pls.' Cmts. at 9–11.

USTR's analysis of the comments, Plaintiffs contend, required a new rulemaking. *See* Pls.' Reply Cmts. at 1 ("If USTR wishes to assess and address the significant comments, evaluate the costs of further tariff actions, and then impose the List 3 and List 4A tariffs going forward, it may take new action."). Plaintiffs seek to distinguish an agency's failure to address comments, which they assert can be remedied by further explanation on remand (i.e., *Regents*' option one), from an agency's failure to analyze or consider comments, which they assert cannot be remedied without a new rulemaking (i.e., *Regents*' option two). Oral Arg. (Feb. 7, 2023) at 59:30–1:00:50 (time stamp from the recording), *available at* https://www.cit.uscourts.gov/sites/cit/files/020723-21-00052- 3JP.mp3.

Plaintiffs' distinction is unsupported. Since *Regents*, as in this case, courts have ordered remands for agencies to respond to significant comments. *See, e.g.*, *Bloomberg*, 45 F.4th at 477–78; *Env't Health*, 9 F.4th at 909, 914; *AT&T Servs., Inc. v. FCC*, 21 F.4th 841, 843, 853 (D.C. Cir. 2021). Such cases do not distinguish between failures of explanation and failures of consideration. *See, e.g.*, *AT&T Servs.*, 21 F.4th at 853 ("The failure to respond to comments is significant only insofar as it demonstrates that the agency's decision was not based *on a consideration* of the relevant factors.") (citation omitted) (emphasis added); *see also W. Coal Traffic League v. Surface Transp. Bd.*, 998 F.3d 945, 954 (D.C. Cir. 2021) (likening the failure to respond to comments to the "fail[ure] to consider an

important aspect of the problem") (quoting *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). Accordingly, USTR's Remand Results are not impermissibly *post hoc* simply because USTR analyzed and addressed the comments on remand. *Cf. FBME Bank Ltd. v. Mnuchin*, 249 F. Supp. 3d 215, 223 (D.D.C. 2017) (reviewing an agency's response to comments on remand). Nevertheless, the court must reconcile USTR's response to comments with *Regents* and the rule against *post hoc* rationalization.

To begin with, the court remanded the matter for USTR to respond to the comments it had already received. *See In Re Section 301 Cases*, 570 F. Supp. 3d at 1338–43.[10] In discussing the limits of option one, *Regents* cites to an opinion from the U.S. Court of Appeals for the D.C. Circuit for the proposition that an agency may provide an "amplified articulation" of a

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[10] In this respect, the underlying case is different from *Regents*. In the context of this case, taking new agency action would require USTR to issue new NPRMs, which would appear to be an inefficient mechanism for responding to comments USTR already received. Other courts have likewise grappled with *Regents*' formulation of the rule against *post hoc* rationalization and its application in circumstances dissimilar from those before the *Regents* court. In *Doe v. Lieberman*, 2022 WL 3576211 (D.D.C. Aug. 11, 2022), the D.C. District Court addressed whether an agency's explanation on remand for an earlier evidentiary determination survived *Regents*' rule against *post hoc* rationalization. *Id.* at *1, 5. The court found that *Regents* did not apply because although *Regents* cabins an agency's reasoning on remand to its initial determinative reason(s), there, the agency did not provide a determinative reason for its evidentiary decision in its initial determination. *Id.* at *5. Further, in addressing the plaintiff's arguments, the court explained that requiring the agency to reconsider the termination afresh based on a conclusory evidentiary ruling did not make sense "in the context of evidentiary rulings in agency adjudications." *Id.* at *6.

prior "conclusory" rationale. *Regents*, 140 S. Ct. at 1908 (quoting *Alpharma, Inc. v. Leavitt*, 460 F.3d 1, 5–6 (D.C. Cir. 2006)). Consistent with this notion, although USTR's reasons for agreeing or disagreeing with certain comments are more expansive than what it previously offered, USTR does not offer new determinative reasons for its actions.[11]

Since *Regents*, some courts have questioned *Alpharma*'s formulation of the rule; in particular, its apparent focus on the author rather than the timing of the supplemental explanation. *See Doe*, 2022 WL 3576211, at *5; *United Food and Com. Workers Union, Local No. 663 v. U.S. Dep't of Ag.*, 532 F. Supp. 3d 741, 779 (D. Minn. 2021); *cf. IAP Worldwide Servs., Inc. v. United States*, 160 Fed. Cl. 57, 76–77 (2022) (rejecting similar language from a pre-*Alpharma* case). However, as indicated by the *Regents* court's citation, *Alpharma* remains good law to the extent that it requires any supplemental decision to be prepared by the appropri-

[11] In explaining USTR's decision to remove certain critical inputs for manufactured goods from List 3, USTR stated that, "[t]hrough the interagency process the Department of Commerce recommended USTR remove eight tariff subheadings." Remand Results at 51. Plaintiffs argue that "[t]his is the first time that detail has been revealed publicly" and that "Commerce's recommendation and underlying reasoning are nowhere in the record." Pls.' Cmts. at 13. The confidential administrative record ("CR") index provided to the court indicates that CR-1 constitutes a "Confidential Summary of Confidential Advisory Committee Advice," the production of which is "subject to 19 U.S.C. § 2155(g)." ECF No. 298 at 4. Following oral argument on the remand determination, the Government provided a redacted version of CR-1, which was previously included in the public administrative record ("PR") as PR-9057. *See* Defs.' Notice of Filing Doc. Referenced During Oral Arg., ECF Nos. 489, 489-1. Even accepting Plaintiffs' premise that this input is newly shared, it does not suggest a new determinative reason for USTR's decision.

ate decisionmaker and tethered to the original justification for the action.

Moreover, while *Alpharma* does not involve an agency's response to comments,[12] it is analogous to the extent that it discusses judicial review of an agency's response, on remand, to concerns raised on the record during the adjudication and prior to the final agency action at issue. *See* 460 F.3d at 5–7.[13] Here, as in *Alpharma*, USTR's Remand Results provide an "amplified articulation" of the grounds for its actions. USTR further explained the removal or retention of certain tariff subheadings, its decision to set the level of duties on the specified aggregate level of trade notwithstanding the stated concerns, and its decision to proceed despite the proffered alternatives. In so doing, USTR responded to significant concerns within the context of China's actionable conduct and the specific direction of the President. Thus, while USTR provided a fuller explanation of its reasoning, it was "a fuller explanation of [its] reasoning *at the time of the agency action*." *Regents*, 140 S. Ct. at 1907–08 (quoting *Pension Benefit Guar. Corp.*, 496 U.S. at 654).[14] Without

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[12] *Alpharma* addresses the U.S. Food and Drug Administration's adjudication of a petition to revoke the agency's approval of a generic animal drug. 460 F.3d at 4.

[13] This court previously recognized the instructiveness of "judicial precedent from the D.C. Circuit . . . in light of the court's expertise in the area of administrative law." *In Re Section 301 Cases*, 570 F. Supp. 3d at 1324 n.7.

[14] Plaintiffs cite two cases supporting their view that "courts regularly have held that an agency failed to provide non-conclusory, non-*post hoc* reasoning sufficient to sustain agency action—even after remanding to give the agency a second chance to cure its APA violation." Pls.' Reply Cmts. at 3 (citing *Comcast Corp. v. FCC*, 579 F.3d 1, 9 (D.C. Cir. 2009); *Tex Tin Corp. v. EPA*, 992 F.2d 353, 355 (D.C. Cir. 1993)). Neither case is analogous.

anything new to propose in new NPRMs, the court is not convinced by Plaintiffs' arguments to require USTR to conduct new notice-and-comment rule-makings.

II. USTR's Response to Comments

The court previously held that "[h]aving requested comments on a range of issues, USTR had a duty to respond to the comments in a manner that enables the court to understand 'why the agency reacted to them as it did.'" *In Re Section 301 Cases*, 570 F. Supp. 3d at 1341 (quoting *Auto. Parts & Accessories Ass'n v. Boyd*, 407 F.2d 330, 338 (D.C. Cir. 1968)). The court now turns to the question whether, through the Remand Results, USTR has fulfilled that requirement.

A. Parties' Contentions

Plaintiffs contend that USTR's reliance on Presidential direction to explain its lack of discretion is legally insufficient given the breadth of USTR's request for comments. Pls.' Cmts. at 12–13; Pls.' Reply Cmts. at 5. Plaintiffs fault USTR for failing to explain why it agreed with the President's direction or how it arrived at the conclusion that the actions were "appropriate" within the meaning of the statute. Pls.' Reply Cmts. at 4–5.

Plaintiffs further contend that USTR responded to major policy concerns raised in the comments in an inadequate and conclusory manner. Pls.' Cmts. at

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In *Comcast*, the D.C. Circuit vacated a rule when the agency had failed to consider important concerns the court raised in prior litigation involving an earlier iteration of the same rule. 579 F.3d at 8–10. In *Tex Tin*, the court held that an agency impermissibly based its decision on remand "on a new theory." *Id.* at 355 (citing *Anne Arundel Cty., Md. v. EPA*, 963 F.2d 412, 418 (D.C. Cir.1992)). As discussed above, USTR did not do so here.

15–17. Plaintiffs assert that USTR failed to explain why the benefits of the actions outweighed their costs in terms of economic harm. *Id.* at 17; Pls.' Reply Cmts. at 7–8. Plaintiffs also argue that USTR failed to address concerns about the perceived ineffectiveness of the tariffs or proposed alternatives to the increased tariffs. Pls.' Cmts. at 18–20; Pls.' Reply Cmts. at 8–9. *Amici* advance similar arguments. *See* RLC's Br. at 5–10; Verifone's Br. at 2–5.[15]

The Government contends that USTR adequately explained the role that Presidential direction played in its decision-making. Defs.' Resp. Cmts. at 17–19. The Government also argues that the entirety of the Remand Results—not just the final few pages—reflects USTR's consideration of the potential for disproportionate economic harm. *Id.* at 21–22. The Government further asserts that Plaintiffs' additional arguments "amount to mere disagreement" with USTR's explanation, *id.* at 22–23, and USTR was not required to consider each alternative because USTR tailored its NPRMs specifically to modifying the original section 301 actions, *id.* at 23–24.

B. USTR's Response to Comments Meets APA Requirements

The standard that an agency's response to comments must meet "is not particularly demanding." *Nat'l Mining Ass'n v. Mine Safety & Health Admin.*, 116 F.3d 520, 549 (D.C. Cir. 1997) (per curiam) (quoting *Pub. Citizen, Inc. v. FAA*, 988 F.2d 186, 197 (D.C. Cir.

[15] Verifone's arguments appear to digress into complaints about USTR's decisions regarding specific exclusions. *See* Verifone's Br. at 6–7 (discussing USTR's decisions to grant, but not thereafter to reinstate, certain exclusions). Specific exclusion decisions are not, however, at issue in this case.

1993)). For "judicial review . . . to be meaningful," the agency's explanation must enable the court "to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did." *Auto. Parts & Accessories Ass'n*, 407 F.2d at 338. The court will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." *Nat'l Mining Ass'n*, 116 F.3d at 549 (quoting *State Farm*, 463 U.S. at 43). With these principles in mind, the court considers the matters it required USTR to address on remand.

1. Presidential Direction

The court previously held that the imposition of List 3 and List 4A duties constituted agency—not Presidential—action. *In Re Section 301 Cases*, 570 F. Supp. 3d at 1323–26. The court also recognized, however, that "the President's specific direction, if any, is a statutory consideration for which the agency must account." *Id.* at 1339. The court faulted USTR for relying on Presidential direction without explaining "the relationship between significant issues raised in the comments and the President's direction." *Id.* at 1341.

The Remand Results demonstrate USTR's adherence to the specific direction of the President in terms of the level of duty increase and the aggregate level of trade affected by the actions. *See* Remand Results at 27–28, 74, 77. While it is clear from the Remand Results that USTR did not interpret the statute to accord USTR much discretion to deviate from the President's direction, *see id.* at 77–78, USTR also explained that the judgments reflected in the construction of *Final List 3* and *Final List 4A* were its own, *see id.* at 80–81.

USTR explained that "[t]he aggregate level of trade included in the President's directive and reflected in

Final List 3 . . . reflected the need to cover a substantial percentage of U.S. imports from China," *id.* at 80, and that "[t]he Trade Representative determined that covering a substantial percentage of U.S. goods exported from China was appropriate to obtain the elimination of China's harmful acts, policies, and practices," *id.* at 81. Likewise, USTR stated that "*Final List 4* reflected the judgment that covering essentially all products not covered by previous actions was needed to obtain the elimination of China's acts, policies and practices." *Id.* USTR explained that the levels of duties imposed reflected its judgment regarding "the appropriate balance" to strike "between exerting an appropriate amount of pressure on China to eliminate its harmful practices, while encouraging China to meaningfully engage in negotiations, against comments suggesting additional duties would result in severe economic harm to U.S. consumers and industries." *Id.* at 77. USTR also explained its exercise of discretion to determine the tariff subheadings that would be subject to List 3 and List 4A duties and establish an exclusion process for products subject to List 4A duties. *See id.* at 77–78.[16]

Plaintiffs fail to persuade the court that USTR was required to provide additional explanation regarding its reasons for agreeing with the President that the chosen actions were "appropriate." Pls.' Reply Cmts. at 5. The court discusses USTR's response to comments

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[16] While USTR ultimately established an exclusion process for products subject to List 3 duties, *see Procs. for Requests to Exclude Particular Prods. From the Sept. 2018 Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Tech. Transfer, Intell. Prop., and Innovation*, 84 Fed. Reg. 29,576 (June 24, 2019), it did not do so initially because USTR "had greater flexibility" to exempt products from the outset, Remand Results at 78.

raising policy concerns below and considers this explanation responsive to the question of whether the actions were appropriate. Moreover, the court recognizes that USTR's consideration of significant comments must account for "section 301's statutory purpose to eliminate the burden on U.S. commerce from China's unfair acts, policies, and practices" and any "specific direction [from] the President." *In Re Section 301 Cases*, 570 F. Supp. 3d at 1340. In remanding *Final List 3* and *Final List 4*, the court admonished USTR for its failure to respond to comments "within the context of the specific direction provided by the President." *Id.* at 1340–41. The court did not order USTR to analyze the President's directives.[17] In contrast to the conclusory treatment of comments in *Final List 3* and *Final List 4*, the Remand Results reflect USTR's conclusion that statutory language linking any modification to the specific direction of the President constrained USTR's ability to depart from that direction and explained USTR's

[17] Plaintiffs previously conceded that they do not contest "subjective determination[s] of what is 'appropriate' (or any other discretionary determination[s])." Pls.' Mem. in Supp. of Pls.' Cross-Mot. for J. on the Agency R. and Resp. to Defs.' Mot. to Dismiss/Mot. for J. on the Agency R. at 51, ECF No. 358; *see also* Oral Arg. (Feb. 1, 2022) at 1:17:50– 1:18:12, *available at* https://www.cit.uscourts.gov/sites/cit/files/020122-21-00052-3JP.mp3 (during the first hearing on the merits, Plaintiffs explained that they do not seek to challenge "the dollar amount" of tariffs and that USTR retains "vast discretion" regarding such determinations). The court is therefore circumspect in requiring further explanation from USTR regarding such discretionary matters that are likely not judicially reviewable. *Cf. Japan Whaling Ass'n v. Am. Cetacean Soc'y*, 478 U.S. 221, 230 (1986) (explaining that the political question doctrine precludes judicial review of "policy choices" committed to the Executive Branch).

position vis-à-vis the President's direction. Nothing more was required.

2. Harm to the U.S. Economy

Plaintiffs assert that the Remand Results reflect no weighing of the costs of the actions, identifying such concerns as "increased costs on U.S. businesses," additional "Chinese retaliation," and impacts on U.S. businesses that export inputs or technology to China. Pls.' Cmts. at 17.[18] While USTR must explain how it "resolved any significant problems raised by the comments," it "need not respond to every comment." *Action on Smoking*, 699 F.2d at 1216. In the Remand Results, the court readily discerns USTR's attempts to balance commenters' concerns about economic harm with the specific direction it had received from the President and the ongoing need to respond to China's acts, policies and practices burdening U.S. commerce.

In responding to such comments, USTR explained that it "shared the view that mitigating harm to U.S. consumers was an important consideration in developing and finalizing lists of products that would be subject to additional duties." Remand Results at 82. USTR pointed to prior tariff actions (i.e., List 1 and List 2) in which USTR sought to avoid consumer impact. *Id.* For List 3, USTR noted that "the selection process" considered "likely impacts on U.S. consumers, and involved the removal of subheadings identified by analysts as likely to cause disruptions to the U.S.

[18] Plaintiffs also fault USTR for relying on documents that predate the imposition of List 3 and List 4 duties. Pls.' Cmts. at 16. USTR did not cite such documents as evidence of its contemporaneous response to comments. Rather, USTR cited such documents as evidence of USTR's ongoing consideration of harm. *See* Remand Results at 82–84.

economy." *Id.* at 83 (citing *List 3 NPRM*, 83 Fed. Reg. at 33,609). USTR further noted that concerns about economic harm prompted USTR "to initially set the duties at 10 percent for three months." *Id.* at 77 (citing *Final List 3*, 83 Fed. Reg. at 47,975).

USTR acknowledged that List 4A resulted in additional "duties on essentially all remaining imports from China, thus necessitating the need for USTR to include consumer products." *Id.* at 83. USTR noted, however, that by segregating certain goods into List 4B, it "would delay additional duties for products where China's share of imports from the world is 75 percent or greater to 'provide a longer adjustment period.'" *Id.* (quoting *Final List 4*, 84 Fed. Reg. at 43,305). USTR also pointed to the announcement of an exclusion process as responsive to these concerns. *Id.* at 84 (citing *Final List 4*, 84 Fed. Reg. at 43,305).

In addition to these broader considerations, USTR's decisions at the subheading level reflect USTR's weighing of economic harm. *See, e.g.*, Remand Results at 27–28 (discussing USTR's requirement for a "clear showing" of ineffectiveness or harm to remove subheadings from List 3 in order to retain the $250 billion aggregate level of trade directed by the President); *id.* at 31 (weighing costs and benefits of including rare earths and critical minerals and deciding to remove those subheadings); *id.* at 33 (same for U.S.-caught seafood); *id.* at 62–63 (same for child safety seats).

While framing the issue as a procedural failure to explain, Plaintiffs effectively take issue with the conclusions USTR reached. *See* Pls.' Reply Cmts. at 7 (arguing that "the fundamental point commenters raised was that USTR's proposed cure for China's unfair acts was worse than the disease" and that "[n]o

regulation is 'appropriate' if it does significantly more harm than good") (quoting *Michigan v. EPA*, 576 U.S. 743, 752 (2015)).[19] Mere disagreement with USTR's actions is not a basis for the court to overturn them. *See Rodriguez-Jimenez v. Garland*, 20 F.4th 434, 439 (9th Cir. 2021) ("[W]e cannot overturn the agency's decision based on mere disagreement."). It is not the court's role to reweigh the evidence or opine on USTR's (or the President's) policy choices, such as the appropriate "cure" for China's conduct. *See Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1376–77 (Fed. Cir. 2015). As discussed above, USTR accounted for concerns regarding the potential for economic harm within the context of the statutory factors it was required to consider and adequately explained how it did so.[20]

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[19] *Michigan* addressed a provision in the Clean Air Act that "instructed EPA to add power plants to [a] program if (but only if) the Agency finds regulation 'appropriate and necessary.'" *Michigan*, 576 U.S. at 752. Citing administrative practice when deciding whether to regulate such matters, the *Michigan* Court considered cost "an important aspect of the problem" that EPA had to address in the context of that case. *Id.* at 752–53. The Court acknowledged, however, that "the phrase 'appropriate and necessary' does not [always] encompass cost." *Id.* at 752.

[20] Although commenters objecting to the tariffs based on economic harm may have been guided by their respective experiences with List 1 and List 2 duties, concerns about the future impact of the List 3 and List 4A duties were, to some extent, speculative. USTR therefore had a limited record with which to balance such harm against the harm caused by China's ongoing unfair trade practices. It is also worth noting that the statute accounts for economic harm caused by section 301 tariffs in the context of USTR's four-year review of necessity. When deciding whether to continue a section 301 action beyond the specified four-year timeframe, the statute requires USTR to consider the effectiveness of the action, alternatives to such

3. Efficacy of the Tariffs

USTR explained that it was not persuaded by "comments which suggested that negotiations alone could be successful in obtaining the elimination of the harmful practices without accompanying economic pressure through additional tariffs." Remand Results at 86–87. USTR acknowledged "that previous actions were not sufficient to encourage China to change its acts, policies, and practices" but nevertheless found "that more substantial trade actions were needed to encourage negotiations" with China. *Id.* at 87. USTR also accounted for concerns of inefficacy in its decisions regarding inclusion or omission of certain subheadings. *See, e.g.*, *id*. at 29, 33, 34, 55; *cf. List 3 NPRM*, 83 Fed. Reg. at 33,609 (seeking comments on "whether imposing increased duties *on a particular product* would be practicable *or effective* to obtain the elimination of China's acts, policies, and practices") (emphasis added).

Plaintiffs accuse USTR of "deflect[ing]" by contextualizing the choice as one "between 'negotiations alone'" and "placing tariffs on virtually all of Chinese trade." Pls.' Cmts. at 18. That is not an accurate summation of USTR's response. USTR's statements were responsive to commenters seeking to dissuade USTR from imposing *any* increased duties and instead to persuade USTR to adopt other courses of action, including negotiations with China. *See* Remand Results at 86.

Plaintiffs further argue that USTR effectively admitted that prior section 301 actions were ineffective and still failed to respond to concerns that List 3 and List 4A duties would likewise be ineffective. Pls.' Cmts.

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action, and "the effects of such actions on the United States economy, including consumers." 19 U.S.C. § 2417(c)(3).

at 19; Pls.' Reply Cmts. at 8. It is unclear, however, what more USTR could state on this point. Absent contrary record evidence, USTR was not bound to agree with commenters characterizing tariffs as an ineffective option simply because List 1 and List 2 duties were deemed insufficient. Section 307(a) authorizes USTR to modify prior actions precisely when they have been ineffective in reducing "the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are the subject of such action." 19 U.S.C. § 2417(a)(1)(B).

4. Alternatives to the Tariffs

On remand, USTR pointed, by way of example, to comments suggesting alternative action under section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337. Remand Results at 88. USTR responded to such comments by explaining that section 337 could not address the "broader set of issues" identified as the basis for the underlying section 301 investigation. *Id.* USTR further explained that it "did not intend to invite comments on alternative measures" because the President directed USTR to act under sections 301 and 307 of the Trade Act. *Id.* at 89.

Plaintiffs argue that USTR engaged with just one of many proposed alternatives, which is insufficient given the invitation for "comments on 'any aspect' of its proposed actions." Pls.' Cmts. at 20. Considering alternatives, Plaintiffs argue, was also necessary for USTR to determine whether additional action was "appropriate." *Id.*

As USTR explained, however, it *was* pursuing additional courses of action, such as initiating a dispute at the World Trade Organization, requesting consultations with China, and proceeding with

negotiations. *See, e.g.*, Remand Results at 6 n.2, 87. Moreover, in the NPRMs, USTR did not seek comments generally on how to respond to China's acts, policies and practices, but instead requested comments on "any aspect *of the proposed supplemental action*," and provided comment topics relevant to such action. *List 3 NPRM*, 83 Fed. Reg. at 33,609 (emphasis added); *cf. List 4 NPRM*, 84 Fed. Reg. at 22,565. Thus, while USTR's request was broad to the extent that it requested comments on "any aspect" of the proposal, it was also more limited in scope than Plaintiffs suggest. Accordingly, USTR adequately explained its disinclination to consider each alternative. *Cf. Nat'l Mining Ass'n*, 116 F.3d at 549 (finding adequate an agency's brief dismissal of certain proposed safety standards as "outside the scope of this rulemaking" based on the court's understanding "that the agency was choosing to impose some standards without addressing 'everything that could be thought to pose any sort of problem'") (citation omitted).[21]

In view of the foregoing, the court finds that USTR has complied with the court's remand order and has supplied the necessary explanation supporting the imposition of duties pursuant to *Final List 3* and *Final List 4*.

III. Defendants' Second Motion to Correct the Record

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[21] Actions under section 337 rest with the U.S. International Trade Commission, not the Trade Representative. *See* 19 U.S.C. § 1337(a)(1), (b)(1). Thus, Plaintiffs' reliance on cases concerning an agency's failure to consider options within its purview is misplaced. *See* Pls.' Reply Cmts. at 8–9 (citing *Spirit Airlines, Inc. v. U.S. Dep't of Trans. and FAA*, 997 F.3d 1247, 1255 (D.C. Cir. 2021); *Chamber of Com. of U.S. v. SEC*, 412 F.3d 133, 145 (D.C. Cir. 2005)).

The Government moves to correct the record to include several *Federal Register* notices, USTR press releases, and one Presidential memorandum, all marked as Exhibits C through K, respectively. 2nd Mot. Correct R. at 1–2, Exs. C–K.[22] "Plaintiffs [took] no position on the motion, on the understanding that the Government has forfeited reliance on documents not cited in its previous merits briefing to this Court." *Id.* at 2.[23]

For purposes of APA review, the administrative record consists of "all documents and materials directly or indirectly considered by agency decision-makers." *Ammex, Inc. v. United States*, 23 CIT 549, 556, 62 F. Supp. 2d 1148, 1156 (1999) (quoting *Thompson v. U. S. Dep't of Labor*, 885 F.2d 551, 555 (9th Cir. 1989)). Additionally, CIT Rule 73.3(a)(1) requires an agency to file, *inter alia*, "[a] copy of the contested determination and the findings or report on which such determination was based."

Exhibits C, E, G and H constitute *Federal Register* notices regarding the initial investigation, determination, and actions taken with respect to List 1 and List 2. 2nd Mot. Correct R. at 3, Exs. C, E, G, H. Exhibit D constitutes a Presidential memorandum issued in conjunction with USTR's section 301 investigation findings. *Id.* at 3, Ex. D. Exhibit F is a USTR press release concerning List 1 and List 2. *Id.* at 3, Ex. F.

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[22] There were no Exhibits A or B attached to the motion, presumably because two prior documents USTR sought to include in the record were labeled as such. *See* Defs.' Mot. to Correct the R., Exs. A–B, ECF No. 441.

[23] To the extent that Plaintiffs' position is based on their arguments concerning *post hoc* rationalization, the court disagrees with Plaintiffs' position for the reasons stated above. *Supra*, Discussion Section I.B.

These documents all predate USTR's issuance of *Final List 3* and "were indirectly considered." *Id.* at 4. Exhibit J is a conforming amendment published in the Federal Register regarding List 3 previously included in the record in an unpublished form as PR 5. *Id.* at 3, 5, Ex. J. Inclusion of these documents is appropriate.

Exhibits I and K constitute press releases published a few days prior to USTR's publication of *Final List 3* and *Final List 4*, respectively. *Id.* at 3, Exs. I, K. The Government argues that the press releases are properly before the court pursuant to CIT Rule 73.3(a)(1) because they were "issued in conjunction with" *Final List 3* and *Final List 4*. *Id.* at 4–5. Consistent with the Government's representations regarding the relationship of these documents to the contested determinations, and their contemporaneous preparation with those determinations, the court finds that the documents are part of the record and will allow the Government to amend the record accordingly.

Accordingly, the Government's second motion to correct the record will be granted.

CONCLUSION AND ORDER

In accordance with the foregoing, it is hereby

ORDERED that the tariff actions imposed by the Office of the United States Trade Representative and styled as *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation*, 83 Fed. Reg. 47,974 (Sept. 21, 2018), and *Notice of Modification of Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation,* 84 Fed. Reg. 43,304 (Aug. 20, 2019), as amended on remand by

Further Explanation of the Final List 3 and Final List 4 Modifications in the Section 301 Action: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, Pursuant to Court Remand Order, ECF No. 467, are SUSTAINED; and it is further

ORDERED that Defendants' second motion to correct the record, ECF No. 466, is GRANTED; and it is further

ORDERED that, on or before March 27, 2023, the Government shall file updated administrative record indices reflecting corrections granted herein and in Slip Op. 22-32.

The court will enter judgment in *HMTX Indus. LLC v. United States,* No. 20-cv-177, accordingly.

/s/ Mark A. Barnett
Mark A. Barnett, Chief Judge

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

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

Dated: March 17, 2023
New York, New York

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2023-1891

HMTX INDUSTRIES LLC, HALSTEAD NEW ENGLAND CORP., METROFLOR CORP., JASCO PRODUCTS COMPANY LLC,

Plaintiffs-Appellants

v.

UNITED STATES, OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, JAMIESON GREER, U.S. TRADE REPRESENTATIVE, UNITED STATES CUSTOMS AND BORDER PROTECTION, RODNEY S. SCOTT, COMMISSIONER OF U.S. CUSTOMS AND BORDER PROTECTION,

Defendants-Appellees

Appeal from the United States Court of International Trade in No. 1:20-cv-00177-3JP, 1:21-cv-00052-3JP, Judge Claire R. Kelly, Chief Judge Mark A. Barnett, Judge Jennifer Choe-Groves.

JUDGMENT

THIS CAUSE having been considered, it is

ORDERED AND ADJUDGED:

AFFIRMED

September 25, 2025
Date

FOR THE COURT

[SEAL OF UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT]

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

APPENDIX E

United States Code Annotated
Title 19. Customs Duties
Chapter 12. Trade Act of 1974
Subchapter III. Enforcement of United States Rights Under Trade Agreements and Response to Certain Foreign Trade Practices (Refs & Annos)

19 U.S.C.A. § 2411

§ 2411. Actions by United States Trade Representative

Effective: February 24, 2016

Currentness

(a) Mandatory action

(1) If the United States Trade Representative determines under section 2414(a)(1) of this title that—

(A) the rights of the United States under any trade agreement are being denied; or

(B) an act, policy, or practice of a foreign country—

(i) violates, or is inconsistent with, the provisions of, or otherwise denies benefits to the United States under, any trade agreement, or

(ii) is unjustifiable and burdens or restricts United States commerce;

the Trade Representative shall take action authorized in subsection (c), subject to the specific direction, if any, of the President regarding any such action, and shall take all other appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to enforce such rights or to obtain

the elimination of such act, policy, or practice. Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country.

(2) The Trade Representative is not required to take action under paragraph (1) in any case in which—

(A) the Dispute Settlement Body (as defined in section 3531(5) of this title) has adopted a report, or a ruling issued under the formal dispute settlement proceeding provided under any other trade agreement finds, that—

(i) the rights of the United States under a trade agreement are not being denied, or

(ii) the act, policy, or practice—

(I) is not a violation of, or inconsistent with, the rights of the United States, or

(II) does not deny, nullify, or impair benefits to the United States under any trade agreement; or

(B) the Trade Representative finds that—

(i) the foreign country is taking satisfactory measures to grant the rights of the United States under a trade agreement,

(ii) the foreign country has—

(I) agreed to eliminate or phase out the act, policy, or practice, or

(II) agreed to an imminent solution to the burden or restriction on United States commerce that is satisfactory to the Trade Representative,

(iii) it is impossible for the foreign country to achieve the results described in clause (i) or (ii), as appropriate, but the foreign country agrees to provide to the United States compensatory trade benefits that are satisfactory to the Trade Representative,

(iv) in extraordinary cases, where the taking of action under this subsection would have an adverse impact on the United States economy substantially out of proportion to the benefits of such action, taking into account the impact of not taking such action on the credibility of the provisions of this subchapter, or

(v) the taking of action under this subsection would cause serious harm to the national security of the United States.

(3) Any action taken under paragraph (1) to eliminate an act, policy, or practice shall be devised so as to affect goods or services of the foreign country in an amount that is equivalent in value to the burden or restriction being imposed by that country on United States commerce.

(b) Discretionary action

If the Trade Representative determines under section 2414(a)(1) of this title that—

(1) an act, policy, or practice of a foreign country is unreasonable or discriminatory and burdens or restricts United States commerce, and

(2) action by the United States is appropriate, the Trade Representative shall take all appropriate and feasible action authorized under subsection (c), subject to the specific direction, if any, of the President regarding any such action, and all other

appropriate and feasible action within the power of the President that the President may direct the Trade Representative to take under this subsection, to obtain the elimination of that act, policy, or practice. Actions may be taken that are within the power of the President with respect to trade in any goods or services, or with respect to any other area of pertinent relations with the foreign country.

(c) Scope of authority

(1) For purposes of carrying out the provisions of subsection (a) or (b) or section 2416(c) of this title, the Trade Representative is authorized to—

(A) suspend, withdraw, or prevent the application of, benefits of trade agreement concessions to carry out a trade agreement with the foreign country referred to in such subsection;

(B) impose duties or other import restrictions on the goods of, and, notwithstanding any other provision of law, fees or restrictions on the services of, such foreign country for such time as the Trade Representative determines appropriate;

(C) in a case in which the act, policy, or practice also fails to meet the eligibility criteria for receiving duty-free treatment under subsections (b) and (c) of section 2462 of this title, subsections (b) and (c) of section 2702 of this title, or subsections (c) and (d) of section 3202 of this title, withdraw, limit, or suspend such treatment under such provisions, notwithstanding the provisions of subsection (a)(3) of this section; or

(D) enter into binding agreements with such foreign country that commit such foreign country to—

(i) eliminate, or phase out, the act, policy, or practice that is the subject of the action to be taken under subsection (a) or (b),

(ii) eliminate any burden or restriction on United States commerce resulting from such act, policy, or practice, or

(iii) provide the United States with compensatory trade benefits that—

(I) are satisfactory to the Trade Representative, and

(II) meet the requirements of paragraph (4).

(2)(A) Notwithstanding any other provision of law governing any service sector access authorization, and in addition to the authority conferred in paragraph (1), the Trade Representative may, for purposes of carrying out the provisions of subsection (a) or (b)—

(i) restrict, in the manner and to the extent the Trade Representative determines appropriate, the terms and conditions of any such authorization, or

(ii) deny the issuance of any such authorization.

(B) Actions described in subparagraph (A) may only be taken under this section with respect to service sector access authorizations granted, or applications therefor pending, on or after the date on which—

(i) a petition is filed under section 2412(a) of this title, or

(ii) a determination to initiate an investigation is made by the Trade Representative under section 2412(b) of this title.

(C) Before the Trade Representative takes any action under this section involving the imposition of fees or other restrictions on the services of a foreign country, the Trade Representative shall, if the services involved are subject to regulation by any agency of the Federal Government or of any State, consult, as appropriate, with the head of the agency concerned.

(3) The actions the Trade Representative is authorized to take under subsection (a) or (b) may be taken against any goods or economic sector—

(A) on a nondiscriminatory basis or solely against the foreign country described in such subsection, and

(B) without regard to whether or not such goods or economic sector were involved in the act, policy, or practice that is the subject of such action.

(4) Any trade agreement described in paragraph (1)(D)(iii) shall provide compensatory trade benefits that benefit the economic sector which includes the domestic industry that would benefit from the elimination of the act, policy, or practice that is the subject of the action to be taken under subsection (a) or (b), or benefit the economic sector as closely related as possible to such economic sector, unless—

(A) the provision of such trade benefits is not feasible, or

(B) trade benefits that benefit any other economic sector would be more satisfactory than such trade benefits.

(5) If the Trade Representative determines that actions to be taken under subsection (a) or (b) are to be in the form of import restrictions, the Trade Representative shall—

(A) give preference to the imposition of duties over the imposition of other import restrictions, and

(B) if an import restriction other than a duty is imposed, consider substituting, on an incremental basis, an equivalent duty for such other import restriction.

(6) Any action taken by the Trade Representative under this section with respect to export targeting shall, to the extent possible, reflect the full benefit level of the export targeting to the beneficiary over the period during which the action taken has an effect.

(d) Definitions and special rules

For purposes of this subchapter—

(1) The term "commerce" includes, but is not limited to—

(A) services (including transfers of information) associated with international trade, whether or not such services are related to specific goods, and

(B) foreign direct investment by United States persons with implications for trade in goods or services.

(2) An act, policy, or practice of a foreign country that burdens or restricts United States commerce may include the provision, directly or indirectly, by that foreign country of subsidies for the construction of vessels used in the commercial transportation by

water of goods between foreign countries and the United States.

(3)(A) An act, policy, or practice is unreasonable if the act, policy, or practice, while not necessarily in violation of, or inconsistent with, the international legal rights of the United States, is otherwise unfair and inequitable.

(B) Acts, policies, and practices that are unreasonable include, but are not limited to, any act, policy, or practice, or any combination of acts, policies, or practices, which—

(i) denies fair and equitable—

(I) opportunities for the establishment of an enterprise,

(II) provision of adequate and effective protection of intellectual property rights notwithstanding the fact that the foreign country may be in compliance with the specific obligations of the Agreement on Trade-Related Aspects of Intellectual Property Rights referred to in section 3511(d)(15) of this title,

(III) nondiscriminatory market access opportunities for United States persons that rely upon intellectual property protection, or

(IV) market opportunities, including the toleration by a foreign government of systematic anticompetitive activities by enterprises or among enterprises in the foreign country that have the effect of restricting, on a basis that is inconsistent with commercial considerations, access of United States goods or services to a foreign market,

(ii) constitutes export targeting,

(iii) constitutes a persistent pattern of conduct that—

(I) denies workers the right of association,

(II) denies workers the right to organize and bargain collectively,

(III) permits any form of forced or compulsory labor,

(IV) fails to provide a minimum age for the employment of children, or

(V) fails to provide standards for minimum wages, hours of work, and occupational safety and health of workers, or

(iv) constitutes a persistent pattern of conduct by the government of a foreign country under which that government fails to effectively enforce commitments under agreements to which the foreign country and the United States are parties, including with respect to trade in goods, trade in services, trade in agriculture, foreign investment, intellectual property, digital trade in goods and services and cross-border data flows, regulatory practices, state-owned and state-controlled enterprises, localization barriers to trade, labor and the environment, anticorruption, trade remedy laws, textiles, and commercial partnerships.

(C)(i) Acts, policies, and practices of a foreign country described in subparagraph (B)(iii) shall not be treated as being unreasonable if the Trade Representative determines that—

(I) the foreign country has taken, or is taking, actions that demonstrate a significant and tangible overall advancement in providing throughout the foreign country (including any designated zone within the foreign country) the rights and other standards described in the subclauses of subparagraph (B)(iii), or

(II) such acts, policies, and practices are not inconsistent with the level of economic development of the foreign country.

(ii) The Trade Representative shall publish in the Federal Register any determination made under clause (i), together with a description of the facts on which such determination is based.

(D) For purposes of determining whether any act, policy, or practice is unreasonable, reciprocal opportunities in the United States for foreign nationals and firms shall be taken into account, to the extent appropriate.

(E) The term "export targeting" means any government plan or scheme consisting of a combination of coordinated actions (whether carried out severally or jointly) that are bestowed on a specific enterprise, industry, or group thereof, the effect of which is to assist the enterprise, industry, or group to become more competitive in the export of a class or kind of merchandise.

(F)(i) For the purposes of subparagraph (B)(i)(II), adequate and effective protection of intellectual property rights includes adequate and effective means under the laws of the foreign country for persons who are not citizens or nationals of such country to secure, exercise, and enforce rights and enjoy commercial benefits relating to patents,

trademarks, copyrights and related rights, mask works, trade secrets, and plant breeder's rights.

(ii) For purposes of subparagraph (B)(i)(IV), the denial of fair and equitable nondiscriminatory market access opportunities includes restrictions on market access related to the use, exploitation, or enjoyment of commercial benefits derived from exercising intellectual property rights in protected works or fixations or products embodying protected works.

(4)(A) An act, policy, or practice is unjustifiable if the act, policy, or practice is in violation of, or inconsistent with, the international legal rights of the United States.

(B) Acts, policies, and practices that are unjustifiable include, but are not limited to, any act, policy, or practice described in subparagraph (A) which denies national or most-favored-nation treatment or the right of establishment or protection of intellectual property rights.

(5) Acts, policies, and practices that are discriminatory include, when appropriate, any act, policy, and practice which denies national or most-favored-nation treatment to United States goods, services, or investment.

(6) The term "service sector access authorization" means any license, permit, order, or other authorization, issued under the authority of Federal law, that permits a foreign supplier of services access to the United States market in a service sector concerned.

(7) The term "foreign country" includes any foreign instrumentality. Any possession or territory of a foreign country that is administered separately for

customs purposes shall be treated as a separate foreign country.

(8) The term "Trade Representative" means the United States Trade Representative.

(9) The term "interested persons", only for purposes of sections 2412(a)(4)(B), 2414(b)(1)(A), 2416(c)(2),1 and 2417(a)(2) of this title, includes, but is not limited to, domestic firms and workers, representatives of consumer interests, United States product exporters, and any industrial user of any goods or services that may be affected by actions taken under subsection (a) or (b).

APPENDIX F

United States Code Annotated
Title 19. Customs Duties
Chapter 12. Trade Act of 1974
Subchapter III. Enforcement of United States Rights Under Trade Agreements and Response to Certain Foreign Trade Practices (Refs & Annos)

19 U.S.C.A. § 2412

§ 2412. Initiation of investigations

Effective: March 29, 2000

Currentness

(a) Petitions

(1) Any interested person may file a petition with the Trade Representative requesting that action be taken under section 2411 of this title and setting forth the allegations in support of the request.

(2) The Trade Representative shall review the allegations in any petition filed under paragraph (1) and, not later than 45 days after the date on which the Trade Representative received the petition, shall determine whether to initiate an investigation.

(3) If the Trade Representative determines not to initiate an investigation with respect to a petition, the Trade Representative shall inform the petitioner of the reasons therefor and shall publish notice of the determination, together with a summary of such reasons, in the Federal Register.

(4) If the Trade Representative makes an affirmative determination under paragraph (2) with respect to a petition, the Trade Representative shall initiate an investigation regarding the issues raised in the petition. The Trade Representative shall

publish a summary of the petition in the Federal Register and shall, as soon as possible, provide opportunity for the presentation of views concerning the issues, including a public hearing—

(A) within the 30-day period beginning on the date of the affirmative determination (or on a date after such period if agreed to by the petitioner) if a public hearing within such period is requested in the petition, or

(B) at such other time if a timely request therefor is made by the petitioner or by any interested person.

(b) Initiation of investigation by means other than petition

(1)(A) If the Trade Representative determines that an investigation should be initiated under this subchapter with respect to any matter in order to determine whether the matter is actionable under section 2411 of this title, the Trade Representative shall publish such determination in the Federal Register and shall initiate such investigation.

(B) The Trade Representative shall, before making any determination under subparagraph (A), consult with appropriate committees established pursuant to section 2155 of this title.

(2)(A) By no later than the date that is 30 days after the date on which a country is identified under section 2242(a)(2) of this title, the Trade Representative shall initiate an investigation under this subchapter with respect to any act, policy, or practice of that country that—

(i) was the basis for such identification, and

(ii) is not at that time the subject of any other investigation or action under this subchapter.

(B) The Trade Representative is not required under subparagraph (A) to initiate an investigation under this subchapter with respect to any act, policy, or practice of a foreign country if the Trade Representative determines that the initiation of the investigation would be detrimental to United States economic interests.

(C) If the Trade Representative makes a determination under subparagraph (B) not to initiate an investigation, the Trade Representative shall submit to the Congress a written report setting forth, in detail—

(i) the reasons for the determination, and

(ii) the United States economic interests that would be adversely affected by the investigation.

(D) The Trade Representative shall, from time to time, consult with the Register of Copyrights, the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, and other appropriate officers of the Federal Government, during any investigation initiated under this subchapter by reason of subparagraph (A).

(c) Discretion

In determining whether to initiate an investigation under subsection (a) or (b) of any act, policy, or practice that is enumerated in any provision of section 2411(d) of this title, the Trade Representative shall have discretion to determine whether action under section 2411 of this title would be effective in addressing such act, policy, or practice.

APPENDIX G

United States Code Annotated
Title 19. Customs Duties
Chapter 12. Trade Act of 1974
Subchapter III. Enforcement of United States Rights Under Trade Agreements and Response to Certain Foreign Trade Practices (Refs & Annos)

19 U.S.C.A. § 2413

§ 2413. Consultation upon initiation of investigation

Currentness

(a) In general

(1) On the date on which an investigation is initiated under section 2412 of this title, the Trade Representative, on behalf of the United States, shall request consultations with the foreign country concerned regarding the issues involved in such investigation.

(2) If the investigation initiated under section 2412 of this title involves a trade agreement and a mutually acceptable resolution is not reached before the earlier of—

(A) the close of the consultation period, if any, specified in the trade agreement, or

(B) the 150th day after the day on which consultation was commenced,

the Trade Representative shall promptly request proceedings on the matter under the formal dispute settlement procedures provided under such agreement.

(3) The Trade Representative shall seek information and advice from the petitioner (if any) and the

appropriate committees established pursuant to section 2155 of this title in preparing United States presentations for consultations and dispute settlement proceedings.

(b) Delay of request for consultations

(1) Notwithstanding the provisions of subsection (a)—

(A) the United States Trade Representative may, after consulting with the petitioner (if any), delay for up to 90 days any request for consultations under subsection (a) for the purpose of verifying or improving the petition to ensure an adequate basis for consultation, and

(B) if such consultations are delayed by reason of subparagraph (A), each time limitation under section 2414 of this title shall be extended for the period of such delay.

(2) The Trade Representative shall—

(A) publish notice of any delay under paragraph (1) in the Federal Register, and

(B) report to Congress on the reasons for such delay in the report required under section 2419(a)(3) of this title.

APPENDIX H

United States Code Annotated
Title 19. Customs Duties
Chapter 12. Trade Act of 1974
Subchapter III. Enforcement of United States Rights Under Trade Agreements and Response to Certain Foreign Trade Practices (Refs & Annos)

19 U.S.C.A. § 2414

§ 2414. Determinations by Trade Representative

Effective: December 3, 2004

Currentness

(a) In general

(1) On the basis of the investigation initiated under section 2412 of this title and the consultations (and the proceedings, if applicable) under section 2413 of this title, the Trade Representative shall—

(A) determine whether—

(i) the rights to which the United States is entitled under any trade agreement are being denied, or

(ii) any act, policy, or practice described in subsection (a)(1)(B) or (b)(1) of section 2411 of this title exists, and

(B) if the determination made under subparagraph (A) is affirmative, determine what action, if any, the Trade Representative should take under subsection (a) or (b) of section 2411 of this title.

(2) The Trade Representative shall make the determinations required under paragraph (1) on or before—

(A) in the case of an investigation involving a trade agreement, except an investigation initiated pursuant to section 2412(b) (2)(A) of this title involving rights under the Agreement on Trade-Related Aspects of Intellectual Property Rights (referred to in section 3511(d)(15) of this title) or the GATT 1994 (as defined in section 3501(1)(B) of this title) relating to products subject to intellectual property protection, the earlier of—

(i) the date that is 30 days after the date on which the dispute settlement procedure is concluded, or

(ii) the date that is 18 months after the date on which the investigation is initiated, or

(B) in all cases not described in subparagraph (A) or paragraph (3), the date that is 12 months after the date on which the investigation is initiated.

(3)(A) If an investigation is initiated under this subchapter by reason of section 2412(b)(2) of this title and—

(i) the Trade Representative considers that rights under the Agreement on Trade-Related Aspects of Intellectual Property Rights or the GATT 1994 relating to products subject to intellectual property protection are involved, the Trade Representative shall make the determination required under paragraph (1) not later than 30 days after the date on which the dispute settlement procedure is concluded; or

(ii) the Trade Representative does not consider that a trade agreement, including the Agreement on Trade-Related Aspects of Intellectual Property Rights, is involved or does not make a

determination described in subparagraph (B) with respect to such investigation, the Trade Representative shall make the determinations required under paragraph (1) with respect to such investigation not later than the date that is 6 months after the date on which such investigation is initiated.

(B) If the Trade Representative determines with respect to an investigation initiated by reason of section 2412(b)(2) of this title (other than an investigation involving a trade agreement) that—

(i) complex or complicated issues are involved in the investigation that require additional time,

(ii) the foreign country involved in the investigation is making substantial progress in drafting or implementing legislative or administrative measures that will provide adequate and effective protection of intellectual property rights, or

(iii) such foreign country is undertaking enforcement measures to provide adequate and effective protection of intellectual property rights,

the Trade Representative shall publish in the Federal Register notice of such determination and shall make the determinations required under paragraph (1) with respect to such investigation by no later than the date that is 9 months after the date on which such investigation is initiated.

(4) In any case in which a dispute is not resolved before the close of the minimum dispute settlement period provided for in a trade agreement, the Trade Representative, within 15 days after the close of

such dispute settlement period, shall submit a report to Congress setting forth the reasons why the dispute was not resolved within the minimum dispute settlement period, the status of the case at the close of the period, and the prospects for resolution. For purposes of this paragraph, the minimum dispute settlement period provided for under any such trade agreement is the total period of time that results if all stages of the formal dispute settlement procedures are carried out within the time limitations specified in the agreement, but computed without regard to any extension authorized under the agreement at any stage.

(b) Consultation before determinations

(1) Before making the determinations required under subsection (a)(1), the Trade Representative, unless expeditious action is required—

(A) shall provide an opportunity (after giving not less than 30 days notice thereof) for the presentation of views by interested persons, including a public hearing if requested by any interested person,

(B) shall obtain advice from the appropriate committees established pursuant to section 2155 of this title, and

(C) may request the views of the United States International Trade Commission regarding the probable impact on the economy of the United States of the taking of action with respect to any goods or service.

(2) If the Trade Representative does not comply with the requirements of subparagraphs (A) and (B) of paragraph (1) because expeditious action is

required, the Trade Representative shall, after making the determinations under subsection (a)(1), comply with such subparagraphs.

(c) Publication

The Trade Representative shall publish in the Federal Register any determination made under subsection (a)(1), together with a description of the facts on which such determination is based.

APPENDIX I

United States Code Annotated
Title 19. Customs Duties
Chapter 12. Trade Act of 1974
Subchapter III. Enforcement of United States Rights Under Trade Agreements and Response to Certain Foreign Trade Practices (Refs & Annos)

19 U.S.C.A. § 2415

§ 2415. Implementation of actions

Effective: December 3, 2004

Currentness

(a) Actions to be taken under section 2411

(1) Except as provided in paragraph (2), the Trade Representative shall implement the action the Trade Representative determines under section 2414(a)(1)(B) of this title to take under section 2411 of this title, subject to the specific direction, if any, of the President regarding any such action, by no later than the date that is 30 days after the date on which such determination is made.

(2)(A) Except as otherwise provided in this paragraph, the Trade Representative may delay, by not more than 180 days, the implementation of any action that is to be taken under section 2411 of this title—

(i) if—

(I) in the case of an investigation initiated under section 2412(a) of this title, the petitioner requests a delay, or

(II) in the case of an investigation initiated under section 2412(b)(1) of this title or to

which section 2414(a)(3)(B) of this title applies, a delay is requested by a majority of the representatives of the domestic industry that would benefit from the action, or

(ii) if the Trade Representative determines that substantial progress is being made, or that a delay is necessary or desirable, to obtain United States rights or a satisfactory solution with respect to the acts, policies, or practices that are the subject of the action.

(B) The Trade Representative may not delay under subparagraph (A) the implementation of any action that is to be taken under section 2411 of this title with respect to any investigation to which section 2414(a)(3)(A)(ii) of this title applies.

(C) The Trade Representative may not delay under subparagraph (A) the implementation of any action that is to be taken under section 2411 of this title with respect to any investigation to which section 2414(a)(3)(B) of this title applies by more than 90 days.

(b) Alternative actions in certain cases of export targeting

(1) If the Trade Representative makes an affirmative determination under section 2414(a)(1)(A) of this title involving export targeting by a foreign country and determines to take no action under section 2411 of this title with respect to such affirmation determination, the Trade Representative—

(A) shall establish an advisory panel to recommend measures which will promote the competitiveness of the domestic industry affected by the export targeting,

(B) on the basis of the report of such panel submitted under paragraph (2)(B) and subject to the specific direction, if any, of the President, may take any administrative actions authorized under any other provision of law, and, if necessary, propose legislation to implement any other actions, that would restore or improve the international competitiveness of the domestic industry affected by the export targeting, and

(C) shall, by no later than the date that is 30 days after the date on which the report of such panel is submitted under paragraph (2)(B), submit a report to the Congress on the administrative actions taken, and legislative proposals made, under subparagraph (B) with respect to the domestic industry affected by the export targeting.

(2)(A) The advisory panels established under paragraph (1)(A) shall consist of individuals appointed by the Trade Representative who—

(i) earn their livelihood in the private sector of the economy, including individuals who represent management and labor in the domestic industry affected by the export targeting that is the subject of the affirmative determination made under section 2414(a)(1)(A) of this title, and

(ii) by education or experience, are qualified to serve on the advisory panel.

(B) By no later than the date that is 6 months after the date on which an advisory panel is established under paragraph (1) (A), the advisory panel shall submit to the Trade Representative and to the Congress a report on measures that the advisory panel recommends be taken by the United States to promote the competitiveness of

the domestic industry affected by the export targeting that is the subject of the affirmative determination made under section 2414(a)(1)(A) of this title.

APPENDIX J

United States Code Annotated
Title 19. Customs Duties
Chapter 12. Trade Act of 1974
Subchapter III. Enforcement of United States Rights Under Trade Agreements and Response to Certain Foreign Trade Practices (Refs & Annos)

19 U.S.C.A. § 2416

§ 2416. Monitoring of foreign compliance

Effective: February 24, 2016

Currentness

(a) In general

The Trade Representative shall monitor the implementation of each measure undertaken, or agreement that is entered into, by a foreign country to provide a satisfactory resolution of a matter subject to investigation under this subchapter or subject to dispute settlement proceedings to enforce the rights of the United States under a trade agreement providing for such proceedings.

(b) Action on the basis of monitoring

(1) In general

If, on the basis of the monitoring carried out under subsection (a), the Trade Representative considers that a foreign country is not satisfactorily implementing a measure or agreement referred to in subsection (a), the Trade Representative shall determine what further action the Trade Representative shall take under section 2411(a) of this title. For purposes of section 2411 of this title, any such determination shall be treated as a determination made under section 2414(a)(1) of this title.

(2) WTO dispute settlement recommendations

(A) Failure to implement recommendation

If the measure or agreement referred to in subsection (a) concerns the implementation of a recommendation made pursuant to dispute settlement proceedings under the World Trade Organization, and the Trade Representative considers that the foreign country has failed to implement it, the Trade Representative shall make the determination in paragraph (1) no later than 30 days after the expiration of the reasonable period of time provided for such implementation under paragraph 21 of the Understanding on Rules and Procedures Governing the Settlement of Disputes that is referred to in section 3511(d)(16) of this title.

(B) Revision of retaliation list and action

(i) In general

Except as provided in clause (ii), in the event that the United States initiates a retaliation list or takes any other action described in section 2411(c)(1)(A) or (B) of this title against the goods of a foreign country or countries because of the failure of such country or countries to implement the recommendation made pursuant to a dispute settlement proceeding under the World Trade Organization, the Trade Representative shall periodically revise the list or action to affect other goods of the country or countries that have failed to implement the recommendation.

(ii) Exception

The Trade Representative is not required to revise the retaliation list or the action described in clause (i) with respect to a country, if—

(I) the Trade Representative determines that implementation of a recommendation made pursuant to a dispute settlement proceeding described in clause (i) by the country is imminent; or

(II) the Trade Representative together with the petitioner involved in the initial investigation under this subchapter (or if no petition was filed, the affected United States industry) agree that it is unnecessary to revise the retaliation list.

(C) Schedule for revising list or action

The Trade Representative shall, 120 days after the date the retaliation list or other section 2411(a) action is first taken, and every 180 days thereafter, review the list or action taken and revise, in whole or in part, the list or action to affect other goods of the subject country or countries.

(D) Standards for revising list or action

In revising any list or action against a country or countries under this subsection, the Trade Representative shall act in a manner that is most likely to result in the country or countries implementing the recommendations adopted in the dispute settlement proceeding or in achieving a mutually satisfactory solution to the issue that gave rise to the dispute settlement proceeding. The Trade Representative shall consult with the

petitioner, if any, involved in the initial investigation under this subchapter.

(E) Retaliation list

The term "retaliation list" means the list of products of a foreign country or countries that have failed to comply with the report of the panel or Appellate Body of the WTO and with respect to which the Trade Representative is imposing duties above the level that would otherwise be imposed under the Harmonized Tariff Schedule of the United States.

(F) Requirement to include reciprocal goods on retaliation list

The Trade Representative shall include on the retaliation list, and on any revised lists, reciprocal goods of the industries affected by the failure of the foreign country or countries to implement the recommendation made pursuant to a dispute settlement proceeding under the World Trade Organization, except in cases where existing retaliation and its corresponding preliminary retaliation list do not already meet this requirement.

(c) Exercise of WTO authorization to suspend concessions or other obligations

If—

(1) action has terminated pursuant to section 2417(c) of this title,

(2) the petitioner or any representative of the domestic industry that would benefit from reinstatement of action has submitted to the Trade Representative a written request for reinstatement of action, and

(3) the Trade Representatives[1] has completed the requirements of subsection (d) and section 2417(c)(3) of this title,

the Trade Representative may at any time determine to take action under section 2411(c) of this title to exercise an authorization to suspend concessions or other obligations under Article 22 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (referred to in section 3511(d)(16) of this title).

(d) Consultations

Before making any determination under subsection (b) or (c), the Trade Representative shall—

(1) consult with the petitioner, if any, involved in the initial investigation under this subchapter and with representatives of the domestic industry concerned; and

(2) provide an opportunity for the presentation of views by interested persons.

[1] So in original. Probably should be "Representative".

APPENDIX K

United States Code Annotated
Title 19. Customs Duties
Chapter 12. Trade Act of 1974
Subchapter III. Enforcement of United States Rights Under Trade Agreements and Response to Certain Foreign Trade Practices (Refs & Annos)

19 U.S.C.A. § 2417

§ 2417. Modification and termination of actions

Effective: February 24, 2016

Currentness

(a) In general

(1) The Trade Representative may modify or terminate any action, subject to the specific direction, if any, of the President with respect to such action, that is being taken under section 2411 of this title if—

(A) any of the conditions described in section 2411(a)(2) of this title exist,

(B) the burden or restriction on United States commerce of the denial rights, or of the acts, policies, and practices, that are the subject of such action has increased or decreased, or

(C) such action is being taken under section 2411(b) of this title and is no longer appropriate.

(2) Before taking any action under paragraph (1) to modify or terminate any action taken under section 2411 of this title, the Trade Representative shall consult with the petitioner, if any, and with representatives of the domestic industry concerned, and shall provide opportunity for the presentation of

views by other interested persons affected by the proposed modification or termination concerning the effects of the modification or termination and whether any modification or termination of the action is appropriate.

(b) Notice; report to Congress

The Trade Representative shall promptly publish in the Federal Register notice of, and report in writing to the Congress with respect to, any modification or termination of any action taken under section 2411 of this title and the reasons therefor.

(c) Review of necessity

(1) If—

(A) a particular action has been taken under section 2411 of this title during any 4-year period, and

(B) neither the petitioner nor any representative of the domestic industry which benefits from such action has submitted to the Trade Representative during the last 60 days of such 4-year period a written request for the continuation of such action,

such action shall terminate at the close of such 4-year period.

(2) The Trade Representative shall notify by mail the petitioner and representatives of the domestic industry described in paragraph (1)(B) of any termination of action by reason of paragraph (1) at least 60 days before the date of such termination.

(3) If a request is submitted to the Trade Representative under paragraph (1)(B) to continue taking a particular action under section 2411 of this

title, or if a request is submitted to the Trade Representative under section 2416(c)(2) of this title to reinstate action, the Trade Representative shall conduct a review of—

(A) the effectiveness in achieving the objectives of section 2411 of this title of—

(i) such action, and

(ii) other actions that could be taken (including actions against other products or services), and

(B) the effects of such actions on the United States economy, including consumers.