IN THE UNITED STATES COURT OF INTERNATIONAL TRADE

BEFORE: THE HONORABLE JANE A. RESTANI, SENIOR JUDGE

SEVERSTAL EXPORT GMBH, *et al.*,	)	
Plaintiffs,	)	
v.	)	Court No. 18-00057
UNITED STATES, *et al.*,	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS
AND, IN THE ALTERNATIVE, OPPOSITION TO PLAINTIFFS' MOTION
FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

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Pursuant to this Court's Rules 12(b)(1), 12(b)(6), and 65, defendants respectfully submit this motion to dismiss and in the alternative opposition to plaintiffs' request for a temporary restraining order and preliminary injunction.[1]

Plaintiffs, wholly-owned subsidiaries of PAO Severstal, a large Russian producer of carbon and alloy steel products, Pl. Br. 1, seek to challenge a Presidential Proclamation issued pursuant to Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862. Proclamation No. 9705, 83 Fed. Reg. 11,625 (Mar. 8, 2018) (Steel Proclamation I), Attachment A; *see also* Proclamation No. 9711, 83 Fed. Reg. 13,361 (Mar. 22, 2018) (Steel Proclamation II), Attachment B. Steel Proclamation I established a tariff of 25 percent on imports of certain steel articles, excluding imports from Canada and Mexico. The President instituted these tariff

[1] Pursuant to the expedited schedule proposed by the plaintiffs, the Government is submitting this response within three business days of receiving the confidential version of the plaintiffs' motion. We respectfully reserve the right to supplement this response, based upon, among other things, the results of discovery concerning plaintiffs' irreparable harm assertions and testimony at the March 29, 2018 hearing.

measures after receiving an investigative report from the Secretary of Commerce (Secretary or Commerce) that (1) found steel articles are being imported into the United States in quantities and under circumstances that threaten to impair the national security; and (2) recommended that the President take steps to ensure the economic viability of the domestic steel industry, which is vital to the national security as defined in Section 232.

Plaintiffs ask this Court to second guess that determination, which the President made pursuant to an express grant of authority from Congress. But this Court lacks jurisdiction to entertain such a challenge to the determination of the President, who is not an "agency" under the Administrative Procedure Act. *See* 28 U.S.C. §§ 2640(c); 2631(i). Courts are not permitted to review the President's findings of fact or his subjective motivations in matters committed to his discretion. *See United States v. George S. Bush & Co.*, 310 U.S. 371, 379-80 (1940); *Dalton v. Specter*, 511 U.S. 462, 464 (1994); *Franklin v. Massachusetts*, 505 U.S. 788, 800-01 (1992)*; Motion Sys. Corp. v. Bush,* 437 F.3d 1356, 1359 (Fed. Cir. 2006) (*en banc*). Additionally, plaintiffs have failed to pursue administrative remedies that could obviate the need for this Court to resolve their claims at all, such that this suit is not ripe for review. For these reasons, this case should be dismissed, and plaintiffs' request for emergency relief denied.

Even if this Court has jurisdiction to consider plaintiffs' request for emergency relief, no such relief is warranted. Plaintiffs bear the burden to establish all four components of the preliminary injunction test to obtain relief, but here, they have established none. Most fundamentally, plaintiffs have not shown that they are likely to succeed on the merits. Plaintiffs claim that Steel Proclamation I exceeded the President's authority, allegedly because the "real reason" the President issued the Steel Proclamation was to "revitalize the American steel industry," Pl. Mot. 2; Pl. Br. 13, as opposed to the national security concerns stated in the

Proclamation itself. Compl. ¶ 44; Pl. Br. 12-23. That claim must fail because the Court cannot review the President's motivations and, even if it could, the President acted within Congress' broad grant of authority. The President (and the Secretary) followed Section 232's procedures, recognized the "close relation of the economic welfare of the Nation to our national security," and evaluated a range of statutory factors to assess the "impact of foreign competition on the economic welfare of [the] domestic [steel] industr[y]." 19 U.S.C. § 1862. Their finding that protecting domestic steel production is essential to the national security is entirely reasonable and lawful. Plaintiffs are not likely to succeed in claiming otherwise.

Just as importantly, plaintiffs have not demonstrated that they will suffer irreparable harm absent emergency relief. Contrary to their claim that any tariffs paid are non-recoverable—a claim for which they provide no authority—this Court has the power to order refunds, liquidation or reliquidation of the tariffs, with interest. Further, plaintiffs' claim that they will suffer irreparable harm because payment of the tariffs will drive them out of business is not credible. Both plaintiffs are wholly owned subsidiaries of a Russian parent company (PAO Severstal) that has nearly $8 billion in annual revenue. That parent company has more than sufficient funds to support plaintiffs while their challenge is pending. While plaintiffs would prefer not to pay tariffs during the pendency of litigation, a company's desire to avoid the "adverse economic impact" of an increase in duties or tariffs does not constitute irreparable harm. *Corus Group PLC v. Bush*, 217 F. Supp. 2d 1347, 1355 (Ct. Int'l Trade 2002). For that reason alone, the Court should deny emergency relief.

Finally, the public interest and balance of harms weigh heavily in favor of the United States. The Secretary and the President have determined that the tariffs are essential for the national security. The public's interest in national security significantly outweighs the plaintiffs'

interest in not paying the tariffs for the duration of this proceeding, payments they would recover should they prevail. Accordingly, this Court should decline to enter emergency injunctive relief.

STATUTORY FRAMEWORK

Congress enacted Section 232 to provide "those best able to judge national security needs . . . [with] a way of taking whatever action is needed to avoid a threat to the national security through imports." H.R. Rep. No. 1761, 85th Cong., 2d Sess. 13 (1958). Section 232 authorizes the President, upon receipt of a report from the Secretary finding that an "article is being imported into the United States [a] in such quantities or [b] under such circumstances as to threaten to impair the national security," to take actions that "in the judgment of the President" will "adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A).

Specifically, Section 232 requires the Secretary, on request or upon the Secretary's own motion, to initiate an "investigation to determine the effects on the national security of imports of [an] article." *Id*. § 1862(b)(1)(A). The statute directs the Secretary to submit to the President "a report on the findings of such investigation with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security," along with "recommendations . . . for [Presidential] action or inaction" based on the investigation's findings. *Id*. § 1862(b)(3)(A). The statute additionally requires the Secretary to consult with the Secretary of Defense and other United States officials, and, if appropriate, to hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to the investigation. *Id*. § 1862(b)(2)(A).

Within 90 days after receiving a report finding that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national

security, Section 232 authorizes the President to (1) "determine whether the President concurs with the finding of the Secretary," and (2) "if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." *Id*. § 1862(c)(1)(A). If the President determines to take action, he must implement that action within 15 days following that determination. *Id*. § 1862(c)(1)(B).

Section 232(d) identifies a non-exclusive list of factors that the Secretary and the President must consider in making the findings and determinations described above. These include the "domestic production needed for projected national defense requirements" and "the capacity of domestic industries to meet such [national defense] requirements," as well as "the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth." *Id.* § 1862(d). They also include recognizing "the close relation of the economic welfare of the Nation to our national security," "the impact of foreign competition on the economic welfare of individual domestic industries;" and "any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports" as well as whether "weakening of our internal economy may impair the national security." *Id*.

FACTUAL AND PROCEDURAL HISTORY

I. The Section 232 Steel Investigation

On April 19, 2017, the Secretary initiated a Section 232 investigation to determine the effect of imports of steel on the national security. *See generally* U.S. DEP'T OF COMMERCE, THE EFFECT OF IMPORTS OF STEEL ON THE NATIONAL SECURITY (Jan. 11, 2018) (ECF No. 19-1)

(Bureau of Industry and Security (BIS) Steel Rep.). On that same date, Commerce notified the Secretary of Defense pursuant to 19 U.S.C. § 1862(b). BIS Steel Rep. at 18; *id*. at App. A. The Department of Defense responded to the Secretary's request on May 8, 2017. BIS Steel Rep. at App. A. Commerce held a public hearing concerning the investigation on May 24, 2017, at which 37 witnesses testified, and reviewed 201 written public comment submissions concerning the investigation. BIS Steel Rep. 18-19, App. C-G. The Secretary issued his report and recommendation to the President on January 11, 2018, within 270 days of initiation of the investigation, in compliance with section 1862(b)(3)(A). BIS Steel Rep. at 18.

The Secretary first found that the availability of steel manufactured by a healthy domestic industry is important to national defense. *Id*. at 23-27, App. H. In assessing domestic production needed for projected national defense requirements, the Secretary explained that the Department of Defense "has a large and ongoing need for a range of steel products that are used in fabricating weapons and related systems for the nation's defense. Defense requirements are met by steel companies which also support the requirements for critical infrastructure and commercial industries." *Id*., App. H at 1. For example, the Secretary noted that "Navy ship hulls require steel produced from integrated steel mills," and "aircraft require exotic steel alloys with high-strength and low weight." *Id*. The Secretary further noted that possible increases in the number of Navy ships would "creat[e] an increase in the demand for specialized steel for military purposes." *Id*. Moreover, "[i]n many cases, the U.S. military relies on special types of steel and the U.S. steel industry's ability to support critical defense needs." *Id*. at App. H at 2. Likewise, the Secretary explained that steel is necessary for critical infrastructure. *Id*. at 23.

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

finding, the Secretary determined that, "[i]n the steel sector, foreign competition is characterized by substantial and sustained global overcapacity and production in excess of foreign domestic demand." *Id*. at 27. As a result of this overcapacity, the Secretary found:

- Significant increases in steel imports into the United States, *id*. at 27-29;
- High import penetration, *id*. at 29;
- High import to export ratio, *id*. at 29-31;
- Relatively high prices in the United States, encouraging imports from low cost competitors and discouraging United States exports, *id*. at 31-33;
- Steel mill closures in the United States, resulting in loss of capacity and expertise, *id*. at 33-35; *see id*. at 34 ("[c]losures of smaller steel mills have had equally devastating impacts on employment");
- Loss of employee expertise, *id*. at 35-36;
- Unfair trade, *id*. at 37;
- Loss of domestic sales to imports, *id*. at 37-38;
- Financial distress of the industry, especially for large integrated mills with high fixed costs; *id*. at 38-40; and
- A decline in capital expenditures. *Id*. at 40-41.

Third, the Secretary found that domestic steel production capacity is "stagnant and concentrated" and, importantly, that capacity for production in integrated facilities has fallen precipitously over the last two decades. Specifically, since "2000 there has been over a 25 percent reduction in the number of basic oxygen furnaces operating in the United States, and 33 percent of the remaining basic oxygen furnaces are currently idled." *Id*. at 43. As a result, "a further reduction in basic oxygen furnace capacity, which is especially important to the ability of domestic industry to meet national security needs, is inevitable if the present imports continue or increase." *Id*. at 43; *see also id*. at 45. This would place the United States in a position where it

may be unable to meet demands for national defense and critical industries in a national emergency. *Id*. at 43-44. The Secretary further found that domestic steel production is far below demand, whereas domestic utilization rates are well below a sustainable level. *Id*. at 45-47; *id*. at 47 ("Overall, steel mill production capacity utilization has declined from 87 percent in 1998, to 81.4 percent in 2008, to 69.4 percent in 2016."). Given the domestic industry's contraction, the Secretary found that, "[i]f the U.S. requires a similar increase in steel production as it did during previous national emergencies, domestic steel production capacity may be insufficient to satisfy national security needs." *Id*. at 50.

Fourth, the Secretary found that global excess steel capacity is weakening the domestic steel economy. *Id*. at 51. The Secretary explained that there is "substantial chronic global excess steel production led by China," *id*., and that several other countries also continue to add production capacity. *Id*. at 53. The additional global steel capacity coming online "represents over 80 percent of existing U.S. steelmaking production capacity, demonstrating that the import challenge to U.S. industry is continuing to grow." *Id*. In light of his finding, the Secretary recommended that "the President take immediate action by adjusting the level of imports through quotas or tariffs on steel imported into the United States . . . [so as to] keep the U.S. steel industry financially viable and able to meet U.S. national security needs." *Id*. at 58.

The Secretary recommended two alternative approaches. First, the Secretary recommended either a global tariff of 24 percent (in addition to any applicable antidumping or countervailing duties), or a global quota of 63 percent of current import volume, so as to increase the domestic industry's capacity utilization rate to 80 percent. *Id*. at 59-60. Alternatively, the Secretary proposed a higher tariff of 53 percent (in addition to any applicable antidumping or countervailing duties) to be imposed on a subset of importers in conjunction with a quota on all

remaining importers fixed at 100 percent of 2017 import volumes. *Id*. at 60. The Secretary also proposed that any final proclamation should allow the President to exempt certain countries from any measures, with corresponding adjustments made to the tariff or quotas involving un-exempted countries, and that Commerce should be allowed to exclude particular products based on lack of sufficient United States production capacity of comparable products or specific national security considerations. *Id*. at 61.

II. The President's Proclamations And Their Implementation

A. Steel Proclamation I

On March 8, 2018, after considering the Secretary's report and recommendations, as well as other information available to him, the President issued a Proclamation announcing measures on "adjusting imports of steel into the United States." *See generally* Steel Proclamation I. Acting pursuant to his constitutional and statutory authority, including Section 232, the President established a 25 percent tariff on imports of steel articles, to take effect March 23, 2018. *Id.* cl. (1)-(2).

The President first acknowledged the Secretary's findings that the present quantities of steel imports and the circumstances of global excess capacity for producing steel are "weakening our internal economy," resulting in the persistent threat of further closures of domestic steel production facilities and the "shrinking [of our] ability to meet national security production requirements in a national emergency." *Id.* ¶ 2. The President further noted the Secretary's conclusion that, because of these risks and the risk that the United States may be unable to "meet [steel] demands for national defense and critical industries in a national emergency," the present quantities and circumstances of steel imports threaten to impair the national security as defined in Section 232. *Id.* In addition, the President considered updated import and production

numbers from 2017, the continued high level of imports since the beginning of 2018, and the failure of other countries to take measures to reduce global excess capacity. *Id.* ¶ 8.

The President "concur[red] in the Secretary's finding that steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States[.]" *Id.* ¶ 5. Further, the President "considered [the Secretary's] recommendations" regarding steps to adjust steel imports. *Id.*

In adopting the tariff, the President recognized that the United States "has important security relationships with some countries whose exports of steel articles to the United States weaken our internal economy and thereby threaten to impair the national security" and that these countries have a "shared concern about global excess capacity, a circumstance that is contributing to the threatened impairment of the national security." *Id.* ¶ 9. He proclaimed that "any country with which [the United States has] a security relationship" could discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country" and that, "[s]hould the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require." *Id.*

In addition, after concluding that Canada and Mexico present a special case, given our mutual interests in national security matters and in addressing global excess steel capacity, their robust economic integration with our economy, and the export of steel articles to Canada and Mexico, among other factors, the President determined that the appropriate means to address the

threat to the national security posed by imports of steel articles from Canada and Mexico is to continue discussions and to exempt steel article imports from those countries, at least at this time (while noting his expectation that Canada and Mexico will take action to prevent transshipment of steel articles to the United States). *Id.* ¶ 10.

The President authorized the Secretary, in consultation with other senior officials, to provide relief from the tariff "for any steel article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality" and also authorized the Secretary to provide such relief "based upon specific national security considerations." *Id.* cl. (3). The President elaborated that "[s]uch relief shall be provided for a steel article only after a request for exclusion is made by a directly affected party located in the United States." *Id.* The President also instructed the Secretary to issue procedures for such exclusion requests. *Id.* cl. (4).

Finally, the President directed the Secretary to monitor imports of steel articles and to review the status of such imports with respect to the national security. The President further instructed the Secretary to inform him of any circumstances "that in the Secretary's opinion might indicate the need for further action by the President under Section 232," or "that in the Secretary's opinion might indicate that the increase in duty rate provided for in this proclamation is no longer necessary." *Id.* cl. 5(b).

B. Steel Proclamation II

After issuance of Steel Proclamation I, a number of countries initiated intense discussions with the President, the United States Trade Representative (USTR), and Commerce to provide appropriate assurances concerning steel exports to the United States. Many of these countries share our country's concerns about global steel overcapacity and the impact of overcapacity on

sustainable steel production to support their military-industrial base needs. Many of these countries are close allies of the United States and share mutual security arrangements and strategies with our country. Steel Proclamation II ¶¶ 6-9. The President thus determined on March 22, 2018, that, because the United States was in continuing discussions with, and has important security relationships with, Australia, Argentina, South Korea, Brazil, and the EU member countries, he would temporarily exempt those countries from the tariffs until May 1, 2018, in the hope of reaching agreements regarding alternative means to address the threat to national security posed by steel imports from those countries. The President also limited the exemption for Canada and Mexico to May 1, 2018. *Id.*

C. Commerce's Administrative Exclusion Procedures

Consistent with the President's direction to Commerce to implement a process for considering requests for exclusion from the Section 232 tariffs, Steel Proclamation I, cl. (3)-(4), Commerce promulgated interim final rules for that process. *Requirements for Submissions Requesting Exclusions From the Remedies Instituted in Presidential Proclamations Adjusting Imports of Steel Into the United States and Adjusting Imports of Aluminum Into the United States; and the Filing of Objections to Submitted Exclusion Requests for Steel and Aluminum*, 83 Fed. Reg. 12,106 (Dep't of Commerce Mar. 19, 2018) (*Interim Final Rule*). The exclusion process is open to any individual or organization using steel articles in business activities in the United States (*e.g.,* construction, manufacturing, or supplying steel to users). *Id.* at 12,110, 12,111-12. An article may be excluded if it is not produced in the United States in a sufficient and reasonably available amount, or in a satisfactory quality, or for a specific national security consideration. *Id.* at 12,110, 12,112.

Commerce's exclusion procedures are transparent and efficient. All exclusion requests, objections, and comments will be made available for public inspection. 83 Fed. Reg. at 12,106, 12,110. Special procedures are available to handle submission of proprietary information. *Id*. at 12,111. BIS has posted forms for making exclusion requests and for submitting objections or comments on its website. *Id*. An exclusion request may be submitted at any time, but objections must be submitted within 30 days of the contested request. BIS will publish responses to exclusion requests, taking into account any objections, at www.regulations.gov. *Id.* Exclusions will generally be approved for a period of one year. Commerce will normally make decisions on requests within 90 days. *See* 15 C.F.R. Part 705, Supp. 1. Finally, "[f]or merchandise entered on or after the date the directly affected party submitted a request for exclusion, such relief shall be retroactive to the date the request for exclusion was posted for public comment." Steel Proclamation II, cl. (7).

STANDARD OF REVIEW

A court may not decide the merits of a case before establishing that it has subject matter jurisdiction. *Steel Co. v. Citizens for Better Env't*, 523 U.S. 83, 94 (1998). This includes granting preliminary relief, which the Court cannot do without first resolving challenges to its jurisdiction. *U.S. Ass'n of Importers of Textiles & Apparel v. United States*, 413 F.3d 1344, 1348 (Fed. Cir. 2005); *Nippon Steel Corp. v. United States*, 219 F.3d 1348, 1353 (Fed. Cir. 2000). The Court lacks jurisdiction to entertain challenges to the President's discretionary determinations, whether under the APA or 28 U.S.C. § 1581(i). Additionally, this Court normally takes a "strict view" of the requirement that parties exhaust administrative remedies, which might eliminate any need for judicial review. *Corus Staal BV v. United States*, 502 F.3d

1370, 1379 (Fed. Cir. 2007); *see Boomerang Tube LLC v. United States*, 856 F.3d 908, 912-13 (Fed. Cir. 2017).

A preliminary injunction "is an extraordinary remedy never awarded as of right." *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 24 (2008) (citing *Munaf v. Geren*, 553 U.S. 674, 689-90 (2008)). In reviewing requests for preliminary injunctive relief, courts must make determinations concerning each of four elements: (1) the plaintiff's likelihood of success on the merits; (2) the plaintiff's demonstration of irreparable harm absent immediate relief; (3) the balance of interests weighing in favor of and against preliminary injunctive relief; and (4) the public interest. *Id*. at 20-21. This is a four-prong test, not a balancing or sliding-scale test, and plaintiffs must prevail on each element in order to obtain preliminary injunctive relief. *Id*.

ARGUMENT

I. The Court Should Dismiss The Complaint For Lack Of Jurisdiction And Failure To Exhaust Available Administrative Remedies

A. Plaintiffs Have Failed To Establish That Presidential Proclamations Pursuant To Section 232 Are Subject To Judicial Review

At the threshold, this Court does not have jurisdiction to entertain plaintiffs' challenge to the Steel Proclamations. Section 1581(i) provides this Court with exclusive jurisdiction to consider certain types of claims against the "United States, its agencies, or its officers," but not against the President. 28 U.S.C. § 1581(i). Congress specifically declined to provide the Court of International Trade with jurisdiction to entertain challenges to discretionary trade decisions by the President. H.R. Rep. No. 1235, 96th Cong., 2d Sess. 32 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3743-44 ("Congress, in enacting various tariff and trade bills, has made it clear that those Presidential decisions are not subject to judicial review but will be reviewed in the course of Congress' consideration of subsequent international trade legislation.").

Plaintiffs cite no basis for this Court's jurisdiction other than Section 1581(i). Compl. ¶ 10. But Section 1581(i) is limited to APA claims, *see* 28 U.S.C. § 2640(e), which do not include claims against the President, and this Court's standing statute similarly limits jurisdiction to matters brought by "any person adversely affected or aggrieved by *agency action* within the meaning of section 702 of title 5." 28 U.S.C. § 2631(i) (emphasis added).

The sole subject of plaintiffs' complaint is the President's Steel Proclamation—not the action of any agency—and it is axiomatic that the President is not an "agency" for purposes of the APA. *Franklin*, 505 U.S. at 800-01. Thus, plaintiffs may not invoke the APA or Section 1581(i) in support of their complaint. *See Corus Grp. PLC. v. Int'l Trade Comm'n*, 352 F.3d 1351, 1359 (Fed. Cir. 2003); *Michael Simon Design, Inc. v. United States*, 609 F.3d 1335, 1340 n.1 (Fed. Cir. 2010).[2]

In accord with this basic rule, the Federal Circuit, sitting *en banc*, has held that the APA does not provide a basis to challenge a Presidential determination to impose special duties. *See Motion Systems*, 437 F.3d 1356. The Court analyzed *Franklin* and *Dalton* and held that the claim was unreviewable. The Court reasoned that "[t]he President's actions cannot be challenged because judicial review is unavailable when a statute allegedly violated itself commits a decision to the discretion of the President." *Id.* at 1362. Section 232 does just that, empowering the President to take "action that, in the judgment of the President," is necessary "to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii). It is difficult to imagine a more explicit

[2] Plaintiffs' footnote, Pl. Br. 2, n.2, asserting that the Court possesses jurisdiction over the President ignores these binding decisions and rests upon a "note" contained in the LexisNexis version of title 28, United States Code Service, based upon a case decided prior to these binding precedents.

commitment of "a decision to the discretion of the President," *Motion Systems*, 437 F.3d at 1362, than that.

The gravamen of plaintiffs' complaint is that the Steel Proclamations were motivated by the need "to revitalize the American steel industry," rather than national security concerns. Pl. Mot. 2; Pl. Br. 13. This claim is not justiciable. Courts have long recognized that the President's findings of fact and motivations in discretionary international trade matters are not reviewable. *George S. Bush*, 310 U.S. at 379-81; *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985). In *George S. Bush*, the Supreme Court addressed the President's imposition of special duties under a statute that, like Section 232, vested the President with discretion, and concluded that "[t]he judgment of the President that on the facts, adduced in pursuance of the procedure prescribed by Congress, a change of rate is necessary is no more subject to judicial review under this statutory scheme than if Congress itself had exercised that judgment." 310 U.S. at 379-80. The Court reasoned that judicial scrutiny of "the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains." *Id*. at 380. The Court held that, "[u]nder the Constitution it is exclusively for Congress, or those to whom it delegates authority, to determine what tariffs shall be imposed. Here the President acted in full conformity with the statute. No question of law is raised when the exercise of his discretion is challenged." *Id*.

That holding forecloses judicial review into the subjective motivations of the President for exercising his statutory authority. *See* Compl. ¶¶ 30, 38. As we explain more fully below, the President received the report that constitutes the single precondition for his exercise of discretion under Section 232(c), concurred in its findings, and took the action to adjust imports

that was appropriate "in the judgment of the President." 19 U.S.C. § 1862(c). That decision to take action was the President's to make, and his exercise of discretion is not subject to challenge.

The Federal Circuit's decision in *Michael Simon* further underscores the conclusion that this Court may not review the President's exercise of discretion under trade statutes. 609 F.3d at 1340. The court found unreviewable a challenge to the President's action in implementing the International Trade Commission's (ITC's) recommended changes to the Harmonized Tariff System of the United States (HTSUS) under 19 U.S.C. §§ 3005 and 3006. *Id*. Like Section 232, those statutes provide that recommendations be made to the President, and give the President broad discretion to take action based upon those recommendations. The Court held that review was unavailable under the APA, and rejected the claim that judicial review was appropriate outside of the APA based on plaintiff's contention that the President had exceeded his statutory authority. *Id*. The court found that the statutory scheme did not constrain the President's discretion and that the courts could not hear challenges to his discretionary judgments. *See id*. at 1341. Section 232 dictates the same result here.

Plaintiffs also cannot clear the bar against challenging presidential exercises of statutory discretion by adding Government agencies to their complaint. In *Dalton*, respondents "sought to enjoin the Secretary of Defense (Secretary) from carrying out a decision by the President to close the Philadelphia Naval Shipyard," in the same way that plaintiffs seek to enjoin agencies from carrying out the Presidential Proclamations here. 511 U.S. at 464. "The President [was] said to have violated the terms of the 1990 Act by accepting procedurally flawed recommendations," *id*. at 474, as plaintiffs similarly claim the President has done here with respect to the Secretary's investigation and recommendation under Section 232. The Court "assume[d] for the sake of argument that some claims that the President has violated a statutory mandate are judicially

reviewable outside the framework of the APA," but explained that "longstanding authority holds that such review is not available when the statute in question commits the decision to the discretion of the President." *Id.; see also Franklin*, 505 U.S. 788 (no review available of Census report because the President was responsible for transmitting final report to Congress); *Michael Simon*, 609 F.3d at 1339 (ITC's recommendations of modification to the HTSUS were not final agency action for purposes of the APA because President had to take action for the ITC's recommendations to have any effect). Here, as in those cases, "the statute in question commits the decision to the discretion of the President," *Dalton*, 511 U.S. at 474, and review is accordingly not available under the APA or Section 1581(i).

Finally, the President's exemptions of certain countries from the tariffs imposed by the Steel Proclamations are similarly nonjusticiable. Compl. ¶ 38; Pl. Br. 7, 15-16. First, they are not justiciable for the same reasons as other aspects of the President's Section 232 determination: they constitute the President's exercise of his discretionary judgment about how best to address the identified threat to national security with respect to steel imports from particular countries. *See* Steel Proclamation II ¶¶ 4, 10. Second, the country-based exemptions are not justiciable because they reflect the President's decisions with regard to relations with other sovereign nations, inherently a political question not appropriate for judicial resolution. As with national security, "[t]he conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—'the political'—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen v. Cent. Leather Co*., 246 U.S. 297, 302 (1918) (citation omitted). Entertaining plaintiffs' argument would require the Court to make foreign-affairs judgments that fall well outside the purview of the Judicial Branch. "Nowhere does the

Constitution contemplate the participation by the third, non-political branch that is the Judiciary, in any fashion in the making of international agreements." *Antolok v. United States*, 873 F.2d 369, 381 (D.C. Cir. 1989).

Because plaintiffs have not asserted a claim within the Court's statutory jurisdiction, and because the President's exercise of discretion pursuant to Section 232 is nonjusticiable, the complaint should be dismissed.

B. Plaintiffs Have Failed To Exhaust Administrative Remedies

This Court should also decline to entertain plaintiffs' challenge to the tariffs because, even if review were otherwise available, plaintiffs have not availed themselves of administrative remedies that could eliminate the need for judicial review entirely. As the Supreme Court long ago explained, "no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *McKart v. United States*, 395 U.S. 184, 193 (1969) (citation omitted). Requiring exhaustion protects administrative agency authority and promotes judicial efficiency, *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992), and Congress accordingly directed the Court of International Trade to "where appropriate, require the exhaustion of administrative remedies." 28 U.S.C. § 2637(d). This Court takes that mandate seriously, explaining that it takes a "strict view" of the requirement that parties exhaust their administrative remedies in trade cases. *Corus Staal BV v. United States,* 502 F.3d 1370, 1379 (Fed. Cir. 2007); *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 342 F. Supp. 2d 1191, 1205 (Ct. Int'l Trade 2004).

Plaintiffs have declined to invoke the administrative process provided by the President and the Secretary for importers seeking to be excluded from the Section 232 tariffs. Commerce has implemented a process to provide relief to requesting parties through product-specific

exclusions. If Commerce grants a party the requested relief, it is effective as of the date the request was posted for public comment. *See* Steel Proclamation II, cl. (7). The exclusion process is open to any individual or organization using steel articles identified in the Presidential Proclamations in business activities in the United States (*e.g.*, construction, manufacturing, or, as relevant here, *supplying steel to users*). *Interim Final Rule*, 83 Fed. Reg. at 12,110, 12,111-12. An article may be excluded if it is not produced in the United States in a sufficient and reasonably available amount, is not produced in the United States in a satisfactory quality, or for a specific national security consideration. *Id.* at 12,110, 12,112. Plaintiffs have not even attempted to pursue this remedy, despite at least one affiliate being eligible for this process, and despite characterizing their products as "custom orders" that are "specific to the particular end use of the customer," Pl. Br. 4, such that plaintiffs may be eligible to obtain an exclusion.

For similar reasons, plaintiffs' claim is not yet ripe for review. The ripeness doctrine serves "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967), *overruled on other grounds by Califano v. Sanders*, 430 U.S. 99, 105 (1977); *Tokyo Kikai Seisakusho, Ltd. v. United States*, 529 F.3d 1352, 1362 (Fed. Cir. 2008) (quoting *Abbott Labs*).

In applying the ripeness doctrine, courts consider two basic factors: "the fitness of the issues for judicial decision" and "the hardship to the parties of withholding court consideration." *Abbott Labs*, 387 U.S. at 149. Neither factor weighs in favor of premature judicial review here.

With regard to fitness, when the agency possesses discretion to apply a rule on a case-by-case basis, judicial review "is likely to stand on a much surer footing in the context of a specific application" of the agency's policy than it would "in the framework of [a] generalized challenge." *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 164 (1967). Commerce possesses the discretion to provide relief from the steel tariffs based on product-specific exclusions; should plaintiffs obtain an exclusion through the available administrative process, there would be no need for judicial review.

With regard to hardship, courts consider the detriment to the parties from deferring judicial review. When the court or the agency has an institutional interest in deferral, that interest will be outweighed only if deferral would "impose a hardship on the complaining party that is immediate, direct, and significant." *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 479-80 (D.C. Cir. 1986). Both the agency and this Court have an institutional interest in deferral here because Commerce should be allowed to review exclusion requests without interference, and hardship is not present when a party faces "mere uncertainty as to the validity of a legal rule[.]" *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 811 (2007).

Both because plaintiffs have yet to exhaust their administrative remedies, and because their claims are not yet ripe for judicial review, the complaint should be dismissed.

II. No Emergency Injunction Should Issue Because Plaintiffs Cannot Demonstrate Likelihood Of Success On The Merits

Even if the Court had jurisdiction to consider plaintiffs' request for emergency relief, however, no such relief is warranted because plaintiffs cannot demonstrate a likelihood of success on the merits. This is clear for three reasons. First, as explained above, this Court cannot entertain plaintiffs' challenge to discretionary Presidential action, and plaintiffs have failed to exhaust administrative remedies. Second, even if the Court were to review the

President's actions (or the actions of the Secretary), the President and the Secretary followed all statutory prerequisites. Third, the President possesses both constitutional and statutory authority to issue the Proclamations.

A. The Secretary And The President Complied With All Statutory Procedures

Apart from noting that the Section 232 proceedings took longer than originally anticipated (which provided additional time for importers to make alternative arrangements and thus redounded to their benefit), plaintiffs do not allege that the President or Secretary failed to follow any statutory procedures. Indeed, both the President and the Secretary complied with all statutory procedures.

As explained above, Section 232(d) provides a non-exhaustive list of factors for the Secretary and the President to consider when exercising this statutory authority. The Commerce report expressly considered these factors in comprehensive detail, including both the factors relating to the domestic production, capacities, and growth needed for national security requirements, and those factors stemming from "the close relation of the economic welfare of the Nation to our national security," such as "the impact of foreign competition on the economic welfare of individual domestic industries." *See generally* BIS Steel Rep. at 23-54. Consistent with Section 232(b)(3), the Secretary advised the President of his findings.

The statute provides that, within 90 days of receiving the report, the President must determine whether he concurs with the Secretary's findings and, if he does, must further "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(i)-(ii). The President complied with these requirements. The President received the steel report on January 11, 2018. Steel Proclamation I

¶ 1. On March 8, 56 days after receiving the report, the President concurred in the Secretary's findings. *Id.* ¶ 5. The President expressly considered the Secretary's report in Steel Proclamation I, demonstrating that the President also evaluated the factors set forth in subsection (d) of the statute. *Id*. ¶ 8. The President determined the nature and duration of the actions that, in the President's judgment, must be taken to adjust steel imports so that they will not threaten to impair the national security. The President's judgment was to adjust the imports of steel articles by imposing a 25 percent *ad valorem* tariff on steel articles. *Id*..

The statute further directs that the President "shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A)." 19 U.S.C. § 1862(c)(1)(B). Pursuant to the terms of the Steel Proclamations, the additional duties became effective on the 15th day after the date of the Proclamations; the duties apply to covered merchandise "entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on March 23, 2018." Steel Proclamation I, cl. (5)(a).

Thus, the precondition for the President's exercise of his discretion was satisfied by his receipt of a report with an affirmative finding, and he otherwise followed the statute in exercising his discretion.

B. The President Acted Well Within His Constitutional And Statutory Authority

Plaintiffs attempt to evade the bedrock principles precluding review and manufacture a reviewable constitutional issue out of the President's alleged subjective motivations. But that effort fails even if the substance of the President's actions were reviewable because it is clear that the President acted within his constitutional and statutory authority.

In evaluating challenges to claims of Presidential power, the Supreme Court generally has applied the tripartite framework first articulated by Justice Robert Jackson in *Youngstown Sheet & Tube Company v. Sawyer (Steel Seizure)*, 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring). *See, e.g.*, *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2083-84 (2015); *Medellin v. Texas*, 552 U.S. 491, 524 (2008); *Dames & Moore v. Regan*, 453 U.S. 686, 668–69 (1981). First, "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." *Steel Seizure*, 343 U.S. at 635 (Jackson, J., concurring). Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers," and he may enter "a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain." *Id*. at 637. Lastly, when the President acts in contravention of the will of Congress, 'his power is at its lowest ebb,' and the Court can sustain his actions "only by disabling the Congress from acting upon the subject." *Medellin*, 552 U.S. at 525 (quoting *Steel Seizure,* 343 U.S. at 637-38).

Here, the President's authority is at its apex. His power to assess the economic conditions that threaten to impair the security of the Nation and to make predictive judgments about how to mitigate such threats falls squarely within the first *Steel Seizure* category, where "the executive action 'would be supported by the strongest of presumptions and the widest latitude of judicial interpretation.'" *Dames & Moore*, 453 U.S. at 668 (*quoting Steel Seizure*, 343 U.S. at 637). First, under the Constitution, the President unquestionably possess "independent authority in the area[] of . . . national security," *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 429 (2003), and is in fact under a "constitutional directive" to take the "primary responsibility—along with the necessary power—to protect the national security." *Zivotofsky*, 135 S. Ct. at 2097

(Thomas, J., concurring in part and dissenting in part) (citation and quotations omitted). He has that power both because he is the Commander-in-Chief, U.S. Const. art. II, § 2, cl. 1, and because of his "longstanding practice" of exercising "unenumerated" national security (and foreign relations) powers. *Id*. at 2097. Indeed, as the Court in *Zivotofsky* observed, historical evidence indicates that this "external executive power" includes '"not only what is properly called military power, but the power likewise . . . of engaging in alliances for an encrease of strength . . . and the power of adjusting the rights of a nation in respect of . . . trade, etc." *Id.* at 2099 (citation omitted).

Second, Congress has expressly authorized the President to issue the Proclamations. The Constitution vests Congress with the authority 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. In Section 232(b), Congress authorized the President to "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(ii). Section 232(d) then articulates the standard to guide the President's invocation of that power, providing a range of factors relevant to determining the domestic production needed for projected defense requirements, the capability of domestic industries to meet such requirements, and the import of goods affecting such industries. *Id*. § 1862(d). As previously discussed, Section 232(d) explicitly directs the President to recognize "the close relation of the economic welfare of the Nation to our national security." And it further directs the President to consider whether imports have so weakened our "internal economy" such that they may threaten to impair the national security. *Id.* In making that assessment, the President is provided yet another non-exhaustive list of factors, including the "impact of foreign competition

on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports." *Id.*

The Supreme Court has held that Section 232 properly delegates Congress's authority over foreign trade and tariffs to the President because of the guidance provided through the "specific factors to be considered by the President in exercising his authority." *Fed. Energy Admin. v. Algonquin SNG*, 426 U.S. 548, 559-60 (1976). The Court also approved the statute's deference to the President's judgment concerning how to adjust imports to eliminate threats to the national security, because such delegation reflects the "recognition that '[n]ecessity . . . fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules.'" *Id.* (citation omitted).

Given Congress's express and broad delegation of power in Section 232 to the President, and the President's independent constitutional authority over national security, the President's authority to issue the Steel Proclamations "is at its maximum." *Steel Seizure*, 343 U.S. at 635 (Jackson, J., concurring). Under such circumstances, how the President exercises that authority is beyond the purview of the Judiciary. Not only is the matter committed to the President's discretion, as discussed above, but "[n]ational security is the prerogative of Congress and the President." *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1849 (2017); *see also Haig v. Agee*, 453 U.S. 280, 292 (1981) (matters closely related to national security are "rarely proper subjects for judicial intervention"); *Bancoult v. McNamara*, 445 F.3d 427, 437 (D.C. Cir. 2006) (in matters involving Executive branch decisions relating to national security, "[t]he courts may not bind the executive's hands . . . whether directly—by restricting what may be done—or indirectly—by restricting how the executive may do it").

At a minimum, though, the Court should give the "utmost deference" to the President's judgment that imports of steel articles threaten to impair the national security and that the tariff he imposed is necessary to eliminate such threats. *United States v. Nixon*, 418 U.S. 683, 710-11 (1974). "It is 'obvious and unarguable' that no governmental interest is more compelling than the security of the Nation." *Haig,* 453 U.S. at 307 (citation omitted). Because of the President's primary responsibility in national security and "the lack of competence on the part of the courts" in such matters, *Holder v. Humanitarian Law Project*, 561 U.S. 1, 34 (2010) (citation omitted), there is a "tradition . . . of giving 'the utmost deference to Presidential responsibilities'" in matters involving national security. *Clinton v. Jones*, 520 U.S. 681, 709 (1997) (quoting *Nixon*, 418 U.S. at 710-11). Thus, the Supreme Court consistently has emphasized that "deference to what the Executive Branch has determined . . . is essential to national security." *Ziglar*, 137 S. Ct. at 1861 (internal quotation marks and citation omitted). That deference applies to the President's "[p]redictive judgment[s]," *Dep't of the Navy v. Egan*, 484 U.S. 518, 530 (1988), especially "when it comes to collecting evidence and drawing factual inferences." *Humanitarian Law Project*, 561 U.S. at 34. It also applies to the Executive's "preventive measure[s]," obviating the need for the Executive to "conclusively link all the pieces in the puzzle before [courts] grant weight to its empirical conclusions." *Id.* at 35.

It is undeniable that steel production is vital to national security. As the Secretary's report explains, steel products are used in a variety of ways for national defense and other critical infrastructural requirements. *See* BIS Steel Rep. 23-25. Based on the Secretary's report, updated import and production numbers from 2017, the continued high level of imports since the beginning of 2018, and the failure of countries to take measures to reduce global excess capacity, *see* Steel Proclamation I at ¶ 8, the President found that steel articles "are being imported into the

United States in such quantities and under such circumstances as to threaten to impair the national security of the United States." *Id.* ¶ 5. In particular, the "present quantities of [such] imports and the circumstances of global excess capacity . . . are 'weakening our internal economy.'" *Id.* ¶ 2. The President also reiterated the Secretary's warning about the "persistent threat of further closures of domestic steel production facilities" and the "shrinking [of our] ability" to meet steel demands "for national defense and critical industries in a national emergency." *Id*. Since 2000, the United States has lost over 25 percent of its basic oxygen furnace facilities with the closure of six such facilities, while four other facilities are idling. BIs Steel Rep. at 33-34. These closures and stoppages have led to a 35 percent decline in employment in the domestic steel industry and have caused the industry as a whole to operate on average with negative net income since 2009. *Id.* at 34. Moreover, steel production capacity utilization has declined from 87 percent in 1998 to 69.4 percent in 2016. *Id.* at 47. While U.S. steel production continues to decline, production capacity in other steel-producing countries has increased. *Id.* at 16. This global excess capacity "means that U.S. steel producers, for the foreseeable future, will continue to lose market share to imported steel," jeopardizing the viability of the steel industry, *id.,* and thereby threatening national security.

The Secretary warned that, absent measures like the tariff here, the United States "may be unable to meet steel demand for national defense and critical industries in a national emergency." Steel Proclamation I ¶ 2 (quotation marks omitted). For example, the Secretary observed that, because the Department of Defense requires a diverse range of products, no single company could afford to operate a steel mill solely to meet such needs. BIS Steel Rep. at 23. Instead, defense requirements must depend on multiple producers, and such producers "must attract sufficient commercial (*i.e.*, non-defense) business" in order to support "construction, operation,

and maintenance of production capacity as well as the upgrades, research and development required to continue to supply defense needs in the future." *Id.*

The Secretary also warned that "[a] further reduction in domestic basic oxygen furnace capacity would put the United States at serious risk of becoming dependent on foreign steel to support its defense and critical infrastructure needs." *Id.* at 44. The national security implications are significant. The Department of Defense already finds itself without domestic suppliers for certain types of steel used in defense products. *Id.* at 45–46. And the United States currently has only one remaining producer of electrical steel—a product that is necessary for power distribution transformers for all types of energy. *Id.* at 46. Moreover, the loss of skilled steel workers due to plant closures and halts to production—numbering 14,100 workers in 2015-16 alone—means the loss of vital skills (or a next-generation workforce) necessary for a major production surge or mobilization, and is "especially detrimental to the long-term health and competitiveness of the industry." *Id.* at 35. As the Secretary explained, "it is the ability to quickly shift production capacity used for commercial products to defense and critical infrastructure production that provides the United States a surge capability that is vital to national security, especially in an unexpected or extended conflict or national emergency." *Id.* at 55–56. And "[i]t is that ability that is now at serious risk." *Id.* at 56.

The President agreed. He judged that a global 25 percent tariff on steel articles (with exclusions to be granted under certain circumstances) is "necessary and appropriate" to address the threat. Steel Proclamation I ¶ 8. The President anticipated that the tariff "will help our domestic steel industry to revive idled facilities, open closed mills, preserve necessary skills by hiring new steel workers, and maintain or increase production." *Id.* He also concluded that achieving these objectives is necessary to "reduce our Nation's need to rely on foreign producers

for steel and ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense." *Id.* These objectives clearly are legitimate aims for the "national security" determination under Section 232. *See* Presidential Auth. Under the Trade Expansion Act to Adjust Shipments of Oil to & from Puerto Rico, 4B Op. O.L.C. 375, 380 (1980) (Section 232(c)—now Section 232(d)—"makes it plain that economic dislocation which results from *excessive* imports is the sort of impairment of the national security that the President may act to prevent.").

Although the Court need not look beyond the plain language of Section 232, *see Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999), legislative history and longstanding Executive practice both confirm that the Steel Proclamations are proper. In enacting Section 232's predecessor, Section 8 of the Trade Agreement Extension of 1958, Pub. L. No. 85–686, 72 Stat. 673, 678, which included the economic factors now codified at 19 U.S.C. § 1862(d), Congress signaled that "the President must take into consideration the effect on the national security of a weakening of the *general economy* by excessive imports of competitive products." S. Rep. No. 1838, 85th Cong. 2d Sess. 2 (1958) (emphasis added). Specifically, subsection (d) was "designed to give the President unquestioned authority" to take action "whenever danger to our national security results from a weakening of segments of the economy through injury to any industry, *whether vital to the direct defense or a part of the economy providing employment and sustenance to individuals or localities*." *Id.* at 5-6 (emphasis added).

Unsurprisingly in light of the explicit statutory language and the clear congressional intent, Presidents have exercised their import-adjustment authority under Section 232 in various ways to protect national security. *E.g.*, Proclamation No. 3279, 24 Fed. Reg. 1781 (Mar. 12, 1959) (setting region-specific caps on oil imports "to avoid discouragement of and decrease in

domestic oil production, exploration and development to the detriment of the national security"); Proclamation No. 3290, 24 Fed. Reg. 3527 (May 2, 1959) (largely excluding oil transported overland, *e.g.*, from Canada, from the import caps); Proclamation No. 3693, 30 Fed. Reg. 15,459 (Dec. 16, 1965) (adjusting import allocations to promote growth of the petrochemical industry in Puerto Rico and to "provide a substantial and much needed increase in opportunities for employment of its citizens"); Proclamation No. 3794, 32 Fed. Reg. 10,547 (July 19, 1967) (adjusting import controls to ensure a greater supply of low-sulfur residual fuel oil to address air pollution concerns); Proclamation No. 4543, 42 Fed. Reg. 64,849 (Dec. 27, 1977) (eliminating fees on imports to be used for the creation of a strategic petroleum reserve); Proclamation No. 4907, 47 Fed. Reg. 10,507 (Mar. 10, 1982) (banning imports of crude oil produced in Libya to eliminate U.S. dependence on Libya as a source of crude oil). The Executive branch has thus long understood that economic vitality—both in general and specific industries—is essential to the national security. That longstanding view is reasonable and warrants great deference here.

And, indeed, Congress is presumably aware of this longstanding Executive practice, *see United States v. Wilson*, 290 F.3d 347, 357 (D.C. Cir. 2002), *Nat'l Lead Co. v. United States*, 252 U.S. 140, 147 (1920); yet Congress has never attempted to narrow the President's Section 232 authority, despite reenacting Section 232 multiple times.[3] That reinforces the conclusion that the plaintiffs are not likely to succeed in arguing that the President's national security motivations fail because the President was "really" concerned about revitalizing the American steel industry. As the statute, its history, and longstanding Executive practice show, strengthening critical sectors of the economy is within the bounds of presidential authority to protect national security.

[3] *See* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, tit. I, § 1501, 102 Stat. 1107; the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1993; Section 232 of the Trade Expansion Act of 1962.

Plaintiffs advance several additional arguments in a further effort to persuade this Court to second guess the President's national security judgments. First, plaintiffs allege that various statements of the President concerning the steel industry are either inconsistent with Section 232 or show some impermissible pretext. *See* Pl. Br. 9, 10, 13. Second, plaintiffs complain about the President's decision to exclude nations that provided adequate assurances to the United States regarding steel exports and capacity. And, plaintiffs dispute the need for steel tariffs, based on what they assert is the Department of Defense's ability to acquire steel to meet national defense needs in light of military requirements for steel in relation to total U.S. steel production. Pls.' Br. Ex. D at 1, 16. Both arguments miss the mark.

As an initial matter, even if the Court could consider extrinsic evidence under section 1581(i), and even if the Court could review the factual basis for the President's discretionary decision, the President's statements (whether on social media or elsewhere) that he seeks to protect steel industry jobs are entirely consistent with Section 232. Section 232(d) explicitly requires the President to recognize "the close relation of the economic welfare of the Nation to our national security," 19 U.S.C. § 1862(d), and directs the President to consider the economic well-being of individual domestic industries in determining whether excessive imports have "weaken[ed] our internal economy." *Id.* In addressing national security, the President may consider, "without excluding other factors," "any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products." *Id.* This is precisely what the President did. An adequate and reliable supply of steel is undeniably essential to the national security. And the Steel Proclamations and statements the President has made outside the four corners of those

Proclamations focus on protecting a steel industry, whose economic viability, and therefore its support for national security, is threatened.

Plaintiffs also devote several pages of their brief to a discussion of wholly unrelated litigation challenging the President's Executive Orders and Proclamations concerning travel and entry into the United States. Pl. Br. 21-23 (citing *Hawaii v. Trump*, 241 F. Supp. 3d 1119 (D. Haw. 2017), and *Hawaii v. Trump*, 245 F. Supp. 3d 1227 (D. Haw. 2017)). These non-precedential decisions concern an inapposite Executive Order, which was superseded by Proclamation No. 9645. The Ninth Circuit affirmed in part the district court's decisions, *see Hawaii v. Trump*, 859 F.3d 741 (9th Cir. 2017), and *Hawaii v. Trump*, 874 F.3d 1112 (9th Cir. 2017), but the Supreme Court subsequently vacated the Ninth Circuit's opinion. The *Hawaii* decisions have little, if any, persuasive value generally and no bearing in this much different context. Moreover, the *Hawaii* litigation involved entirely distinct constitutional and statutory claims and a fundamentally different factual record. A much closer analog—assuming it would be appropriate to project from one decision concerning a Presidential action to another action concerning an entirely different Presidential action—is this Court's recent decision in *Silfab Solar, Inc. et al. v. United States, et al.,* slip op. 18-15 (Ct. Int'l Trade Mar. 5, 2018). There, the Court denied a request to enjoin safeguard measures imposed by Presidential Proclamation pursuant to Section 201 of the Trade Act of 1974, based upon the well-established framework for judicial review outlined above, without probing Presidential motives, scrutinizing tweets, or scouring the Internet for ulterior motivations.

Nor do the temporary country-based exemptions in any way undercut the President's articulated national security basis. *See* Pl. Br. 17. The President explained that the United States has close security arrangements with many countries that share our concern about the impact of

global overcapacity on long-term sustainability of steel industries necessary to provide for national security. The President explained that several nations are in the midst of negotiating with the United States regarding satisfactory alternative means to reduce global excess steel capacity and production, and to increase domestic capacity utilization. Indeed, the exemptions remain fluid and may change or expire after May 1. If some countries succeed in obtaining an exemption, while others do not, that is precisely the sort of foreign affairs and national security distinction that the Constitution and Congress empowered the President to make.

Finally, contrary to plaintiffs' argument, the fact that "the U.S. military requirements for steel . . . only represent about three percent of U.S. production" and, thus, that "DoD does not believe that the findings in the reports impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements," does not undercut any national security basis for the President's Proclamations. Pl. Br. Ex. D at 1 (Mem. for the Secretary of Commerce from the Secretary of Defense). The Secretary of Defense agreed that "the systematic use of unfair trade practices to intentionally erode our innovation and manufacturing industrial base poses a risk to our national security." *Id.* He concurred with Commerce's conclusion that imports of foreign steel and aluminum impair the national security. *Id.* Although he expressed a preference for one recommended course of action (targeted tariffs versus a uniform, global tariff), he likewise recognized the need to "rebuild economic strength at home" and to ensure "a fair and reciprocal international economic system," by "correcting Chinese overproduction and countering [the Chinese] attempt to circumvent existing antidumping tariffs." *Id.* at 1-2. The President initially chose to impose a global tariff, exempting only Canada and Mexico while welcoming other countries to discuss with the United States "alternative ways to address the threatened impairment of the national security caused by

imports from that country," Steel Proclamation I ¶ 8, and later decided to temporarily exempt certain other countries from the tariffs, Steel Proclamation II, cl. (1), with the effect of making the tariff more targeted.

That military requirements represent only three percent of domestic steel production does not undercut the President's determination that the current and anticipated levels of imports of steel articles threaten to impair national security. Section 232 requires the President to consider the ability of domestic industries to meet the economic requirements of national security in its broadest terms. The President must therefore consider not only the immediate needs of defense, but also whether "[the] weakening of our internal economy" by the imports "may impair the national security" in the long run. 19 U.S.C. § 1862(d). In making that assessment, the President must consider the impact of imports on "the economic welfare of individual domestic industries." *Id.* Indeed, precisely because defense and critical infrastructure requirements alone are insufficient to support a robust steel industry, the Secretary determined that the ability of the domestic steel industry to supply the needs of the military depended on a healthy domestic industry that is able to compete in the commercial marketplace. *See* BIS Steel Rep. at 55-56, App. H at 2. Further, the Secretary determined that "[a] continued loss of viable commercial production capabilities and related skilled workforce will jeopardize the U.S. steel industry's ability to meet the full spectrum of defense requirements." *Id.* App. H at 2.

At bottom, should this Court review the President's exercise of his statutory discretion—and it should not, for the reasons detailed above—that exercise of discretion was lawful.

III. Plaintiffs Fail To Demonstrate Immediate, Irreparable Harm

Even if plaintiffs were able to demonstrate likelihood of success on the merits, their request for an emergency injunction fails for the additional, straightforward reason that they

cannot show irreparable harm. Monetary harm is not irreparable since there is, by definition, an adequate remedy at law. It has long been "a guiding rule that a bill in equity does not lie in any case where a plain, adequate, and complete remedy may be had at law." *Singer Sewing Mach. Co. of New Jersey v. Benedict*, 229 U.S. 481, 484 (1913). An injunction should issue only where the intervention of a court of equity "is essential in order effectually to protect property rights against injuries *otherwise irremediable*." *Cavanaugh v. Looney*, 248 U.S. 453, 456 (1919) (emphasis added). The Supreme Court has held repeatedly that the threshold requirement for injunctive relief in the Federal courts is irreparable injury and the inadequacy of legal remedies. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 61 (1975); *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 506-07 (1959).

Contrary to plaintiffs' contention that they cannot recover amounts paid pursuant to the Steel Proclamations should they ultimately prevail in litigation, Pl. Br. 11; Compl. ¶¶ 49-50, this Court does indeed have the power to grant such relief. Should plaintiffs prevail on the merits, the Court may direct the Government to refund, liquidate, or reliquidate covered entries without the Section 232 tariffs. *See United States v. United States Shoe Corp.,* 523 U.S. 360 (1998); *Shinyei Corp. of Am. v. United States*, 355 F.3d 1297, 1312 (Fed. Cir. 2004). Plaintiffs also would be entitled to interest on the amount of any improperly collected duties. *See* 19 U.S.C. § 1505(b). In other words, any "injury" by virtue of paying tariffs now on entries of covered merchandise is entirely compensable and not irreparable.

Plaintiffs also allege that paying the tariffs while this litigation is pending will put SSE Miami out of business. *See* Pl. Br. 11-12. That allegation is not credible given plaintiffs' relationship with their extremely well-resourced Russian parent company, PAO Severstal. According to its fourth quarter and fiscal year 2017 financial results, PAO Severstal had

revenues for 2017 of $7.8 billion, leading to net profit and free cash flow of nearly $1.4 billion. *See Severstal reports Q4 & FY2017 financial results*, *available at* http://www.severstal.com/eng/media/news/document21403.phtml (visited Mar. 25, 2018).[4] In the fourth quarter of 2017, alone, PAO Severstal realized revenues of $2.1 billion and a net profit of $563 million. *See id.* The company's resources thus dwarf the anticipated duties at issue. *See* Compl. ¶ 41.

SSE Miami is a wholly-owned subsidiary of this large corporate parent, which is clearly capable of footing the bill for tariffs while its subsidiaries litigate this case. Indeed, plaintiffs acknowledge that PAO Severstal has already loaned SSE Miami the funds to cover possible duties in the short-term. Compl. ¶ 42.c. Given that parent company's resources and SSE Miami's status as a wholly-owned subsidiary, any decision to close SSE Miami would be a purely economic business decision on the part of PAO Severstal. *See id*. Large corporations like PAO Severstal cannot manufacture irreparable harm by deciding that they will not "furnish the capital necessary to help [plaintiff] recoup its losses." *Econ. Research Servs., Inc. v. Resolution Econ., LLC*, 140 F. Supp. 3d 47, 52 (D.D.C. 2015).

Plaintiffs' irreparable harm arguments are undermined further by customer communications indicating that plaintiffs' customers are prepared to split the cost of the Section 232 tariffs with plaintiffs. *See* Pl. Br., Ex. 1. The customer communications, which indicate that plaintiffs have changed positions from being willing to split the tariff costs with their customer to passing the costs along entirely to their customers, show that (1) plaintiffs do not need to incur the tariff costs in their entirety in the short term, and (2) any loss of goodwill is due in significant part to plaintiffs' change in position concerning splitting tariff costs, not the tariffs themselves.

[4] *See also Company Overview of PAO Severstal*, Bloomberg, *available at* https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=7489861 (visited Mar. 24, 2018)

In truth, plaintiffs' asserted harm is the sort of ordinary "adverse economic impact" that is insufficient to warrant injunctive relief, lest every challenge to a duty increase or tariff be converted to emergency litigation. *Corus Group*, 217 F. Supp. 2d at 1355. In *Corus*, the plaintiff sought to enjoin the collection of additional duties imposed on its products under a Section 201 Presidential Proclamation imposing certain safeguard tariffs on steel products. *Id*. at 1349. This Court held an evidentiary hearing at which two witnesses testified that, if the duties were collected, Corus's "Norway factory was not sufficiently profitable to attract investment for upgrades that might allow it to produce [new products]. Both witnesses [also] testified that, as a result, the Bergen Plant would have to raise prices or absorb the tariffs. . . . Corus argues[d] that sound business principles would require it to *close the plant* rather than operate at a loss." *Id.* at 1355 (emphasis added).

Notwithstanding the assertion that Corus would be required to close its factory, this Court denied the motion for a preliminary injunction. In doing so, the Court explained that "every increase in duty rate will necessarily have an adverse effect on foreign producers and importers," which was "particularly true with regards to the 30% increase imposed under the safeguard provision." *Id*. This Court reasoned that, if it "were to find irreparable harm under these facts," then it "would likely be required to do so in any challenge to a duty increase because every plaintiff could argue that increased tariffs would cause revenue shortfalls possibly resulting in either operating at a loss or plant closure at some future date." *Id*. The Court held that "Corus has shown that it may suffer an adverse economic impact, but to find irreparable harm here would effectively create a *per se* irreparable harm rule in similar challenges-a result likely contrary to the extraordinary nature of the remedy." *Id.* (citation omitted). In other words, despite having "arguably presented evidence of economic injury," the Court found that plaintiff's

evidence failed to exhibit the magnitude and immediacy of injury necessary for finding irreparable harm. *Id*.

Plaintiffs' allegations fail for the same reason. Plaintiffs contend that a Section 232 tariff will make it expensive for plaintiffs to import their merchandise,[5] but tariffs and duties *always* increase expenses. That is precisely the sort of economic injury that does not rise to the level of irreparable harm because a "preliminary injunction will not issue simply to prevent a mere possibility of injury, even where prospective injury is great." *S.J. Stile Assocs. v. Snyder*, 646 F.2d 522, 525 (Cust. & Pat. App. 1981). Plaintiffs suggest that, absent preliminary injunctive relief, the Miami office might close. Torres Decl. ¶ 23. But what plaintiffs present as an inevitable outcome is, again, a business decision by their corporate parent to stop selling products in the United States rather than pay tariffs during litigation. The possibility that plaintiffs' parent company might make that business decision does not demonstrate irreparable harm.

Moreover, plaintiffs concede that they have known for months that imposition of Section 232 tariffs on steel products was possible. *See* Compl. ¶ 36. By their own telling, they have been following the President's comments concerning this and other trade matters since he took office and were thus well aware that Section 232 tariffs could be imposed on steel articles. They nonetheless made a business decision to continue their normal operations in the face of that risk, including after Commerce issued its report and recommendations to the President in January

[5] As discussed during the Court's telephonic conference on March 23, 2018, the Government will seek financial documents and to depose plaintiffs' affiants on Wednesday, March 28, 2018, and we intend to cross-examine these witnesses at the hearing on Thursday, March 29, 2018. We respectfully reserve the right to introduce evidence and additional reasons why plaintiffs cannot show irreparable harm after completing this discovery.

2018. *See* Pl. Br. 7. Far from being ambushed, plaintiffs have had ample notice and opportunity to factor the possibility of Section 232 tariffs into their business operations.

Fundamentally, plaintiffs have not carried their burden to demonstrate that they are likely to be irreparably harmed absent a preliminary injunction. Accordingly, no injunction can or should issue.

IV. The Public Interest And Balance Of Hardships Compel Denial Of Injunctive Relief

Finally, even if the plaintiffs could somehow establish irreparable harm and show that they are likely to succeed on the merits, that showing may still be "outweighed" by the balance of equities and the public interest, *Winter*, 555 U.S. at 23—factors that "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). These factors provide another independent reason why emergency injunctive relief should be denied.

The Supreme Court's decision in *Winter* illustrates why. There, the lower courts entered a preliminary injunction after holding that the plaintiffs were likely to succeed on the merits in challenging the Navy's use of certain sonar technology in training exercises and that they were suffering irreparable injury. 555 U.S. at 17-20, 23-24. The Supreme Court reversed, concluding that, even if petitioners were likely to succeed on the merits and had shown irreparable harm, the public interest and balance of equities weighed decisively against injunctive relief. *See id*. at 23-31. As the Court explained, "[a]n injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course." *Id*. at 32.

Independently of the merits, "the balance of equities and consideration of the public interest . . . are pertinent in assessing the propriety of any injunctive relief." *Id*. Applying that principle, the Court declined to "address the lower courts' holding" because it determined that, "even if plaintiffs have shown irreparable injury from the Navy's training exercises, any such

injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors." *Id.* at 23-24. "A proper consideration of these factors alone," the Court held, "requires denial of the requested injunctive relief." *Id.* at 23; *accord, e.g.*, *Romero-Barcelo*, 456 U.S. at 313 (courts are "not mechanically obligated to grant an injunction for every violation of law," and evaluating "commonplace considerations" beyond the merits is "a practice with a background of several hundred years of history" (citation omitted)).

Plaintiffs' assertions of irreparable harm are far outweighed by the public interest in national security. Pl. Br. 23-24. While military interests do not always override other considerations, courts generally accord extreme deference to the judgment of the President and his advisors in determining the appropriate measures necessary to ensure our long-term national security. *See Goldman v. Weinberger*, 475 U.S. 503, 507 (1986). Here, the Secretary made findings that steel imports are negatively affecting key domestic industries that are essential to the national security. As relevant here, the Secretary found that the ability of the domestic steel industry to supply the needs of the military depended on a healthy domestic industry that is able to compete in the commercial marketplace: "[T]his ability to meet defense requirements in turn depends on the continued ability of the U.S. steel industry to compete fairly in the commercial marketplace and maintain a financially viable domestic manufacturing capability. This includes the ability to have an adequately skilled workforce for manufacturing as well as to conduct research and development for future products." BIS Steel Rep., App. H at 2. Further, "[a] continued loss of viable commercial production capabilities and related skilled workforce will jeopardize the U.S. steel industry's ability to meet the full spectrum of defense requirements." *Id.* In sum, the Secretary concluded that steel products are important to national security and that

"[p]roviding the wide range of steel products needed for defense requires a strong steel industry." *Id.*, App. H at 3.

The Secretary further found that "excess [global] capacity means that U.S. steel producers, for the foreseeable future, will face increasing competition from imported steel as other countries export more steel to the United States to bolster their own economic objectives." *Id*. at 55. Because "defense and critical infrastructure requirements alone are not sufficient to support a robust steel industry, U.S. steel producers must be financially viable and competitive in the commercial market to be available to produce the needed steel output in a timely and cost efficient manner." *Id.* Therefore, the Secretary recommended that "the President take corrective action pursuant to the authority granted by Section 232." *Id.* at 57 (citing 19 U.S.C. § 1862(c)).

In issuing his Proclamation, the President considered many factors relevant to the public interest, including (1) the Secretary's findings; (2) updated import and production numbers for 2017; (3) the failure of countries to agree on measures to reduce global excess capacity; (4) the continued high level of imports since the beginning of the year; and (5) special circumstances that exist with respect to Canada and Mexico. *See* Steel Proclamation I, ¶ 8. The President elaborated that the relief he proclaimed "will help our domestic steel industry to revive idled facilities, open closed mills, preserve necessary skills by hiring new steel workers, and maintain or increase production, which will reduce our Nation's need to rely on foreign producers for steel and ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense." *Id.* Conversely, "[w]ithout this tariff . . . the [steel] industry will continue to decline, leaving the United States at risk of becoming reliant on foreign producers of steel to meet our national security needs – a situation that is fundamentally inconsistent with the safety and security of the American people." *Id.* ¶ 11.

The President thus found that, "[u]nder current circumstances, this tariff is necessary and appropriate to address the threat that imports of steel articles pose to the national security." *Id.* ¶ 8; *see also id*. ¶ 11 ("It is my judgment that the tariff imposed by this proclamation is necessary and appropriate to adjust imports of steel articles so that such imports will not threaten to impair the national security as defined in section 232 . . . .").

These many findings by the Secretary and the President underscore that an injunction against collection of the Section 232 tariffs, even one temporary is nature, is not in the public interest. The Court should consider plaintiffs' arguments on the merits in the ordinary course of this case before enjoining a measure that the President and the Secretary have determined is essential to national security. While plaintiffs would be required to pay tariffs during the pendency of this proceeding, this Court may order full relief in the form of refunds, liquidation, or reliquidation if plaintiffs ultimately prevail. The plaintiffs' interest in avoiding that temporary expense does not outweigh the public interest in national security. Plaintiffs' request should be denied.

CONCLUSION

For these reasons, we respectfully request that the Court dismiss the complaint or, alternatively, we respectfully request that the Court deny plaintiffs' request for injunctive relief.

Respectfully submitted,

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March 28, 2018

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the word limitation of Court of International Trade Standard Chambers Procedures § 2(B)(1) and contains approximately 13,374 words, excluding the parts of the brief exempted from the word limitation. In preparing this certificate of compliance, I have relied upon the word count function of the word processing system used to prepare the brief.

/s/ Tara K. Hogan

Attachment A

Presidential Documents

Proclamation 9705 of March 8, 2018

Adjusting Imports of Steel Into the United States

By the President of the United States of America

A Proclamation

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

2. The Secretary found and advised me of his opinion that steel articles are being imported into the United States in such quantities and under such circumstances as to threaten to impair the national security of the United States. The Secretary found that the present quantities of steel articles imports and the circumstances of global excess capacity for producing steel are ''weakening our internal economy,'' resulting in the persistent threat of further closures of domestic steel production facilities and the ''shrinking [of our] ability to meet national security production requirements in a national emergency.'' Because of these risks and the risk that the United States may be unable to ''meet [steel] demands for national defense and critical industries in a national emergency,'' and taking into account the close relation of the economic welfare of the Nation to our national security, *see* 19 U.S.C. 1862(d), the Secretary concluded that the present quantities and circumstances of steel articles imports threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.

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

4. In light of this conclusion, the Secretary recommended actions to adjust the imports of steel articles so that such imports will not threaten to impair the national security. Among those recommendations was a global tariff of 24 percent on imports of steel articles in order to reduce imports to a level that the Secretary assessed would enable domestic steel producers to use approximately 80 percent of existing domestic production capacity and thereby achieve long-term economic viability through increased production. The Secretary has also recommended that I authorize him, in response to specific requests from affected domestic parties, to exclude from any adopted import restrictions those steel articles for which the Secretary determines there is a lack of sufficient U.S. production capacity of comparable products, or to exclude steel articles from such restrictions for specific national security-based considerations.

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

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

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

8. In the exercise of these authorities, I have decided to adjust the imports of steel articles by imposing a 25 percent ad valorem tariff on steel articles, as defined below, imported from all countries except Canada and Mexico. In my judgment, this tariff is necessary and appropriate in light of the many factors I have considered, including the Secretary's report, updated import and production numbers for 2017, the failure of countries to agree on measures to reduce global excess capacity, the continued high level of imports since the beginning of the year, and special circumstances that exist with respect to Canada and Mexico. This relief will help our domestic steel industry to revive idled facilities, open closed mills, preserve necessary skills by hiring new steel workers, and maintain or increase production, which will reduce our Nation's need to rely on foreign producers for steel and ensure that domestic producers can continue to supply all the steel necessary for critical industries and national defense. Under current circumstances, this tariff is necessary and appropriate to address the threat that imports of steel articles pose to the national security.

9. In adopting this tariff, I recognize that our Nation has important security relationships with some countries whose exports of steel articles to the United States weaken our internal economy and thereby threaten to impair the national security. I also recognize our shared concern about global excess capacity, a circumstance that is contributing to the threatened impairment of the national security. Any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country. Should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel articles imports from that country and, if necessary, make any corresponding adjustments to the tariff as it applies to other countries as our national security interests require.

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

11. In the meantime, the tariff imposed by this proclamation is an important first step in ensuring the economic viability of our domestic steel industry.

Without this tariff and satisfactory outcomes in ongoing negotiations with Canada and Mexico, the industry will continue to decline, leaving the United States at risk of becoming reliant on foreign producers of steel to meet our national security needs—a situation that is fundamentally inconsistent with the safety and security of the American people. It is my judgment that the tariff imposed by this proclamation is necessary and appropriate to adjust imports of steel articles so that such imports will not threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962, as amended.

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

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

(2) In order to establish increases in the duty rate on imports of steel articles, subchapter III of chapter 99 of the HTSUS is modified as provided in the Annex to this proclamation. Except as otherwise provided in this proclamation, or in notices published pursuant to clause 3 of this proclamation, all steel articles imports specified in the Annex shall be subject to an additional 25 percent ad valorem rate of duty with respect to goods entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on March 23, 2018. This rate of duty, which is in addition to any other duties, fees, exactions, and charges applicable to such imported steel articles, shall apply to imports of steel articles from all countries except Canada and Mexico.

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

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

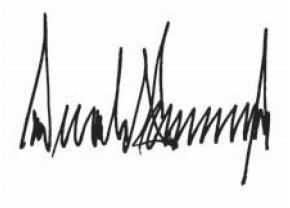
(5) (a) The modifications to the HTSUS made by the Annex to this proclamation shall be effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time

on March 23, 2018, and shall continue in effect, unless such actions are expressly reduced, modified, or terminated.

(b) The Secretary shall continue to monitor imports of steel articles and shall, from time to time, in consultation with the Secretary of State, the Secretary of the Treasury, the Secretary of Defense, the USTR, the Assistant to the President for National Security Affairs, the Assistant to the President for Economic Policy, the Director of the Office of Management and Budget, and such other senior Executive Branch officials as the Secretary deems appropriate, review the status of such imports with respect to the national security. The Secretary shall inform the President of any circumstances that in the Secretary's opinion might indicate the need for further action by the President under section 232 of the Trade Expansion Act of 1962, as amended. The Secretary shall also inform the President of any circumstance that in the Secretary's opinion might indicate that the increase in duty rate provided for in this proclamation is no longer necessary.

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

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



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ANNEX

TO MODIFY CHAPTER 99 OF THE HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES

Effective with respect to goods entered, or withdrawn from warehouse for consumption, on or after 12:01 a.m. eastern daylight time on March 23, 2018, subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States is modified by inserting in numerical sequence the following new note and tariff provision, with the material in these provisions inserted in the columns labeled "Heading/Subheading", "Article Description", "Rates of Duty 1-General", and "Rates of Duty 2", respectively:

"16. (a) Heading 9903.80.01 sets forth the ordinary customs duty treatment applicable to all entries of iron or steel products from all countries, except products of Canada and of Mexico, classifiable in the headings or subheadings enumerated in this note. Such goods shall be subject to duty as provided herein. No special rates of duty shall be accorded to goods covered by heading 9903.80.01 under any tariff program enumerated in general note 3(c)(i) to the tariff schedule. All anti-dumping, countervailing, or other duties and charges applicable to such goods shall continue to be imposed.

(b) The rates of duty set forth in heading 9903.80.01 apply to all imported products of iron or steel classifiable in the provisions enumerated in this subdivision:

(i) flat-rolled products provided for in headings 7208, 7209, 7210, 7211, 7212, 7225 or 7226;

(ii) bars and rods provided for in headings 7213, 7214, 7215, 7227, or 7228, angles, shapes and sections of 7216 (except subheadings 7216.61.00, 7216.69.00 or 7216.91.00); wire provided for in headings 7217 or 7229; sheet piling provided for in subheading 7301.10.00; rails provided for in subheading 7302.10; fish-plates and sole plates provided for in subheading 7302.40.00; and other products of iron or steel provided for in subheading 7302.90.00;

(iii) tubes, pipes and hollow profiles provided for in heading 7304, or 7306; tubes and pipes provided for in heading 7305.

(iv) ingots, other primary forms and semi-finished products provided for in heading 7206, 7207 or 7224; and

(v) products of stainless steel provided for in heading 7218, 7219, 7220, 7221, 7222 or 7223.

(c) The Secretary of Commerce may determine and announce any exclusions from heading 9903.80.01 that may be appropriate for individual iron or steel products

otherwise covered by subdivision (b) of this note or for individual shipments thereof, whether or not limited to particular quantities of any such goods or shipments, and shall immediately convey all such determinations to U.S. Customs and Border Protection ("CBP") for implementation by CBP at the earliest possible opportunity, but not later than five business days after the date on which CBP receives any such determination from Commerce.

(d) Any importer entering the iron or steel products covered by this note under heading 9903.80.01 shall provide any information that may be required, and in such form, as is deemed necessary by CBP in order to permit the administration of this subheading. Importers are likewise directed to report information concerning any applicable exclusion granted by Commerce in such form as CBP may require.

Heading/ Subheading	Article description	Rates of Duty		
		1		2
		General	Special	
9903.80.01	"Products of iron or steel provided for in the tariff headings or subheadings enumerated in note 16 to this subchapter, except products of Canada or of Mexico or any exclusions that may be determined and announced by the Department of Commerce.....	25%		The duty provided in the applic-able sub-heading + 25%"

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Filed 3–14–18; 11:15 am]
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Attachment B

Presidential Documents

Proclamation 9711 of March 22, 2018

Adjusting Imports of Steel Into the United States

By the President of the United States of America

A Proclamation

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

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

3. In proclaiming this tariff, I recognized that our Nation has important security relationships with some countries whose exports of steel articles to the United States weaken our internal economy and thereby threaten to impair the national security. I also recognized our shared concern about global excess capacity, a circumstance that is contributing to the threatened impairment of the national security. I further determined that any country with which we have a security relationship is welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports from that country, and noted that, should the United States and any such country arrive at a satisfactory alternative means to address the threat to the national security such that I determine that imports from that country no longer threaten to impair the national security, I may remove or modify the restriction on steel articles imports from that country and, if necessary, adjust the tariff as it applies to other countries as the national security interests of the United States require.

4. The United States is continuing discussions with Canada and Mexico, as well as the following countries, on satisfactory alternative means to address the threatened impairment to the national security by imports of steel articles from those countries: the Commonwealth of Australia (Australia), the Argentine Republic (Argentina), the Republic of Korea (South Korea), the Federative Republic of Brazil (Brazil), and the European Union (EU) on behalf of its member countries. Each of these countries has an important security relationship with the United States and I have determined that the necessary and appropriate means to address the threat to the national security posed by imports from steel articles from these countries is to continue these discussions and to exempt steel articles imports from these countries from the tariff, at least at this time. Any country not listed in this proclamation with which we have a security relationship remains welcome to discuss with the United States alternative ways to address the threatened impairment of the national security caused by imports of steel articles from that country.

5. The United States has an important security relationship with Australia, including our shared commitment to supporting each other in addressing national security concerns, particularly through our security, defense, and

intelligence partnership; the strong economic and strategic partnership between our countries; our shared commitment to addressing global excess capacity in steel production; and the integration of Australian persons and organizations into the national technology and industrial base of the United States.

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

7. The United States has an important security relationship with South Korea, including our shared commitment to eliminating the North Korean nuclear threat; our decades-old military alliance; our shared commitment to addressing global excess capacity in steel production; and our strong economic and strategic partnership.

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

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

10. In light of the foregoing, I have determined that the necessary and appropriate means to address the threat to the national security posed by imports of steel articles from these countries is to continue ongoing discussions and to increase strategic partnerships, including those with respect to reducing global excess capacity in steel production by addressing its root causes. In my judgment, discussions regarding measures to reduce excess steel production and excess steel capacity, measures that will increase domestic capacity utilization, and other satisfactory alternative means will be most productive if the tariff proclaimed in Proclamation 9705 on steel articles imports from these countries is removed at this time.

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

are temporary, however, I have determined that it is necessary and appropriate to maintain the current tariff level at this time.

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

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

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

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

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

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

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

(4) The exemption afforded to steel articles from Canada, Mexico, Australia, Argentina, South Korea, Brazil, and the member countries of the EU shall apply only to steel articles of such countries entered, or withdrawn from warehouse for consumption, through the close of April 30, 2018, at which

time Canada, Mexico, Australia, Argentina, South Korea, Brazil, and the member countries of the EU shall be deleted from paragraph (a) of U.S. note 16 to subchapter III of chapter 99 of the HTSUS and from the article description of heading 9903.80.01 of the HTSUS.

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

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

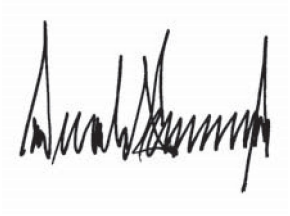
(7) Clause 3 of Proclamation 9705, as amended by clause 6 of this proclamation, is further amended by inserting a new fifth sentence as follows: ''For merchandise entered on or after the date the directly affected party submitted a request for exclusion, such relief shall be retroactive to the date the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

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

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

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

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



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