

U.S. Customs and Border Protection

19 CFR PART 12

CBP DEC. 21-02

RIN 1515-AE60

IMPOSITION OF IMPORT RESTRICTIONS ON CATEGORIES OF ARCHAEOLOGICAL AND ETHNOLOGICAL MATERIAL FROM MOROCCO

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security; Department of the Treasury.

ACTION: Final rule.

SUMMARY: This final rule amends the U.S. Customs and Border Protection (CBP) regulations to reflect the imposition of import restrictions on certain archaeological and ethnological material from the Kingdom of Morocco (Morocco). These restrictions are being imposed pursuant to an agreement between the Government of the United States and the Government of Morocco that has been entered into under the authority of the Convention on Cultural Property Implementation Act. The final rule amends the CBP regulations by adding Morocco to the list of countries which have a bilateral agreement with the United States that imposes cultural property import restrictions. The final rule also contains the Designated List that describes the types of archaeological and ethnological material to which the restrictions apply.

DATES: Effective on January 15, 2021.

FOR FURTHER INFORMATION CONTACT: For legal aspects, Lisa L. Burley, Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of Trade, (202) 325-0300, ot-otrrculturalproperty@cbp.dhs.gov. For operational aspects, Genevieve S. Dozier, Management and Program Analyst, Commercial Targeting and Analysis Center, Trade Policy and Programs, Office of Trade, (202) 945-2942, CTAC@cbp.dhs.gov.

SUPPLEMENTARY INFORMATION:

Background

The Convention on Cultural Property Implementation Act, Public Law 97–446, 19 U.S.C. 2601 *et seq.* (hereinafter, “the Cultural Property Implementation Act”), implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)) (hereinafter, “the Convention”). Pursuant to the Cultural Property Implementation Act, the Government of the United States entered into a bilateral agreement with the Government of the Kingdom of Morocco (Morocco) to impose import restrictions on certain archaeological and ethnological material from Morocco on January 14, 2021. This rule announces the imposition of import restrictions on certain archaeological and ethnological material from Morocco.

Determinations

Under 19 U.S.C. 2602(a)(1), the United States must make certain determinations before entering into an agreement to impose import restrictions under 19 U.S.C. 2602(a)(2). On April 30, 2020, the Assistant Secretary for Educational and Cultural Affairs, United States Department of State, after consultation with and recommendation by the Cultural Property Advisory Committee, made the determinations required under the statute with respect to certain archaeological and ethnological material from Morocco that is described in the Designated List set forth below in this document. These determinations include the following: (1) That Morocco’s cultural heritage is in jeopardy from pillage of certain types of archaeological material representing Morocco’s cultural heritage ranging in date from approximately 1 million B.C. to A.D. 1750 and certain types of ethnological material representing Morocco’s cultural heritage from the Saadian and Alaouite dynasties ranging in date from approximately A.D. 1549 to 1912 (19 U.S.C. 2602(a)(1)(A)); (2) that the Moroccan government has taken measures consistent with the Convention to protect its cultural patrimony (19 U.S.C. 2602(a)(1)(B)); (3) that import restrictions imposed by the United States would be of substantial benefit in deterring a serious situation of pillage and remedies less drastic are not available (19 U.S.C. 2602(a)(1)(C)); and (4) that the application of import restrictions as set forth in this final rule is consistent with the general interests of the international community in the interchange of cultural property among nations for scientific, cultural, and educational purposes (19 U.S.C. 2602(a)(1)(D)). The Assistant Secretary also found that the material described in the determinations meets

the statutory definition of “archaeological or ethnological material of the State Party” (19 U.S.C. 2601(2)).

The Agreement

On January 14, 2021, the Government of the United States and the Government of Morocco entered into a bilateral agreement, “Memorandum of Understanding between the Government of the United States of America and the Government of the Kingdom of Morocco Concerning the Imposition of Import Restrictions on Categories of Archaeological and Ethnological Material of Morocco” (hereinafter, “the Agreement”), pursuant to the provisions of 19 U.S.C. 2602(a)(2). The Agreement entered into force upon signature, and enables the promulgation of import restrictions on certain categories of archaeological material ranging in date from approximately 1 million B.C. to A.D. 1750, as well as certain categories of ethnological material from the Saadian and Alaouite dynasties ranging in date from approximately A.D. 1549 to 1912. A list of the categories of archaeological and ethnological material subject to the import restrictions is set forth later in this document.

Restrictions and Amendment to the Regulations

In accordance with the Agreement, importation of material designated below is subject to the restrictions of 19 U.S.C. 2606 and § 12.104g(a) of title 19 of the Code of Federal Regulations (19 CFR 12.104g(a)) and will be restricted from entry into the United States unless the conditions set forth in 19 U.S.C. 2606 and § 12.104c of the CBP Regulations (19 CFR 12.104c) are met. CBP is amending § 12.104g(a) of the CBP Regulations (19 CFR 12.104g(a)) to indicate that these import restrictions have been imposed.

Import restrictions listed at 19 CFR 12.104g(a) are effective for no more than five years beginning on the date on which the Agreement enters into force with respect to the United States. This period may be extended for additional periods of not more than five years if it is determined that the factors which justified the Agreement still pertain and no cause for suspension of the Agreement exists. The import restrictions will expire on January 14, 2026, unless extended.

Designated List of Archaeological and Ethnological Material of Morocco

The Agreement between the United States and Morocco includes the categories of objects described in the Designated List set forth below. Importation of material on this list is restricted unless the

material is accompanied by documentation certifying that the material left Morocco legally and not in violation of the export laws of Morocco.

The Designated List includes certain archaeological and ethnological material from the Kingdom of Morocco. The archaeological material in the Designated List includes, but is not limited to, objects made of stone, ceramic, metal, bone, ivory, shell, glass, faience, semi-precious stone, painting, plaster, and textiles ranging in date from approximately 1 million B.C. to A.D. 1750. The ethnological material included in the Designated List contains architectural elements, manuscripts, and ceremonial and ritual objects of the Islamic culture from the Saadian and Alaouite dynasties ranging in date from approximately A.D. 1549 to 1912. This would exclude Jewish ceremonial or ritual objects.

Categories of Material

I. Archaeological

- A. Stone
- B. Ceramic
- C. Metal
- D. Bone, Ivory, Shell, and Other Organic Materials
- E. Glass, Faience, and Semi-Precious Stone
- F. Painting and Plaster
- G. Textiles, Basketry, and Rope

II. Ethnological

- A. Stone
- B. Metal
- C. Ceramic and Clay
- D. Wood
- E. Bone, Ivory, and Shell
- F. Glass and Semi-Precious Stone
- G. Leather, Parchment, and Paper

I. Archaeological Material

Archaeological material covered by the Agreement includes categories of objects from the Paleolithic, Neolithic, Phoenician, Greek, Mauritanian, Roman, Byzantine, and Islamic (Idrisid, Almoravid, Almohad, Marinid, Saadian, and Alaouite) periods and cultures ranging in date from approximately 1 million B.C. to A.D. 1750.

Approximate chronology of well-known archaeological periods and sites:

- (a) *Paleolithic period (c. 1 million–6500 B.C.):* Thomas Quarry, Sidi Abderrahmane, Jebel Irhoud, Dar Soltane 2, Taforalt Cave
- (b) *Neolithic period (c. 6500–300 B.C.):* Kaf Taht El Ghar, Rouazi Skhirat, Tumulus of Mzoura
- (c) *Phoenician period (c. 600–300 B.C.):* Lixus, Mogador, Tangiers, Thamusida
- (d) *Mauretanian period (c. 300–49 B.C.):* Lixus, Tangiers, Thamusida, Volubilis, Rirha
- (e) *Roman period (c. 40 B.C.–A.D. 600):* Banasa, Cotta, Dchar Jdid, Kouass, Lixus, Mogador, Rirha, Sala, Tamuda, Thamusida, Volubilis
- (f) *Islamic period (c. A.D. 600–present):*¹ Aghmat, Al-Mahdiya, Be-lyounech, Chichaoua, Essaouira, Fez, Figuig, Ighliz, Moulay Idris, Qsar es-Seghir, Marrakesh, Meknes, Rabat, Sala, Sijil-masa, Tetouan, Tinmal, Volubilis (Walila).

A. Stone

1. Architectural Elements—This category includes doors, door frames, window fittings, columns, capitals, bases, lintels, jambs, archways, friezes, pilasters, engaged columns, altars, prayer niches (*mihlabs*), screens, fountains, inlays, and blocks from walls, floors, and ceilings of buildings. Architectural elements may be plain, molded, or carved and are often decorated with motifs and inscriptions. Marble, limestone, sandstone, and gypsum are most commonly used, in addition to porphyry and granite.

2. Mosaics—Floor mosaics are made from stone cut into small bits (*tesserae*) and laid into a plaster matrix. Wall and ceiling mosaics are made with a similar technique, but may include *tesserae* of both stone and glass. Subjects can include landscapes; scenes of deities, humans, or animals; religious imagery; and activities, such as hunting or fishing. There may also be vegetative, floral, or geometric motifs and imitations of stone.

3. Architectural and Non-Architectural Relief Sculptures—Types include carved slabs with figural, vegetative, floral, geometric, or other decorative motifs, carved relief vases, steles, palettes, and plaques. All types can sometimes be inscribed in various languages.

Sculptures may be used for architectural decoration, including in religious, funerary (*e.g.*, grave markers), votive, or commemorative monuments. Marble, limestone, and sandstone are most commonly used.

¹ Import restrictions concerning archaeological material from the Islamic period apply only to those objects dating from c. A.D. 600–1750.

4. Monuments—Types include votive statues, funerary or votive stelae, and bases and base revetments made of marble, limestone, and other kinds of stone. These may be painted, carved with relief sculpture, decorated with moldings, and/or carry dedicatory or funerary inscriptions in various languages.

5. Statuary—Types include large-scale representations of deities, humans, animals, or hybrid figures made of marble, limestone, or sandstone. The most common type of statuary are freestanding life-sized portrait or funerary busts (head and shoulders of an individual) measuring approximately 1 m to 2.5 m (approximately 3 ft to 8 ft) in height. Statuary figures may be painted.

6. Figurines—Figurines are small-scale representations of deities, humans, or animals made of limestone, calcite, marble, or sandstone.

7. Sepulchers—Types of burial containers include sarcophagi, caskets, reliquaries, and chest urns made of marble, limestone, or other kinds of stone. Sepulchers may be plain or have figural, geometric, or floral motifs painted on them. They may be carved in relief, and/or have decorative moldings.

8. Vessels and Containers—These include bowls, cups, jars, jugs, lamps, flasks, and smaller funerary urns. Funerary urns can be egg-shaped vases with button-topped covers. Vessels and containers can be made of marble, limestone, calcite, or other stone.

9. Furniture—Types include thrones, tables, and beds, from funerary or domestic contexts. Furniture may be made from marble or other stone.

10. Tools and Weapons—Chipped stone types include blades, borers, scrapers, sickles, burins, notches, retouched flakes, cores, arrowheads, cleavers, knives, chisels, and microliths (small stone tools). Ground stone types include grinders (*e.g.*, mortars, pestles, millstones, whetstones, querns), choppers, spherical-shaped hand axes, hammers, mace heads, and weights. The most commonly used stones are flint, chert, obsidian, and other hard stones.

11. Jewelry—Types include seals, beads, finger rings, and other personal adornment made of marble, limestone, or various semi-precious stones, including rock crystal, amethyst, jasper, agate, steatite, and carnelian.

12. Seals and Stamps—These are small devices with at least one side engraved (in intaglio and relief) with a design for stamping or sealing. Stamps and seals can be in the shape of squares, disks, cones, cylinders, or animals.

13. Rock Art—Rock art can be painted and/or incised drawings on natural rock surfaces. Tazina-style art is common from southern

Morocco. Common motifs include humans, animals, such as horses, and geometric and/or floral elements.

B. *Ceramic*

1. Architectural Elements—These are baked clay (terracotta) elements used to decorate buildings. Examples include acroteria, antefixes, painted and relief plaques, revetments, carved and molded bricks, knobs, plain or glazed roof tiles, and glazed tile wall ornaments and panels.

2. Figurines—These include clay (terracotta) statues and statuettes in the shape of deities, humans, and animals ranging in height from approximately 5 cm to 20 cm (2 in to 8 in). Ceramic figurines may be undecorated or decorated with paint, appliques, or inscribed lines.

3. Vessels and Containers—Types, forms, and decoration vary among archaeological styles and over time. Shapes include jars, jugs, bowls, pitchers, basins, cups, storage and shipping amphorae, cooking pots (such as Roman *mortaria*), and large water jugs (*zirs*). Examples may be painted or unpainted, handmade or wheel-made, and may be decorated with burnishes, glazes, or carvings. Roman terra sigillata and other red gloss wares are particularly characteristic. Ceramic vessels can depict imagery of humans, deities, animals, floral decorations, or inscriptions.

4. Lamps—Lamps can be handmade or molded, glazed or unglazed, and may have “saucer,” “slipper,” or other forms; they typically will have rounded bodies with a hole on the top and in the nozzle, handles or lugs, and may be decorated with motifs, such as beading, human faces, and rosettes or other floral elements. Inscriptions may also be found on the body. Later period examples may have straight or round, bulbous bodies with a flared top and several branches.

5. Objects of Daily Use—These include game pieces, loom weights, toys, tobacco pipes, and andirons.

C. *Metal*

1. Statuary—These are large- and small-scale, including deities, human, and animal figures in bronze, iron, silver, or gold. Common types are large-scale, freestanding statuary ranging in height from approximately 1 m to 2.5 m (approximately 3 ft to 8 ft) and life-size busts (head and shoulders of an individual).

2. Reliefs—These include plaques, appliques, steles, and masks, often in bronze. Reliefs may include inscriptions in various languages.

3. Inscribed or Decorated Sheet Metal—These are engraved inscriptions and thin metal sheets with engraved or impressed designs often used as attachments to furniture or figures. They are primarily made of copper alloy, bronze, or lead.

4. Vessels and Containers—Forms include bowls, cups, plates, jars, jugs, strainers, cauldrons, and boxes, as well as vessels in the shape of an animal or part of an animal. This category also includes scroll and manuscript containers, reliquaries, and incense burners. These vessels and containers are made of bronze, silver, or gold, and may portray deities, humans, or animals, as well as floral motifs in relief. They may include an inscription.

5. Jewelry—Jewelry includes necklaces, chokers, pectorals, finger rings, beads, pendants, bells, belts, buckles, earrings, diadems, straight pins and fibulae, bracelets, anklets, girdles, wreaths and crowns, cosmetic accessories and tools, metal strigils (scrapers), crosses, and lamp holders. Jewelry may be made of iron, bronze, silver, or gold. Metal can be inlaid with items, such as colored stones and glass.

6. Seals and Sealings—Seals are small devices with at least one side engraved with a design for stamping or sealing. Types include finger rings, amulets, and seals with a shank. Seals can be made of lead, tin, copper, bronze, silver, and/ or gold. Sealings are lead strips, stamped in Arabic, used for closing bags of coins.

7. Tools—Types include hooks, weights, axes, scrapers, hammerheads, trowels, locks, keys, nails, hinges, tweezers, ingots, mirrors, thimbles, and fibulae (for pinning clothing). Tools may be made of copper, bronze, or iron.

8. Weapons and Armor—This includes body armor, such as helmets, cuirasses, bracers, shin guards, and shields, and horse armor, often decorated with elaborate designs that are engraved, embossed, or perforated. This also includes both launching weapons (*e.g.*, spears, javelins, arrowheads) and hand-to-hand combat weapons (*e.g.*, swords, daggers, *etc.*) in copper, bronze, and iron.

9. Lamps—Lamps can be open saucer-type or closed, rounded bodies with a hole on the top and in the nozzle, handles, or lugs. They can include decorative designs, such as beading, human faces, animals or animal parts, and rosettes or other floral elements. This category includes handheld lamps, candelabras, braziers, sconces, chandeliers, and lamp stands.

10. Coins—This category includes coins of Numidian, Mauretanian, Greek/ Punic, Roman, Byzantine, Islamic, and Medieval Spanish types that circulated primarily in Morocco, ranging in date from the fifth century B.C. to A.D. 1750. Coins were made in copper, bronze,

silver, and gold. Examples may be square or round, have writing, and show imagery of animals, buildings, symbols, or royal figures.

D. Bone, Ivory, Shell, and Other Organic Materials

1. Small Statuary and Figurines—These include representations of deities, humans, or animals in bone or ivory. These range from approximately 10 cm to 1 m (4 in to 40 in) in height.

2. Reliefs, Plaques, Steles, and Inlays—These are carved and sculpted and may have figurative, floral, and/or geometric motifs.

3. Jewelry—Types include amulets, pendants, combs, pins, spoons, bracelets, buckles, beads, and pectorals. Jewelry can be made of bone, ivory, and spondylus shell.

4. Seals and Stamps—These are small devices with at least one side engraved with a design for stamping or sealing. Seals and stamps can be in the shape of squares, disks, cones, cylinders, or animals.

5. Vessels and Luxury Objects—Ivory, bone, and shell were used either alone or as inlays in luxury objects, including furniture, chests and boxes, writing and painting equipment, musical instruments, games, cosmetic containers, and combs. Objects can include decorated vessels made of ostrich eggshell.

6. Tools—Tools include bone points and awls, burnishers, needles, spatulae, and fish hooks.

7. Manuscripts—Manuscripts can be written or painted on specially prepared animal skins (*e.g.*, cattle, sheep, goat, camel skins) known as parchment. They may be single leaves, bound as a book or codex, or rolled into a scroll.

8. Human Remains—This includes skeletal remains from the human body, preserved in burials or other contexts.

E. Glass, Faience, and Semi-Precious Stone

1. Architectural Elements—These include glass inlay and tesserae pieces from floor and wall mosaics, mirrors, and windowpanes.

2. Vessels and Containers—These can take various shapes, such as jars, bottles, bowls, beakers, goblets, candle holders, perfume jars (*unguentaria*), and flasks. Vessels and containers may have cut, incised, raised, enameled, molded, or painted decoration. Ancient examples may be engraved and/or light blue, blue-green, green, or colorless, while those from later periods may include animal, floral, and/or geometric motifs.

3. Jewelry—Jewelry includes bracelets and rings (often twisted with colored glass), pendants, and beads in various shapes (*e.g.*, circular, globular), some with relief decoration, including multi-colored “eye” beads.

4. Lamps—Lamps may have a straight or round, bulbous body, some in the form of a goblet, with flared top, and engraved or molded decorations and may have several branches.

F. Painting and Plaster

1. Wall Painting—Wall painting can include figurative (*i.e.*, deities, humans, animals), floral, and/or geometric motifs, as well as funerary scenes. These are painted on stone, mud plaster, and lime plaster (wet—*buon fresco*—and dry—*secco fresco*), sometimes to imitate marble.

2. Stucco—This is a fine plaster used for coating wall surfaces, or molding and carving into architectural decorations, such as reliefs, plaques, steles, and inlays.

G. Textiles, Basketry, and Rope

1. Textiles—These include linen, hemp, and silk cloth used for burial wrapping, shrouds, garments, banners, and sails. These also include linen and wool used for garments and hangings.

2. Basketry—Plant fibers were used to make baskets and containers in a variety of shapes and sizes, as well as sandals and mats.

3. Rope—Rope and string were used for a great variety of purposes, including binding, lifting water for irrigation, fishing nets, measuring, lamp wicks, and stringing beads for jewelry and garments.

II. Ethnological Material

Ethnological material covered by the Agreement includes architectural elements, manuscripts, and ceremonial and ritual objects of the Islamic culture from the Saadian and Alaouite dynasties ranging in date from approximately A.D. 1549 to 1912. This would exclude Jewish ceremonial or ritual objects.

A. Stone

1. Architectural Elements—This category includes doors, door frames, window fittings, columns, capitals, plinths, bases, lintels, jambs, archways, friezes, pilasters, engaged columns, altars, prayer niches (*mihrab*s), screens, fountains, inlays, and blocks from walls, floors, and ceilings of buildings. Architectural elements may be plain, molded, or carved and are often decorated with motifs and inscriptions. Marble, limestone, and sandstone are most commonly used.

2. Architectural and Non-Architectural Relief Sculpture—This category includes slabs, plaques, steles, capitals, and plinths carved with religious, figural, floral, or geometric motifs or inscriptions in Arabic. Examples occur primarily in marble, limestone, and sandstone.

3. Memorial Stones and Tombstones—This category includes tombstones, grave markers, and cenotaphs. Examples occur primarily in marble and are engraved with Arabic script.

4. Vessels and Containers—This category includes stone lamps and containers, such as those used in religious services, as well as smaller funerary urns.

B. *Metal*

1. Architectural Elements—This category includes doors, door fixtures, such as knockers, bolts, and hinges, chandeliers, screens, taps, spigots, fountains, and sheets. Copper, brass, lead, and alloys are most commonly used.

2. Architectural and Non-Architectural Relief Sculpture—This category includes appliques, plaques, and steles, primarily made of bronze and brass. Examples often include religious, figural, floral, or geometric motifs. They may also have inscriptions in Arabic.

3. Lamps—This category includes handheld lamps, candelabras, braziers, sconces, chandeliers, and lamp stands.

4. Vessels and Containers—This category includes containers used for religious services, such as Koran (*Qur'an*) cases and incense burners. Brass, copper, silver, and gold are most commonly used. Containers may be plain, engraved, hammered, or otherwise decorated.

5. Musical Instruments—This category includes instruments used in Islamic/Sufi religious ceremonies or rituals, such as cymbals and trumpets.

C. *Ceramic and Clay*

This category consists of architectural elements, which include carved and molded brick, and engraved and/or painted and glazed tile wall ornaments and panels, sometimes with Arabic script.

D. *Wood*

1. Architectural Elements—This category includes doors, door frames and fixtures, windows, window frames, panels, beams, balconies, stages, screens, prayer niches (*mihirabs*), portable *mihirabs* (*anazas*), minbars, and ceilings. Examples may be decorated with religious, geometric, or floral motifs or inscriptions, and may be either carved or painted.

2. Architectural and Non-Architectural Relief Sculpture—This category includes panels, roofs, beams, balconies, stages, panels, ceilings, and doors. Examples are carved, inlaid, or painted with decorations of religious, floral, or geometric motifs or Arabic inscriptions.

3. Furniture—This category includes furniture, such as minbars, professorial chairs, divans, stools, and tables from Islamic ceremonial or ritual contexts. Examples can be carved, inlaid, or painted, and are made from various types of wood.

4. Vessels and Containers—This category includes containers used for religious purposes, such as Koran (*Qur'an*) cases. Examples may be carved, inlaid, or painted with decorations in religious, floral, or geometric motifs, or Arabic script.

5. Writing Implements—This category includes printing blocks, writing tablets, and Islamic study tablets inscribed in Arabic and used for teaching the Koran (*Qur'an*).

6. Musical Instruments—This category includes instruments used in Islamic/Sufi religious ceremonies or rituals, such as frame drums (*banadir*).

7. Beads—This category includes Islamic prayer beads (*mas'baha*). Examples may be plain or decorated with carved designs.

E. Bone, Ivory, and Shell

1. Architectural Elements—This category includes inlays for religious decorative and architectural elements.

2. Ceremonial Paraphernalia—This category includes boxes, reliquaries (and their contents), plaques, pendants, candelabra, and stamp and seal rings.

F. Glass and Semi-Precious Stone

1. Architectural Elements—This category includes windowpanes, mosaic elements, inlays, and stained glass.

2. Vessels and Containers—This category includes glass and enamel mosque lamps and ritual vessels.

3. Beads—This category includes Islamic prayer beads (*mas'baha*) in glass or semi-precious stones.

G. Leather, Parchment, and Paper

1. Books and Manuscripts—Manuscripts can be written or painted on specially prepared animal skins (*e.g.*, cattle, sheep, goat, camel skins) known as parchment or paper. They occur as single leaves, bound with leather or wood as a book or codex, or rolled into a scroll. Types include the Koran (*Qur'an*) and other Islamic books and manuscripts, often written in black or brown ink, and sometimes embellished with painted colorful floral or geometric motifs.

2. Vessels and Containers—This category includes containers used for Islamic religious services, such as leather Koran (*Qur'an*) cases or pouches.

3. Musical Instruments—This category includes instruments used in Islamic/Sufi religious ceremonies or rituals, such as leather drums (*banadir*).

References

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Etude sur la numismatique et l'histoire monétaire du Maroc i: Corpus des dirhams idrissites et contemporains, 1971, Daniel Eustache, Banque du Maroc, Rabat.

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Les Bronzes Antiques du Maroc, Etudes et travaux d'archéologie marocaine, 1969–1994, Christiane Boube-Piccot, Editions marocaines et internationales, Tangier.

The Roman Provincial Coinage, Multiple Volumes, 1992–, Andrew Burnett, et al., The British Museum Press, London.

Inapplicability of Notice and Delayed Effective Date

This amendment involves a foreign affairs function of the United States and is, therefore, being made without notice or public procedure (5 U.S.C. 553(a)(1)). For the same reason, a delayed effective date is not required under 5 U.S.C. 553(d)(3).

Regulatory Flexibility Act

Because no notice of proposed rulemaking is required, the provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) do not apply.

Executive Orders 12866 and 13771

CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Order 12866 or Executive Order 13771 because it pertains to a foreign affairs function of the United States, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866 and section 4(a) of Executive Order 13771.

Signing Authority

This regulation is being issued in accordance with 19 CFR 0.1(a)(1) pertaining to the Secretary of the Treasury’s authority (or that of his/her delegate) to approve regulations related to customs revenue functions.

List of Subjects in 19 CFR Part 12

Cultural property, Customs duties and inspection, Imports, Prohibited merchandise, Reporting and recordkeeping requirements.

Amendment to CBP Regulations

For the reasons set forth above, part 12 of title 19 of the Code of Federal Regulations (19 CFR part 12), is amended as set forth below:

PART 12—SPECIAL CLASSES OF MERCHANDISE

■ 1. The general authority citation for part 12 and the specific authority citation for § 12.104g continue to read as follows:

Authority: 5 U.S.C. 301; 19 U.S.C. 66, 1202 (General Note 3(i), Harmonized Tariff Schedule of the United States (HTSUS)), 1624;

* * * * *

Sections 12.104 through 12.104i also issued under 19 U.S.C. 2612;

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■ 2. In § 12.104g, the table in paragraph (a) is amended by adding Morocco to the list in alphabetical order to read as follows:

§ 12.104g Specific items or categories designated by agreements or emergency actions.

(a) * * *

State party	Cultural property	Decision No.
* * *	* * *	* * *
Morocco	Archaeological material from Morocco ranging in date from approximately 1 million B.C. to A.D. 1750, and ethnological material from Morocco ranging in date from approximately A.D. 1549 to 1912.	CBP Dec. 21–02.
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Mark A. Morgan, the Chief Operating Officer and Senior Official Performing the Duties of the Commissioner, having reviewed and

approved this document, is delegating the authority to electronically sign this notice document to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated: January 15, 2021.

ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
Regulations & Rulings, Office of Trade,
U.S. Customs and Border Protection.

TIMOTHY E. SKUD,
Deputy Assistant
Secretary of the Treasury.

[Published in the Federal Register, January 22, 2021 (85 FR 6561)]



CBP Dec. 21-03

**WESTERN HEMISPHERE TRAVEL INITIATIVE:
DESIGNATION OF AN APPROVED NATIVE AMERICAN
TRIBAL CARD ISSUED BY THE MUSCOGEE (CREEK)
NATION AS AN ACCEPTABLE DOCUMENT TO DENOTE
IDENTITY AND CITIZENSHIP FOR ENTRY IN THE UNITED
STATES AT LAND AND SEA PORTS OF ENTRY**

AGENCY: U.S. Customs and Border Protection, DHS.

ACTION: Notice.

SUMMARY: This notice announces that the Commissioner of U.S. Customs and Border Protection is designating an approved Native American tribal card issued by the Muscogee (Creek) Nation to U.S. and Canadian citizen tribal members as an acceptable travel document for purposes of the Western Hemisphere Travel Initiative. The approved card may be used to denote identity and citizenship of Muscogee (Creek) Nation members entering the United States from contiguous territory or adjacent islands at land and sea ports of entry.

DATES: This designation will become effective on January 22, 2021.

FOR FURTHER INFORMATION CONTACT: Adele Fasano, Executive Director, Planning, Program Analysis, and Evaluation, Office of Field Operations, U.S. Customs and Border Protection, via email at *Adele.Fasano@cbp.dhs.gov*.

SUPPLEMENTARY INFORMATION:

Background

The Western Hemisphere Travel Initiatives

Section 7209 of the Intelligence Reform and Terrorism Prevention Act of 2004 (IRTPA), Public Law 108–458, as amended, required the Secretary of Homeland Security (Secretary), in consultation with the Secretary of State, to develop and implement a plan to require U.S. citizens and individuals for whom documentation requirements have previously been waived under section 212(d)(4)(B) of the Immigration and Nationality Act (8 U.S.C. 1182(d)(4)(B)) to present a passport or other document or combination of documents as the Secretary deems sufficient to denote identity and citizenship for all travel into the United States. *See* 8 U.S.C. 1185 note. On April 3, 2008, the Department of Homeland Security (DHS) and the Department of State promulgated a joint final rule, effective on June 1, 2009, that implemented the plan known as the Western Hemisphere Travel Initiative (WHTI) at U.S. land and sea ports of entry. *See* 73 FR 18384 (the WHTI Land and Sea Final Rule). The rule amended various sections in the Code of Federal Regulations (CFR), including 8 CFR 212.0, 212.1, and 235.1. The WHTI Land and Sea Final Rule specifies the documents that U.S. citizens and nonimmigrant aliens from Canada, Bermuda, and Mexico are required to present when entering the United States at land and sea ports of entry.

Under the WHTI Land and Sea Final Rule, one type of citizenship and identity document that may be presented upon entry to the United States at land and sea ports of entry from contiguous territory or adjacent islands¹ is a Native American tribal card that has been designated as an acceptable document to denote identity and citizenship by the Secretary of Homeland Security, pursuant to section 7209 of IRTPA. Specifically, 8 CFR 235.1(e), as amended by the WHTI Land and Sea Final Rule, provides that upon designation by the Secretary of Homeland Security, of a United States qualifying tribal entity document as an acceptable document to denote identity and citizenship for the purposes of entering the United States, Native Americans may be permitted to present tribal cards upon entering or seeking admission to the United States according to the terms of the voluntary agreement entered between the Secretary of Homeland Security and the tribe. It provides that the Secretary of Homeland Security

¹ “Adjacent islands” is defined in 8 CFR 212.0 as “Bermuda and the islands located in the Caribbean Sea, except Cuba.” This definition applies to 8 CFR 212.1 and 235.1.

will announce, by publication of a notice in the **Federal Register**, documents designated under this paragraph. It further provides that a list of the documents designated under this section will also be made available to the public.

A United States qualifying tribal entity is defined as a tribe, band, or other group of Native Americans formally recognized by the United States Government which agrees to meet WHTI document standards. See 8 CFR 212.1.² Native American tribal cards are also referenced in 8 CFR 235.1(b), which lists the documents U.S. citizens may use to establish identity and citizenship when entering the United States. See 8 CFR 235.1(b)(7).

The Secretary has delegated to the Commissioner of U.S. Customs and Border Protection (CBP) the authority to designate certain documents as acceptable border crossing documents for persons arriving in the United States by land or sea from within the Western Hemisphere, including certain United States Native American tribal cards. See DHS Delegation Number 7105 (Revision 00), dated January 16, 2009.

Tribal Card Program

The WHTI Land and Sea Final Rule allows U.S. federally recognized Native American tribes to work with CBP to enter into agreements to develop tribal identification cards that can be designated as acceptable to establish identity and citizenship when entering the United States at land and sea ports of entry from contiguous territory or adjacent islands. CBP has been working with various U.S. federally recognized Native American tribes to facilitate the development of such cards.³ As part of the process, CBP will enter into one or more agreements with a U.S. federally recognized tribe that specify the requirements for developing and issuing WHTI-compliant Native American tribal cards, including a testing and auditing process to ensure that the cards are produced and issued in accordance with the terms of the agreements.

After production of the cards in accordance with the specified requirements, and successful testing and auditing by CBP of the cards and program, the Secretary of Homeland Security or the Commissioner of CBP may designate the Native American tribal card as an acceptable WHTI-compliant document for the purpose of establishing identity and citizenship when entering the United States by land or sea from contiguous territory or adjacent islands. Such designation

² This definition applies to 8 CFR 212.1 and 235.1.

³ The Native American tribal cards qualifying to be a WHTI-compliant document for border crossing purposes are commonly referred to as “Enhanced Tribal Cards” or “ETCs.”

will be announced by publication of a notice in the **Federal Register**. More information about WHTI-compliant documents is available at www.cbp.gov/travel.

The Pascua Yaqui Tribe of Arizona became the first Native American tribe to have its Native American tribal card designated as a WHTI-compliant document by the Commissioner of CBP. This designation was announced in a notice published in the **Federal Register** on June 9, 2011 (76 FR 33776). Subsequently, the Commissioner of CBP announced the designation of several other Native American tribal cards as WHTI-compliant documents. *See, e.g.*, the Puyallup Tribe of Indians, 84 FR 67278 (December 9, 2019); the Swinomish Indian Tribal Community, 84 FR 70984 (December 26, 2019); and the Confederated Tribes of the Colville Reservation, 85 FR 31796 (May 27, 2020).

Muscogee (Creek) Nation WHTI-Compliant Native American Tribal Card Program

The Muscogee (Creek) Nation has voluntarily established a program to develop a WHTI-compliant Native American tribal card that denotes identity and U.S. or Canadian citizenship. On March 28, 2016, CBP and the Muscogee (Creek) Nation entered into a Memorandum of Agreement (MOA) to develop, issue, test, and evaluate tribal cards to be used for border crossing purposes. Pursuant to this MOA, the cards are issued to members of the Muscogee (Creek) Nation who can establish identity, tribal membership, and U.S. or Canadian citizenship. The cards incorporate physical security features acceptable to CBP as well as facilitative technology allowing for electronic validation by CBP of identity, citizenship, and tribal membership.⁴

CBP has tested the cards developed by the Muscogee (Creek) Nation pursuant to the above MOA and related agreements, and has performed an audit of the tribe's card program. On the basis of these tests and audit, CBP has determined that the Native American tribal cards meet the requirements of section 7209 of the IRTPA and are acceptable documents to denote identity and citizenship for purposes of entering the United States at land and sea ports of entry from contiguous territory or adjacent islands.⁵ CBP's continued acceptance

⁴ CBP and the Muscogee (Creek) Nation entered into a Service Level Agreement (SLA) on April 27, 2017, concerning technical requirements and support for the production, issuance, and verification of the Native American tribal cards. CBP and the Muscogee (Creek) Nation also entered into an Interconnection Security Agreement in November 2016, with respect to individual and organizational security responsibilities for the protection and handling of unclassified information.

⁵ The Native American tribal card issued by the Muscogee (Creek) Nation may not, by itself, be used by Canadian citizen tribal members to establish that they meet the requirements of section 289 of the Immigration and Nationality Act (INA) [8 U.S.C. 1359]. INA § 289

of the Native American tribal cards as a WHTI-compliant document is conditional on compliance with the MOA and related agreements.

Acceptance and use of the WHTI-compliant Native American tribal cards is voluntary for tribe members. If an individual is denied a WHTI-compliant Native American tribal card, he or she may still apply for a passport or other WHTI-compliant document.

Designation

This notice announces that the Commissioner of CBP designates the Native American tribal card issued by the Muscogee (Creek) Nation in accordance with the MOA and all related agreements between the tribe and CBP as an acceptable WHTI-compliant document pursuant to section 7209 of the IRTPA and 8 CFR 235.1(e). In accordance with these provisions, the approved card, if valid and lawfully obtained, may be used to denote identity and U.S. or Canadian citizenship of Muscogee (Creek) Nation members for the purposes of entering the United States from contiguous territory or adjacent islands at land and sea ports of entry.

The Senior Official Performing the Duties of the Commissioner Mark A. Morgan, having designated the Native American tribal card issued by the Muscogee (Creek) Nation as an acceptable WHTI-compliant document pursuant to section 7209 of the IRTPA and 8 CFR 235.1(e), and having reviewed and approved this notice, is delegating the authority to electronically sign this notice to Robert F. Altneu, who is the Director of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

Dated: January 15, 2021.

ROBERT F. ALTNEU,
Director,
Regulations & Disclosure Law Division,
Regulations & Rulings, Office of Trade,
U.S. Customs and Border Protection.

[Published in the Federal Register, January 22, 2021 (85 FR 6664)]

provides that nothing in this title shall be construed to affect the right of American Indians born in Canada to pass the borders of the United States, but such right shall extend only to persons who possess at least 50 per centum of blood of the American Indian race. While the tribal card may be used to establish a card holder's identity for purposes of INA § 289, it cannot, by itself, serve as evidence of the card holder's Canadian birth or that he or she possesses at least 50% American Indian blood, as required by INA § 289.

VESSEL ENTRANCE OR CLEARANCE STATEMENT

AGENCY: U.S. Customs and Border Protection (CBP), Department of Homeland Security.

ACTION: 60-Day notice and request for comments; extension of an existing collection of information.

SUMMARY: The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

DATES: Comments are encouraged and must be submitted (no later than March 26, 2021) to be assured of consideration.

ADDRESSES: Written comments and/or suggestions regarding the item(s) contained in this notice must include the OMB Control Number 1651-0019 in the subject line and the agency name. Please use the following method to submit comments:

Email. Submit comments to: *CBP_PRA@cbp.dhs.gov*.

Due to COVID-19-related restrictions, CBP has temporarily suspended its ability to receive public comments by mail.

FOR FURTHER INFORMATION CONTACT: Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, Telephone number 202-325-0056 or via email *CBP_PRA@cbp.dhs.gov*. Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at *https://www.cbp.gov/*.

SUPPLEMENTARY INFORMATION: CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the

proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

Overview of This Information Collection

Title: Vessel Entrance or Clearance

OMB Number: 1651-0019.

Form Number: CBP Form 1300.

Current Actions: Extension.

Type of Review: Extension (without change).

Affected Public: Businesses.

Abstract: CBP Form 1300, *Vessel Entrance or Clearance Statement*, is used to collect essential commercial vessel data at time of formal entrance and clearance in U.S. ports. The form allows the master to attest to the truthfulness of all CBP forms associated with the manifest package, and collects information about the vessel, cargo, purpose of entrance, certificate numbers, and expiration for various certificates. It also serves as a record of fees and tonnage tax payments in order to prevent overpayments. CBP Form 1300 was developed through agreement by the United Nations Intergovernmental Maritime Consultative Organization (IMCO) in conjunction with the United States and various other countries. This form is authorized by 19 U.S.C. 1431, 1433, and 1434, and provided for by 19 CFR part 4, and accessible at <http://www.cbp.gov/newsroom/publications/forms?title=1300>.

Type of Information Collection: CBP Form 1300 Vessel Entrance or Clearance Statement.

Estimated Number of Respondents: 2,624.

Estimated Number of Annual Responses per Respondent: 72.

Estimated Number of Total Annual Responses: 188,928.

Estimated Time per Response: 30 minutes or (.5) hours.

Estimated Total Annual Burden Hours: 94,464.

Dated: January 12, 2021.

SETH D. RENKEMA,
Branch Chief,
Economic Impact Analysis Branch,
U.S. Customs and Border Protection.

[Published in the Federal Register, January 25, 2021 (85 FR 6896)]



19 CFR PART 177

MODIFICATION OF TWO RULING LETTERS AND REVOCAION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF MANDRELS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Final notice of modification of two ruling letters and revocation of treatment relating to the tariff classification of mandrels.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is modifying two ruling letters concerning tariff classification of mandrels under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 54, No. 14, on April, 15, 2020. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 11, 2021.

FOR FURTHER INFORMATION CONTACT: Anthony L. Shurn, Electronics, Machinery, Automotive and International Nomenclature Branch, Regulations and Rulings, Office of Trade, at (202) 325–0218.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obli-

gation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. §1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 54, No. 14, on April, 15, 2020, proposing to modify two ruling letters pertaining to the tariff classification of mandrels. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In HQ H097658, dated December 31, 2013, CBP stated that the two mandrels with pilot drills should be classified in heading 8207, HTSUS, which provides for "Interchangeable tools for handtools, whether or not power operated, or for machine-tools (for example, for pressing, stamping, punching, tapping, threading, drilling, boring, broaching, milling, turning or screwdriving), including dies for drawing or extruding metal, and rock drilling or earth boring tools; base metal parts thereof". CBP has reviewed HQ H097658 and has determined the ruling letter to be in error *only* with respect to the tariff classification of the subject mandrels. It is now CBP's position that the two mandrels with pilot drills are properly classified in heading 8466, HTSUS, specifically in subheading 8466.10.01, HTSUS, which provides for "Parts and accessories suitable for use solely or principally with the machines of headings 8456 to 8465, including work or tool holders, self-opening dieheads, dividing heads and other special attachments for the machines; tool holders for any type of tool for working in the hand: Tool holders and self-opening dieheads..."

In HQ H251432, dated October 16, 2016, CBP stated that the “Metal/Wood Door Kit consists, in relevant part, of 2 bi-metal hole saws of heading 8202, HTSUS, and a mandrel of heading 8207, HTSUS.” CBP has reviewed H251432 and has determined the ruling error to be in error only with respect to the statement regarding the mandrel. It is now CBP’s position that mandrels are properly classified under subheading 8466.10.01 as noted in the previous paragraph.

Pursuant to 19 U.S.C. §1625(c)(1), CBP is proposing to modify HQ H097658 and HQ H251432 as noted in the two previous paragraphs and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the ruling HQ H278181, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated:

GREGORY CONNOR
for

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division

Attachment

HQ H278181

January 19, 2021

CLA-2 OT:RR:CTF:TCM H278181 ALS

CATEGORY: Classification

TARIFF NO.: 8466.10.01

MR. HEIDAR NURISTANI
CENTRAL PURCHASING, LLC
3491 MISSION OAKS BOULEVARD
CAMARILLO, CALIFORNIA 93011

RE: Modification of HQ H097658 (December 31, 2013) regarding the tariff classification of Mandrels; Modification of HQ H251432 (October 20, 2016) regarding the tariff classification of Mandrels.

DEAR MR. NURISTANI:

In a letter to U.S. Customs and Border Protection (CBP), you had requested a reconsideration of a tariff classification ruling under the Harmonized Tariff Schedule of the United States (HTSUS) for a bi-metal hole saw kit that includes mandrels.

In CBP Ruling NY N090938 (February 10, 2010), CBP classified the saw kit under subheading 8207.50.20, HTSUS, which provides for “Interchangeable tools for handtools, whether or not power operated, or for machine-tools (for example, for pressing, stamping, punching, tapping, threading, drilling, boring, broaching, milling, turning or screwdriving), including dies for drawing or extruding metal, and rock drilling or earth boring tools; base metal parts thereof: Tools for drilling, other than for rock drilling, and parts thereof: With cutting part containing by weight over 0.2 percent of chromium, molybdenum, or tungsten or over 0.1 percent of vanadium. . .” We also noted in the ruling that the “six hole saws are appropriately classified in heading 8202, HTSUS, as saw blades; and the two mandrels are appropriately classified in heading 8207, HTSUS, as tools for drilling.” [Emphasis added.]

In CBP Ruling HQ H097658, we reconsidered NY N090938 and found the ruling to be in error with respect to the classification of the bi-metal hole saw kit including mandrels. HQ H097658 revoked NY N090938. In doing so, HQ H097658 noted that in some cases the mandrels with drill bits of the kit were imported separately. While mandrels were not the subject of that ruling, HQ H097658 stated that “the two mandrels are appropriately classified in heading 8207, HTSUS, as tools for drilling.” The article classified in HQ H097658, bi-metal hole saw kit including mandrels, is not at issue here.

In CBP Ruling HQ H251432, we reconsidered NY J82340 (March 25, 2003) and found the ruling to be in error with respect to the classification of the Newell Rubbermaid Metal/Wood Door Kit and Wood Door Kit. In doing so, we stated that the “Metal/Wood Door Kit consists, in relevant part, of 2 bi-metal hole saws of heading 8202, HTSUS, and a mandrel of heading 8207, HTSUS.” [Emphasis added.] The articles classified in HQ H251432, the Newell Rubbermaid Metal/Wood Door Kit and Wood Door Kit, are not at issue here.

We emphasize that the subject of this proposed modification are not the articles that were actually classified in the cases under reconsideration. Rather, the subject of this proposed modification are the statement from HQ H097658 that “The six hole saws are appropriately classified in heading 8202, HTSUS, as saw blades; and the two mandrels are appropriately

classified in heading 8207, HTSUS, as tools for drilling [Emphasis added] and the statement from HQ H251432 that “As an initial matter, CBP observes that the Metal/Wood Door Kit and Wood Door Kit each consist of a variety of individual component articles that are, prima facie, classifiable in two or more headings. Specifically, the Metal/Wood Door Kit consists, in relevant part, of 2 bi-metal hole saws of heading 8202, HTSUS, *and a mandrel of heading 8207, HTSUS*” [Emphasis added]. In other words, the statements regarding the classification of mandrels as stand-alone articles is what is under consideration here.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice proposing to modify HQ H097658 with respect to the statement regarding the classification of mandrels alone and modify HQ H251432 with respect to the statement regarding the classification of mandrels, was published on April 15, 2020, in Volume 54, Number 14 of the Customs Bulletin. No comments were received in response to this notice.

FACTS:

The subject mandrels in each case are cylinders made of metal that have an indentation at one end into which a metal drill bit is fitted, or around which other metal is fixed so that it may be worked. Mandrels are at times referred to as “arbors”, as discussed below.

ISSUE:

Are the stand-alone mandrels referenced in HQ H097658 and the stand-alone mandrel referenced in HQ H251432, as described above, properly classified under heading 8207, HTSUS, which provides for “Interchangeable tools for handtools, whether or not power operated, or for machine-tools (for example, for pressing, stamping, punching, tapping, threading, drilling, boring, broaching, milling, turning or screwdriving), including dies for drawing or extruding metal, and rock drilling or earth boring tools; base metal parts thereof”, or under heading 8466, HTSUS, which provides for “Parts and accessories suitable for use solely or principally with the machines of headings 8456 to 8465, including work or tool holders, self-opening dieheads, dividing heads and other special attachments for the machines; tool holders for any type of tool for working in the hand”?

LAW AND ANALYSIS:

Classification under the HTSUS is determined in accordance with the General Rules of Interpretation (“GRI”) and, in the absence of special language or context which otherwise requires, by the Additional U.S. Rules of Interpretation (“ARI”). GRI 1 provides that the classification of goods shall be “determined according to the terms of the headings and any relative section or chapter notes.” In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, GRIs 2 through 6 may be applied in order. The HTSUS headings and subheadings at issue are the following:

- 8207 Interchangeable tools for handtools, whether or not power operated, or for machine-tools (for example, for pressing, stamping, punching, tapping, threading, drilling, boring, broaching, milling, turning or screwdriving), including dies for drawing or extruding metal, and rock drilling or earth boring tools; base metal parts thereof:
- 8207.50 Tools for drilling, other than for rock drilling, and parts thereof:
- 8207.50.20 With cutting part containing by weight over 0.2 percent of chromium, molybdenum, or tungsten or over 0.1 percent of vanadium...
- * * *
- 8466 Parts and accessories suitable for use solely or principally with the machines of headings 8456 to 8465, including work or tool holders, self-opening dieheads, dividing heads and other special attachments for the machines; tool holders for any type of tool for working in the hand:
- 8466.10.01 Tool holders and self-opening dieheads...

Note 2 to Chapter 82, HTSUS, states that “[p]arts of base metal of the articles of this chapter are to be classified with the articles of which they are parts, except parts separately specified as such and toolholders for handtools (heading 8466).”

The Explanatory Notes (ENs) to the Harmonized Commodity Description and Coding System represent the official interpretation of the tariff at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

We note that a mandrel is not defined within the HTSUS or within the ENs. When a term is not defined within the HTSUS, the common and commercial meaning may be determined by consulting dictionaries, lexicons, scientific authorities, and other reliable sources. *Nippon Kogasku (USA Inc. v. United States*, 69 CCPA 89, 673 F.2d 380 (Fed. Cir. 1982). The term “mandrels” is defined as a “spindle or an axle used to secure or support material being machined or milled” or a shaft on which a working tool is mounted, as in a dental drill.” THE FREE [ONLINE] DICTIONARY, [https://www.thefreedictionary.com/Arbor+\(tool\)](https://www.thefreedictionary.com/Arbor+(tool)) (2019). We also note that when searching for the term “arbor (tool)” within The Free Dictionary the search redirects to the term “mandrel.” *See also* Merriam-Webster [Online] Dictionary, <https://www.merriam-webster.com/dictionary/mandrel> (2019) (defining “mandrel” as a “usually tapered or cylindrical axle, spindle, or *arbor* inserted into a hole in a piece of work to support it during machining” [*emphasis added*]). Thus, it appears that the terms “mandrel” and “arbor” are used interchangeably when referring to a cylindrical tool used to hold or secure a working tool or material that is worked by another tool.

As referenced above, note 2 to chapter 82, HTSUS, specifically notes that “toolholders for handtools” of heading 8466 are not to be classified with the articles of which they are parts. Additionally, the EN for heading 8207 states that the “heading also excludes ‘[w]ork and tool holders for machines or hand tools, and self-opening dieheads (heading 84.66).’” Thus, the threshold question here is whether or not the mandrels referenced in HQ H097658 and the mandrel referenced in HQ H251432 are classifiable under heading 8466.

It is clear from the description above that subject mandrels are in fact toolholders for handtools. In the cases under reconsideration the mandrels are the toolholders and the drill bits are the tools. Thus, we conclude that the subject mandrels are excluded from classification under heading 8207 by virtue of note 2 to chapter 82, HTSUS, and are properly classified under heading 8466, HTSUS. Specifically, they are properly classified under subheading 8466.10.01, which provides for “Parts and accessories suitable for use solely or principally with the machines of headings 8456 to 8465, including work or tool holders, self-opening dieheads, dividing heads and other special attachments for the machines; tool holders for any type of tool for working in the hand: Tool holders and self-opening dieheads:...”

HOLDING:

By application of GRIs 1 and 6, the subject mandrels are properly classified under heading 8466, HTSUS, and specifically under subheading 8466.10.01, which provides for “Parts and accessories suitable for use solely or principally with the machines of headings 8456 to 8465, including work or tool holders, self-opening dieheads, dividing heads and other special attachments for the machines; tool holders for any type of tool for working in the hand: Tool holders and self-opening dieheads:...” The general column one rate of duty, for merchandise classified under this subheading is 3.9%.

However, we again note that the classification of the subject merchandise does not change the outcome of HQ H097658 and of HQ H251432. HQ H097658 properly classified a bi-metal hole saw kit including mandrels under subheading 8202.99.00, HTSUS. HQ H251432 properly classified the Newell Rubbermaid Metal/Wood Door Kit and Wood Door Kit under subheading 8202.99.00, HTSUS.

Duty rates are provided for your convenience and subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the World Wide Web at www.usitc.gov.

EFFECT ON OTHER RULINGS:

HQ H097658 (December 31, 2013) is hereby MODIFIED *only* with respect to the statement regarding the tariff classification of stand-alone mandrels.

HQ H251432 (October 20, 2016) is hereby MODIFIED *only* with respect to the statement regarding the tariff classification of a stand-alone mandrel.

Pursuant to U.S. Note 20(b) to Subchapter III, Chapter 99, HTSUS, products of China classified under subheading 8466.10.01, HTSUS, unless specifically excluded, are subject to an additional 25 percent ad valorem rate of duty. At the time of importation, an importer must report the Chapter 99 subheading, i.e., 9903.88.01, in addition to subheading 8466.10.01, HTSUS, noted above, for products of China.

The HTSUS is subject to periodic amendment so you should exercise reasonable care in monitoring the status of goods covered by the Note cited above and the applicable Chapter 99 subheading. For background information regarding the trade remedy initiated pursuant to Section 301 of the Trade Act of 1974, you may refer to the relevant parts of the USTR and CBP websites, which are available at <https://ustr.gov/issue-areas/enforcement/section-301-investigations/tariff-actions> and <https://www.cbp.gov/trade/remedies/301-certain-products-china> respectively.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after publication in the Customs Bulletin.

Sincerely,
GREGORY CONNOR
for
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division



19 CFR PART 177

**REVOCAION OF TWO RULING LETTERS, MODIFICATION
OF THREE RULING LETTERS, AND REVOCAION OF
TREATMENT RELATING TO THE TARIFF
CLASSIFICATION OF AUTOMOBILE ORGANIZERS**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of two ruling letters, modification of three ruling letters, and of revocation of treatment relating to the tariff classification of automobile organizers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking two ruling letters and modifying three ruling letters concerning tariff classification of automobile organizers under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 54, No. 49, on December 16, 2020. No comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 11, 2021.

FOR FURTHER INFORMATION CONTACT: Marina Mekheil, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325-0974.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. §1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 54, No. 49, on December 16, 2020, proposing to revoke two ruling letters and modify three ruling letters pertaining to the tariff classification of automobile organizers. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In NY M80150, NY A87718, and NY L81614 CBP classified automobile organizers in subheading 8708.29.80, HTSUS. In HQ 950525 CBP classified the automobile organizer in subheading 8708.99.50, HTSUS. Subheading 8708.99.81, HTSUS provides for "Parts and accessories of the motor vehicles of Headings 8701 to 8705: Other: Other: Other." In NY C89303 CBP classified the automobile organizer in subheading 8708.29.50, HTSUS, which provides for "Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories of bodies (including cabs): Other: Other."

CBP has reviewed NY M80150, NY C89303, NY A87718, and HQ 950525 and has determined the ruling letters to be in error. It is now CBP's position that automobile organizers are properly classified, in

heading 4202, HTSUS, specifically in subheading 4202.92.91, HTSUS, which provides for “Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; ... of textile materials: Other: With outer surface of sheeting of plastic or of textile materials: Other: Other: With outer surface of textile materials: Other: Of man-made fibers.”

Pursuant to 19 U.S.C. §1625(c)(1), CBP is revoking NY L81614 and HQ 950525 and modifying NY M80150, NY C89303, and NY A87718 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H287875, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated: January 25, 2021

for
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

HQ H287875

January 25, 2021

OT:RR:CTF:CPMM H287875 MMM

CATEGORY: Classification

TARIFF NO.: 4202.92.91, 4202.92.08

MR. WILLIAM A. HELMS

VICE PRESIDENT SCHMIDT, PRITCHARD & Co. CUSTOMHOUSE BROKERS

9801 WEST LAWRENCE AVENUE

SCHILLER PARK, IL 60176

RE: Revocation of NY L81614 and HQ 950525 and Modification of NY M80150, NY C89303 and NY A87718; classification of automotive organizers

DEAR MR. HELMS:

This is in regard to New York Ruling Letter (NY) M80150, dated February 24, 2006, regarding the classification under the Harmonized Tariff Schedule of the United States (HTSUS) of the automobile organizer. In NY M80150, CBP classified the automobile organizer in heading 8708, HTSUS, as a motor vehicle accessory. We have reviewed your ruling, and determined that it is incorrect, and for the reasons set forth below, are modifying your ruling.

We have also reviewed NY L81614, dated January 4, 2005, NY C89303, dated June 25, 1998, NY A87718, dated October 15, 1996, and HQ 950525, dated February 7, 1992, and determined they are also incorrect, and for the reasons set forth below, we are revoking NY L81614, and HQ 950525 and modifying NY C89303 and NY A87718.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Volume 54, No. 49, on December 16, 2020. No comment was received in response to this notice.

FACTS:

In your ruling NY M80150, CBP stated as follows in reference to the subject merchandise:

The third item (your stock number sku # 25110) is a container that fits in a trunk and has convenient handles. It has no zippered closure and no cover.

CBP classified the merchandise in heading 8708, HTSUS, as an accessory of a motor vehicle.

The subject merchandise in NY L81614 (automobile cooler), NY C89303 (backseat pocket and center seat organizer), NY A87718 (backpack backseat organizer (Item #14510) and glove box litter bag (Item #14521)), and HQ 950525¹ (automobile trash container) are similar to the merchandise in NY M80150 and were all classified in heading 8708, HTSUS.

¹ New York Ruling Letter 830760 is mentioned in HQ 950525, however, is unavailable on CROSS.

ISSUE:

Are the automobile organizers solely or principally suitable for use in a motor vehicle and thus classifiable as an accessory of heading 8708, HTSUS, or as a travel bag of heading 4202, HTSUS?

LAW AND ANALYSIS:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, the remaining GRIs may then be applied.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN), constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the EN provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of the headings. It is CBP's practice to follow, whenever possible, the terms of the ENs when interpreting the HTSUS. *See* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The 2020 HTSUS provisions under consideration are as follows:

4202 Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper:

8708 Parts and accessories of the motor vehicles of headings 8701 to 8705

* * * * *

Note 3 to Section XVII states as follows:

References in chapters 86 to 88 to “parts” or “accessories” do not apply to parts or accessories which are not suitable for use solely or principally with the articles of those chapters. A part or accessory which answers to a description in two or more of the headings of those chapters is to be classified under that heading which corresponds to the principal use of that part or accessory.”

The General EN to Section XVII, states, in pertinent part:

It should, however, be noted that these headings apply **only** to those parts or accessories which comply with **all three** of the following conditions :

- (a) They must not be excluded by the terms of Note 2 to this Section (see paragraph (A) below).

and (b) They must be suitable for use solely or principally with the articles of Chapters 86 to 88 (see paragraph (B) below).

and (c) They must not be more specifically included elsewhere in the Nomenclature (see paragraph (C) below).

* * *

(C) Parts and accessories covered more specifically elsewhere in the Nomenclature.

Parts and accessories, even if identifiable as for the articles of this Section, are **excluded** if they are covered more specifically by another heading elsewhere in the Nomenclature, e.g.:

...

(12) Vehicle seats of **heading 94.01**.

The EN to 8708 states, in pertinent part:

This heading covers parts and accessories of the motor vehicles of headings 87.01 to 87.05, **provided** the parts and accessories fulfill **both** the following conditions:

(i) They must be identifiable as being suitable for use solely or principally with the above-mentioned vehicles;

and (ii) They must not be excluded by the provisions of the Notes to Section XVII (see the corresponding General Explanatory Note).

* * * * *

In *Bauerhin Techs. Ltd. P'ship. v. United States*, 110 F.3d 774 (Fed. Cir. 1997), the court identified two distinct lines of cases defining the word “part.” Consistent with *United States v. Willoughby Camera Stores, Inc.*, 21 C.C.P.A. 322, 324 (1933) (citations omitted), one line of cases holds that a part of an article “is something necessary to the completion of that article. . . . [W]ithout which the article to which it is to be joined, could not function as such article.” The other line of cases evolved from *United States v. Pompeo*, 43 C.C.P.A. 9, 14 (1955), which held that a device may be a part of an article even though its use is optional and the article will function without it, if the device is dedicated for use upon the article, and, once installed, the article will not operate without it. The definition of “parts” was also discussed in *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1353 (Fed. Cir. 2002), wherein the United States Court of Appeals for the Federal Circuit (“CAFC”) defined parts as “an essential element or constituent; integral portion which can be separated, replaced, etc.”² This line of reasoning has been applied in previous CBP rulings.³

Insofar as the term “accessory” is concerned, the Court of International Trade (“CIT”) has previously referred to the common meaning of the term because the term is not defined by the HTSUS or its legislative history.⁴ We also employ the common and commercial meanings of the term “accessory”, as the CIT did in *Rollerblade, Inc.*, wherein the court derived from various dictionaries “that an accessory must relate directly to the thing

² *Id.* at 1353 (citing Webster’s New World Dictionary 984 (3d College Ed. 1988)).

³ See e.g., HQ H255093, dated January 14, 2015; HQ H238494, dated June 26, 2014; and HQ H027028, dated August 19, 2008

⁴ See *Rollerblade, Inc. v. United States*, 24 Ct. Int’l Trade 812, 815–819 (2000), *aff’d*, 282 F.3d 1349 (Fed. Cir. 2002)).

accessorized.”⁵ In *Rollerblade, Inc.*, the CAFC noted that “an ‘accessory’ must bear a direct relationship to the primary article that it accessorizes.”⁶

The subject merchandise in this case is not a “part” under any of the tests provided in the judicial decisions described above. It is not a “part” under the *Willoughby* test because a car can function without a automobile organizer, litter bag, cooler, etc. It is also not a “part” under the Pompeo test because the subject merchandise is not “installed,” and the car can still operate without the subject merchandise once stored in the car.⁷ Lastly the subject merchandise is not a “part” because it is not an essential, constituent, or integral part to the vehicle.⁸

The subject merchandise is also not an “accessory” of motor vehicles. Like the protective gear in *Rollerblade, Inc.* and the truck tents classified in HQ H242603, dated April 3, 2015, the subject merchandise at issue does not directly affect the car’s operation nor does it contribute to the car’s effectiveness.⁹ Instead, the subject merchandise merely allows the driver and its passengers to store items needed for their enjoyment or convenience,¹⁰ or dispose of items while driving. The subject merchandise is not classified in heading 8708, HTSUS.

Heading 4202, HTSUS, provides for, among other items, spectacle cases, camera cases, holsters, traveling bags and similar containers of textile materials such as the subject article. In classifying goods under the residual provision of “similar containers” of heading 4202, HTSUS, the Court of International Trade has stated as follows: “As applicable to classification cases, *ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* [by name] in order to be classified under the general terms.”¹¹ The court found that the rule of *ejusdem generis* requires only that the imported merchandise share the essential character or purpose running through all the containers listed *eo nomine* in heading 4202, HTSUSA., i.e., “...to organize, store, protect and carry various items.”¹²

In *Totes*, the CIT held that a trunk organizer, used to store automotive tools and supplies, was correctly classified in heading 4202. The trunk organizer in *Totes* had handles for carrying and Velcro strips that gripped carpeted sur-

⁵ See *Rollerblade, Inc.*, 24 Ct. Int’l Trade at 817.

⁶ 282 F.3d at 1352 (holding that inline roller skating protective gear is not an accessory because it “does not directly act on” or “contact” the roller skates).

⁷ See also *Rollerblade, Inc.*, 282 F.3d at 1353 (the CAFC found that the protective gear was not a part to the roller skates because they did not “attach to or contact” the roller skates, they were “not necessary to make the skates ... work”, nor were “they necessary to make the skates ... work efficiently or safely.”)

⁸ See *Id.*

⁹ See *Rollerblade, Inc.*, 282 F.3d at 1353; HQ 960950 (Jan. 16, 1998) (stating that “[a]ccessories are of secondary importance,” but must “somehow contribute to the effectiveness of the principal article”).

¹⁰ To the extent some of these articles accessorize a vehicle’s seat, they are excluded from classification here under the General EN to the Section, C(12). Heading 9401 for seats does not include a provision for accessories.

¹¹ *Totes, Inc. v. United States*, 18 CIT 919, 865 F. Supp. 867, 871 (1994), *aff’d*. 69 F. 3d 495 (Fed. Cir. 1995).

¹² *Totes*, 865 F. Supp. at 872.

faces and held it in place inside a trunk. The trunk organizer was comprised of a storage section which could be divided into three storage areas using dividers. The subject merchandise is similar to the merchandise in *Totes*, and is designed to organize, store, protect, and carry personal items. The varying merchandise are all comprised of a single storage section. The subject merchandise in M80150 and L81614 include handles for carrying and the subject merchandise in A87718 includes a closure to the main storage section in order to protect and store. The subject merchandise thus shares the essential character and purpose of the containers of heading 4202, HTSUS, and is therefore *ejusdem generis* with those articles. Past rulings have also classified similar articles in Heading 4202, despite their claimed use as motor vehicle accessories.¹³

Lastly, according to Note 3 to Section XVII and the ENs to Section XVII, parts and accessories that are more specifically described outside of HTSUS Section XVII should be classified under the other, more specific provision.¹⁴ If the subject merchandise is also *prima facie* classifiable in 8708, HTSUS, it is still correctly classified in heading 4202, HTSUS, because the merchandise is more specifically described by heading 4202, HTSUS.¹⁵

HOLDING:

By application of GRI 1, the automobile organizers found in NY M80150, NY C89303, NY A87718, and HQ 950525 are classified in heading 4202, HTSUS, specifically 4202.92.91, HTSUS, which provides for: "Trunks, suitcases, vanity cases, attache cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; ... of textile materials: Other: With outer surface of sheeting of plastic or of textile materials: Other: Other: With outer surface of textile materials: Other: Of man-made fibers." The automobile cooler in NY L81614 is specifically classified in subheading 4202.92.08, HTSUS, which provides for: "Insulated food and beverage bags...with outer surface of textile materials: Other: of man-made fibers." The rate of duty for 4202.92.91 is 17.6% *ad valorem*. The rate of duty for 4202.92.08 is 7% *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

EFFECT ON OTHER RULINGS:

NY M80150, dated February 24, 2006, NY C89303, dated June 25, 1998, and NY A87718, dated October 15, 1996 are hereby MODIFIED in accordance with the above analysis.

NY L81614, dated June 1, 2005 and HQ 950525, dated February 7, 1992 are hereby REVOKED in accordance with the above analysis.

¹³ See *e.g.*, Headquarters Ruling Letter (HQ) 084931, dated August 14, 1989; HQ 087795, dated August 30, 1990; NY G87545, dated February 26, 2001; NY G88609, dated April 3, 2001; NY M80989, dated March 16, 2006; and NY N032058, dated July 29, 2008.

¹⁴ *Totes*, 69 F.3d at 499.

¹⁵ *Totes*, 69 F.3d at 499 (citing *United States v. Electrolux Corp.*, 46 C.C.P.A. 143, 147 (1959) (principal that use provisions generally govern over *eo nomine* provisions is not a strict rule, but a convenient rule of thumb for resolving issues where the competing provisions are otherwise in balance)).

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

*Sincerely,
for*

CRAIG T. CLARK,
Director

Commercial and Trade Facilitation Division



19 CFR PART 177

REVOCAION OF NINE RULING LETTERS, MODIFICATION OF FOUR RULING LETTERS, AND REVOCAION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF BACKSEAT AUTOMOBILE ORGANIZERS

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of nine ruling letters, modification of four ruling letters, and of revocation of treatment relating to the tariff classification of backseat automobile organizers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking nine ruling letters and modifying four ruling letters concerning tariff classification of backseat automobile organizers under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 54, No. 49, on December 16, 2020. No comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 11, 2021.

FOR FURTHER INFORMATION CONTACT: Marina Mekheil, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–0974.

SUPPLEMENTARY INFORMATION:**BACKGROUND**

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. §1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 54, No. 49, on December 16, 2020, proposing to revoke nine ruling letters and modify four ruling letters pertaining to the tariff classification of backseat automobile organizers. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In NY N087915, CBP classified the backseat automobile organizer in subheading 8708.99.81, HTSUS. In NY N018628, NY M80150, NY J83474, NY H87607, NY G86716, NY H82730, NY G88263, NY G84567, and NY A87718, CBP classified the backseat automobile organizers in subheading 8708.99.80, HTSUS. In NY 886254 and NY 869451, CBP classified the backseat automobile organizers in 8708.99.50, HTSUS. Subheading 8708.99.81, HTSUS provides for "Parts and accessories of the motor vehicles of Headings 8701 to 8705: Other: Other: Other." In NY C89303, CBP classified the backseat automobile organizers in 8708.29.50, HTSUS, which provides for "Parts and accessories of the motor vehicles of headings 8701 to 8705: Other parts and accessories of bodies (including cabs): Other: Other."

CBP has reviewed NY N087915, NY N018628, NY M80150, NY J83474, NY H87607, NY G86716, NY H82730, NY G88263, NY G84567, NY C89303, NY A87718, NY 886254, and NY 869451 and has determined the ruling letters to be in error. It is now CBP's position that backseat automobile organizers are properly classified, in heading 6307, HTSUS, specifically in subheading 6307.90.98, HTSUS, which provides for "Other made up articles, including dress patterns: Other: Other: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY N018628, NY J83474, NY H87607, NY G86716, NY H82730, NY G88263, NY G84567, NY 886254, and NY 869451, modify NY N087915, NY M801150, NY C89303, and NY A87718 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H312216, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated: January 25, 2021

for
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

HQ H312216

January 25, 2021

OT:RR:CTF:CPMM H312216 MMM

CATEGORY: Classification

TARIFF NO.: 6307.90.9889

MR. JIM GHEDI

GHEDI INTERNATIONAL, INC.

8002 BURLESON ROAD

AUSTIN, TX 78744

RE: Revocation of NY N087915, NY N018628, NY M80150, NY J83474, NY H87607, NY G86716, NY H82730, NY G88263, NY G84567, NY C89303, NY A87718, NY 886254, and NY 869451; tariff classification of textile backseat automobile organizers

DEAR MR. GHEDI:

This is in regard to New York Ruling Letter (NY) N087915, dated January 13, 2010, regarding the classification of an over-the-seat car organizer under the Harmonized Tariff Schedule of the United States (HTSUS). In NY N087915, CBP classified the backseat automobile organizer in heading 8708, HTSUS, as a motor vehicle accessory. We have reviewed your ruling, and determined that it is incorrect, and for the reasons set forth below, are modifying your ruling.

We have also reviewed NY N018628, dated November 8, 2007, NY M80150, dated February 24, 2006, NY J83474, dated April 25, 2003, NY H87607, dated February 8, 2002, NY G86716, dated February 6, 2001, NY H82730, dated June 26, 2001, NY G88263, dated March 19, 2001, NY G84567, dated December 5, 2000, NY C89303, dated June 25, 1998, NY A87718, dated October 15, 1996, NY 886254, dated May 20, 1993, and NY 869451, dated December 17, 1991 and determined they are also incorrect, and for the reasons set forth below, are revoking NY N018628, NY J83474, NY H87607, NY G86716, NY H82730, NY G88263, NY G84567, NY 886254 and NY 869451 and modifying NY M80150, NY C89303 and NY A87718.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103-182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Volume 54, No. 49, on December 16, 2020. No comment was received in response to this notice.

FACTS:

In your ruling NY N087915, CBP stated as follows in reference to the subject merchandise:

Item 20446 is an over-the-seat car organizer made of nylon fabric with plastic pockets and mesh pockets. It is designed with a snap clip and drawstring that enable the organizer to be attached to the car seat.

CBP classified the merchandise in heading 8708, HTSUS, as an accessory of a motor vehicle. The subject merchandise in NY N018628,¹ NY M80150,²

¹ Backseat Organizer (Part # 62950).

² Backseat Organizer with multi pockets, designed to hold electronics and media (sku #25080).

NY J83474,³ NY H87607,⁴ NY G86716,⁵ NY H82730,⁶ NY G88263,⁷ NY G84567,⁸ NY C89303,⁹ NY A87718,¹⁰ NY 886254,¹¹ and NY 869451¹² are also backseat automobile organizers and all classified in heading 8708.

ISSUE:

Whether the subject backseat automobile organizers are classifiable in heading 4202, HTSUS, which provides for “similar containers,” under heading 6307, HTSUS, which provides for “Other made up articles, including dress patterns,” or under heading 8708, HTSUS, which provides for “Parts and accessories of the motor vehicles of headings 8701 to 8705.”

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order. GRI 2(a) provides, in relevant part, that “[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished articles has the essential character of the complete or finished article.”

The Harmonized Commodity Description and Coding System Explanatory Notes (ENs) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings. See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The 2020 HTSUS provisions under consideration are as follows:

- 4202** Trunks, suitcases, vanity cases, attaché cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers
- 6307** Other made up articles, including dress patterns:

³ Car Back Seat Organizer (Style BSON-1815-WB).

⁴ Backseat Tray Organizer (PP236843).

⁵ Pockets Car Seat Organizer.

⁶ Backseat Media Organizer.

⁷ Auto Backseat Organizer.

⁸ Automotive Backseat Organizer Mobile Office (ABS-5 MO).

⁹ Backseat Organizer and the Deluxe Backseat Organizer with Flip-down Tray.

¹⁰ Backseat Travel Tray (Item #142402).

¹¹ Backseat automobile organizer

¹² Backseat Organizer.

8708 Parts and accessories of the motor vehicles of headings 8701 to 8705:

Note 3 to Section XVII states as follows:

References in chapters 86 to 88 to “parts” or “accessories” do not apply to parts or accessories which are not suitable for use solely or principally with the articles of those chapters. A part or accessory which answers to a description in two or more of the headings of those chapters is to be classified under that heading which corresponds to the principal use of that part or accessory.

EN to Section XVII states, in pertinent part:

(III) **PARTS AND ACCESSORIES**

It should, however, be noted that these headings apply **only** to those parts or accessories which comply with **all three** of the following conditions:

(a) They must not be excluded by the terms of Note 2 to this Section (see paragraph (A) below).

and (b) They must be suitable for use solely or principally with the articles of Chapters 86 to 88 (see paragraph (B) below).

and (c) They must not be more specifically included elsewhere in the Nomenclature (see paragraph (C) below).

EN to 8708 states, in pertinent part:

This heading covers parts and accessories of the motor vehicles of headings 87.01 to 87.05, **provided** the parts and accessories fulfil **both** the following conditions:

(i) They must be identifiable as being suitable for use solely or principally with the above-mentioned vehicles;

and (ii) They must not be excluded by the provisions of the Notes to Section XVII (see the corresponding General Explanatory Note).

* * *

In *Bauerhin Techs. Ltd. P'ship. v. United States*, 110 F.3d 774 (Fed. Cir. 1997), the court identified two distinct lines of cases defining the word “part.” Consistent with *United States v. Willoughby Camera Stores, Inc.*, 21 C.C.P.A. 322, 324 (1933) (citations omitted), one line of cases holds that a part of an article “is something necessary to the completion of that article. . . . [W]ithout which the article to which it is to be joined, could not function as such article.” The other line of cases evolved from *United States v. Pompeo*, 43 C.C.P.A. 9, 14 (1955), which held that a device may be a part of an article even though its use is optional and the article will function without it, if the device is dedicated for use upon the article, and, once installed, the article will not operate without it. The definition of “parts” was also discussed in *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1353 (Fed. Cir. 2002), wherein the United States Court of Appeals for the Federal Circuit (“CAFC”) defined parts as “an

essential element or constituent; integral portion which can be separated, replaced, etc.”¹³ This line of reasoning has been applied in previous CBP rulings.¹⁴

Insofar as the term “accessory” is concerned, the Court of International Trade (“CIT”) has previously referred to the common meaning of the term because the term is not defined by the HTSUS or its legislative history.¹⁵ We also employ the common and commercial meanings of the term “accessory”, as the CIT did in *Rollerblade, Inc.*, wherein the court derived from various dictionaries “that an accessory must relate directly to the thing accessorized.”¹⁶ In *Rollerblade, Inc.*, the CAFC noted that “an ‘accessory’ must bear a direct relationship to the primary article that it accessorizes.”¹⁷

The subject merchandise in this case is not a “part” under any of the tests provided in the judicial decisions described above. It is not a “part” under the *Willoughby* test because a car can function without a backseat automobile organizer. It is also not a “part” under the Pompeo test because firstly it is snap clipped onto the back of a seat, which would not constitute being “installed,” and even if it were considered “installed,” the car can still operate without the organizer once attached to the seat.¹⁸ Lastly the subject merchandise is not a “part” because it is not an essential, constituent, or integral part to the vehicle.¹⁹

The subject merchandise is also not an “accessory” of motor vehicles. Like the protective gear in *Rollerblade, Inc.* and the truck tents classified in HQ H242603, dated April 3, 2015, the backseat automobile organizers at issue do not directly affect the car’s operation nor do they contribute to the car’s effectiveness.²⁰ Instead, the automobile organizers merely allow the driver and its passengers to store items needed for their enjoyment or convenience but not for the operation of the automobile. The subject merchandise is not classified in heading 8708, HTSUS.

In classifying goods under the residual provision of “similar containers” of heading 4202, HTSUS, the Court of International Trade (CIT) has stated as follows: “As applicable to classification cases, *ejusdem generis* requires that the imported merchandise possess the essential characteristics or purposes that unite the articles enumerated *eo nomine* [by name] in order to be

¹³ *Id.* at 1353 (citing Webster’s New World Dictionary 984 (3d College Ed. 1988)).

¹⁴ See e.g., HQ H255093, dated January 14, 2015; HQ H238494, dated June 26, 2014; and HQ H027028, dated August 19, 2008

¹⁵ See *Rollerblade, Inc. v. United States*, 24 Ct. Int’l Trade 812, 815–819 (2000), *aff’d*, 282 F.3d 1349 (Fed. Cir. 2002)).

¹⁶ See *Rollerblade, Inc.*, 24 Ct. Int’l Trade at 817.

¹⁷ 282 F.3d at 1352 (holding that inline roller skating protective gear is not an accessory because it “does not directly act on” or “contact” the roller skates).

¹⁸ See also *Rollerblade, Inc.*, 282 F.3d at 1353 (the CAFC found that the protective gear was not a part to the roller skates because they did not “attach to or contact” the roller skates, they were “not necessary to make the skates ... work”, nor were “they necessary to make the skates ... work efficiently or safely.”)

¹⁹ See *Id.*

²⁰ See *Rollerblade, Inc.*, 282 F.3d at 1353; HQ 960950 (Jan. 16, 1998) (stating that “[a]ccessories are of secondary importance,” but must “somehow contribute to the effectiveness of the principal article”).

classified under the general terms.”²¹ The court found that the rule of *ejusdem generis* requires only that the imported merchandise share the essential character or purpose running through all the containers listed *eo nomine* in heading 4202, HTSUSA, i.e., “...to organize, store, protect and carry various items.”²²

In *Totes*, the CIT held that a trunk organizer, used to store automotive tools and supplies, was correctly classified in heading 4202. The trunk organizer in *Totes* had handles for carrying and Velcro strips that gripped carpeted surfaces and held it in place inside a trunk. The trunk organizer was comprised of a storage section which could be divided into three storage areas using dividers. The subject merchandise in this case is different than the merchandise in *Totes*. The backseat automobile organizer’s physical characteristics are particularly dissimilar. They are not comprised of a main storage section, but are a flat-backed organizer to be fastened unto the back of a seat. They include additions such as pockets or pull-down tables but do not include handles.²³ Although the backseat organizers organize and store items, they would not be used to carry items. Additionally, they do not have the same physical characteristics as the containers in heading 4202. The subject merchandise is not classified in heading 4202, HTSUS.

As the subject merchandise in the above rulings are comprised of textile and plastic components and not classifiable at GRI 1, they are composite goods classified at GRI 3(b). According to GRI 3(b), composite goods consisting of different materials or made up of different components shall be classified as if they consisted of the material or component which gives them their essential character. Although the GRIs do not provide a definition of “essential character,” EN (VIII) of GRI 3(b) provides guidance. According to this EN, the essential character may be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

It is well-established that a determination as to “essential character” is driven by the particular facts of the case at hand. Essential character has traditionally been understood as “that which is indispensable to the structure, core or condition of the article, i.e., what it is” and as “the most outstanding and distinctive characteristic of the article.” In this instance, the textile components provide the essential character to the backseat organizers. The textile components are the most distinctive characteristic of the organizers, as they make up the bulk of the product while the plastic components are mere additions for the structure of the pockets and the clasps, etc. The subject merchandise is properly classified in heading 6307, HTSUS, as made-up textile articles, specifically under subheading 6307.90.98, HTSUS, which provides for “Other made up articles, including dress patterns: Other: Other: Other.”

²¹ *Totes, Inc. v. United States*, 18 CIT 919, 865 F. Supp. 867, 871 (1994), *aff’d*. 69 F. 3d 495 (Fed. Cir. 1995).

²² *Totes*, 865 F. Supp. at 872.

²³ See HQ H295656, dated May 3, 2019 (“While a handle, strap or closure is not dispositive of the issue, in this case, without straps or a handle of some sort, carrying the seat sack while it is filled with heavy books and school supplies would be quite uncomfortable and cumbersome”).

HOLDING:

Under the authority of GRIs 1 and 3(b) the subject textile backseat automobile organizers are classified under heading 6307, HTSUS, specifically under subheading 6307.90.98, HTSUS, which provides for “Other made up articles, including dress patterns: Other: Other: Other.” The 2020 column one, general rate of duty is 7 percent *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at www.usitc.gov/tata/hts/.

EFFECT ON OTHER RULINGS:

NY N087915, dated January 13, 2010, NY M80150, dated February 24, 2006, NY C89303, dated June 25, 1998, and NY A87718, dated October 15, 1996, are hereby MODIFIED in accordance with the above analysis.

NY N018628, dated November 8, 2007, NY J83474, dated April 25, 2003, NY H87607, dated February 8, 2002, NY G86716, dated February 6, 2001, NY H82730, dated June 26, 2001, NY G88263, dated March 19, 2001, NY G84567, dated December 5, 2000, NY 886254, dated May 20, 1993, and NY 869451, dated December 17, 1991, are hereby REVOKED in accordance with the above analysis.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the Customs Bulletin.

Sincerely,

for

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division


19 CFR PART 177

**REVOCATION OF SIX RULING LETTERS, MODIFICATION
OF ONE RULING LETTER, AND REVOCATION OF
TREATMENT RELATING TO THE TARIFF
CLASSIFICATION OF “PIGGY” BANKS**

AGENCY: U.S. Customs and Border Protection, Department of Homeland Security.

ACTION: Notice of revocation of NY I87269, NY D84404, NY 816190, NY N005466, NY C85171, and NY L86796, and modification of NY L82296 and of revocation of treatment relating to the tariff classification of “piggy” banks.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. §1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises

interested parties that U.S. Customs and Border Protection (CBP) is revoking six ruling letters, and modifying one ruling letter concerning tariff classification of “piggy” banks under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 54, No. 42, on October 28, 2020. No comment was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after April 11, 2021.

FOR FURTHER INFORMATION CONTACT: Marina Mekheil, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325-0974.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community’s responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. §1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 54, No. 42, on October 28, 2020, proposing to revoke six ruling letters, and modify one ruling letter pertaining to the tariff classification of “piggy” banks. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An im-

porter's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In NY I87269, NY 816190, NY N005466, NY L86796, and NY L82296, CBP classified "piggy" banks in heading 9503, HTSUS, specifically in subheading 9503.49.00, HTSUS, which provides for "Other toys: Other."¹ In NY D84404 and NY C85171, CBP classified "piggy" banks in heading 9503, HTSUS, specifically in subheading 9503.90.00, HTSUS, which provides for "Other toys: Other."² CBP has reviewed NY I87269, NY D84404, NY 816190, NY N005466, NY C85171, NY L86796, and NY L82296 and has determined the ruling letters to be in error. It is now CBP's position that "piggy" banks are properly classified, in heading 3924, HTSUS, specifically in subheading 3924.90.56, HTSUS, which provides for "Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics: Other: Other."

Pursuant to 19 U.S.C. §1625(c)(1), CBP is revoking NY I87269, NY D84404, NY 816190, NY N005466, NY C85171, and NY L86796, modifying NY L82296 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in HQ H268403, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. §1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

In accordance with 19 U.S.C. §1625(c), this ruling will become effective 60 days after publication in the *Customs Bulletin*.

Dated: January 25, 2021

for
CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

¹ 9503.00.00 in the 2020 edition of the HTSUS.

² 9503.00.00 in the 2020 edition of the HTSUS.

HQ H268403

January 25, 2021

OT:RR:CTF:CPMM H268403MMM

CATEGORY: Classification

TARIFF NO.: 3924.90.56

MR. RALPH SAUNDERS
DERINGER LOGISTICS CONSULTING GROUP
1 LINCOLN BOULEVARD, SUITE 225
ROUSES POINT, NY 12979

RE: Modification of NY L82296 and Revocation of NY I87269, NY D84404, NY 816190, NY N005466, NY C85171, and NY L86796; Classification of “piggy” Banks

DEAR MR. SAUNDERS,

This is reference to the New York Ruling Letter (NY) L82296, issued to you by U.S. Customs and Border Protection (CBP) on February 22, 2005 concerning classification of an animal “piggy” bank under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed your ruling, and determined that it is incorrect, and for the reasons set forth below, are modifying your ruling.

We have also reviewed NY I87269, dated October 11, 2002, NY D84404, dated December 2, 1998, NY 816190, dated October 31, 1995, NY N005466, dated January 26, 2007, NY C85171, dated April 2, 1998, and NY L86796, dated August 5, 2005, and determined they are also incorrect, and for the reasons set forth below, we are revoking those rulings.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the Customs Bulletin, Volume 54, No. 42, on October 28, 2020. No comment was received in response to this notice.

FACTS:

In your ruling NY L82296 (representation of a pig), and in rulings NY I87269 (representation of a pig), NY D84404 (representation of a soda vending machine), and NY 816190 (representation of Mickey Mouse character), CBP classified the subject plastic “piggy” banks into heading 9503, HTSUS, as toys.

In NY N005466, CBP stated as follows in reference to the subject merchandise:

Described as a Zillions Counting Pig Toy Bank. There is no designated item number indicated for the product. The article is a large, translucent pig bank with a digital reader that indicates the amount of money in the bank. This “piggy” bank encourages a child to save money and tells them the amount in the bank deposited.

In NY C85171, CBP stated as follows:

The first article is a PVC bank measuring approximately 4” in height. It is depicted in the shape of the head of the Looney Tune cartoon character “Marvin the Martian.” It has a black face, large white eyes, and is shown wearing a green trojan helmet. The article has a small coin slot in its top and a retrieval plug in the base. The base is red in color and contains the

legend “BIRTHDAY GREETINGS EARTHLING!!!.” Inside of the article is an electronic musical mechanism which plays a Happy Birthday melody when coins are dropped through the coin slot. This mechanism consumes a large part of the cavity of the article.

The second article is a PVC bank measuring approximately 4” in height. It is depicted in the shape of a football permanently mounted to a football tee. The football is brown and white in color and contain a small coin slot in its top. The football tee is orange in color and has a retrieval plug in its base. The utility of these items is limited due to the small size of the respective coin slots and storage capacities.

In NY L86796, CBP stated as follows:

An animal bank that is composed of a plastic body covered with plush on the outside surface. The product is designated as item number C078JA01245. The bank is a whimsical depiction of an elephant, and although it is a functional bank, the primary purpose of the article is to amuse a child or an adult.

CBP also classified the merchandise in NY N005466, NY C85171, and NY L86796 in heading 9503, HTSUS, as toys.

ISSUE:

Whether the subject “piggy” banks are classified in heading 9503, HTSUS, as other toys.

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS. Tariff classification is governed by the principles set forth in the General Rules of Interpretation (GRIs) and, in the absence of special language or context which requires otherwise, by the Additional U.S. Rules of Interpretation. The GRIs and the Additional U.S. Rules of Interpretation are part of the HTSUS and are to be considered statutory provisions of law for all purposes.

GRI 1 requires that classification be determined first according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order. GRI 2(a) provides, in relevant part, that “[a]ny reference in a heading to an article shall be taken to include a reference to that article incomplete or unfinished, provided that, as entered, the incomplete or unfinished articles has the essential character of the complete or finished article.”

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the Harmonized System at the international level. While neither legally binding nor dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings . See T.D. 89–80, 54 Fed. Reg. 35127, 35128 (August 23, 1989).

The 2019 HTSUS provision under consideration are as follows:

- 3924:** Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics:
- 6307:** Other made up articles

8543: Electrical machines and apparatus, having individual functions, not specified or included elsewhere in this chapter; parts thereof:

9503: Dolls, other toys

Note 2 to Chapter 39, states in relevant part:

2. This chapter does not cover:

- (s) Articles of section XVI (machines and mechanical or electrical appliances)
- (y) Articles of Chapter 95 (for examples, toys, games, sports equipment)

The ENs to Heading 9503 state in relevant part:

(D) Other toys.

This group covers toys intended essentially for the amusement of persons (children or adults). However, toys which, on account of their design, shape or constituent material, are identifiable as intended exclusively for animals, e.g., pets, do not fall in this heading, but are classified in their own appropriate heading. This group includes:

All toys not included in (A) to (C). Many of the toys are mechanically or electrically operated.

These include:

- (xxii) Toy money boxes

* * * *

Classification within Chapter 39 is subject to Chapter 39, Legal Note 2(y), which excludes from Chapter 39 goods that are classifiable in Chapter 95, HTSUS. Therefore, if the subject articles are described in Chapter 95, they are precluded from classification in any of the provisions of Chapters 39, even if they are described therein. We must therefore first address whether the subject articles are described in heading 9503, HTSUS.

Although the term “toy” is not defined in the HTSUS, EN 95.03 provides that heading 9503, HTSUS, covers toys intended essentially for the amusement of persons. *U. S. v. Topps Chewing Gum*, 58 CCPA 157, C.A.D. 1022 (1971) (hereafter *Topps*), is illustrative in determining whether an article is intended for the amusement of the user. *Topps* held that an article may be considered a toy if it provides the same kind of amusement as a plaything. In *Topps*, various decorative buttons with humorous quotes which created evident and inherent amusement were classified as toys of heading 9503.

Where merchandise might have another purpose in addition to providing amusement, the primary purpose of the item must be its amusement value for it to be classified as a toy. In *Ideal Toy Corp. v. United States*, 78 Cust. Ct. 28, 33 (1977), the Customs Court held that “when amusement and utility become locked in controversy, the question becomes one of determining whether the amusement is incidental to the utilitarian purpose, or the utility purpose is incidental to the amusement.”

Additionally, heading 9503, HTSUS, is a “principal use” provision within the meaning of Additional U.S. Rule of Interpretation (AUSRI) 1(a), HTSUS.¹ For articles governed by principal use, Additional U.S. Rule of Interpretation 1(a), HTSUS, provides that, in the absence of special language or context

¹ *Minnetonka Brands v. United States*, 110 F. Supp. 2d 1020, 1026 (CIT 2000).

which otherwise requires, such use “is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of goods of that class or kind to which the imported goods belong, and the controlling use is the principal use.” In other words, the article’s principal use at the time of importation determines whether it is classifiable within a particular class or kind.

In determining whether the principal use of a product is for amusement, and thereby classified as a toy, Customs considers a variety of factors, including: (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channels, class or kind of trade in which the merchandise moves; (4) the environment of the sale (i.e., accompanying accessories and the manner in which the merchandise is advertised and displayed); (5) usage, if any, in the same manner as merchandise which defines the class.² Not all of these factors will necessarily be relevant in every situation. In the instant case, the factors for which information is available is primarily the physical characteristics.

While EN 95.03(D)(xxii) provides specifically for toy money boxes, any toy classifiable in heading 9503, HTSUS, particularly one with a dual purpose of utility and amusement, must meet the criteria discussed above. For example, in *Nadel & Sons Toy Corp. v. United States*, 4 CIT 20 (1982), the Court of International Trade discussed the application of these precedents to a plastic money bank in the figure of Uncle Sam. The figure was standing on a decorated platform which served as a receptacle of coins. One of Uncle Sam’s arms was extended and its hand was designed to accommodate a coin. When a button was pressed, the arm dropped the coin into a satchel that opened. The Court found that the purpose of the Uncle Sam bank was to save and store coins. The Court stated that “the coins are received into the article in a manner that amuses is incidental and not controlling,” and that there was little “amusement value” in such a pastime, which would be soon abandoned.

In the instant case, the physical features of the subject banks are not characteristic of a toy. These banks serve a utilitarian purpose, and if they provide any amusement, it is incidental to the utilitarian purpose. Similar to the toy bank in *Nadel*, the purpose of the banks is to save and store coins, with very little amusement value.

Additionally, although the subject banks in NY C85171 and NY 816190 have amusing appearances, as they are representations of recognizable licensed animated characters (“Mickey Mouse” and “Marvin the Martian”), they do “not promote pretend and role play, stimulate imagination, combat a child’s ennui, promote mimetic activity or provide the opportunity for children to develop manipulative skill or muscular dexterity” and are also not characteristic of a toy.³ Thus the subject merchandise in NY L82296, NY I87269, NY D84404, NY 816190, and the Football bank in NY C85171 are by application of GRI 1 not toys and are classified in heading 3924, HTSUS as household articles of plastic.

The Zillions Counting Toy pig (NY N005466), the Marvin the Martian bank (NY C85171), and the plush animal bank (NY L86796) are by application of GRI 3(b), composite goods classified in heading 3924. According to GRI 3(b),

² *United States v. Carborundum Co.*, 63 C.C.P.A. 98, 102, 536 F.2d 373, 377 (1976).

³ Headquarters Ruling H275175, dated September 5, 2017 (citing *Spring Creative Prods. Group v. United States*, 35 I.T.R.D. (BNA) 1955, Slip Op. 13–107 (Ct. Int’l Trade Aug. 16, 2013)).

composite goods consisting of different materials or made up of different components shall be classified as if they consisted of the material or component which gives them their essential character. Although the GRIs do not provide a definition of “essential character,” EN (VIII) of GRI 3(b) provides guidance. According to this EN, the essential character may be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of a constituent material in relation to the use of the goods.

It is well-established that a determination as to “essential character” is driven by the particular facts of the case at hand.⁴ Essential character has traditionally been understood as “that which is indispensable to the structure, core or condition of the article, *i.e.*, what it is” and as “the most outstanding and distinctive characteristic of the article.”⁵

The plastic components provide the essential character to the subject merchandise. The electronic components in NY N005466 and NY C85171 and the textile components in NY L86796 are merely used to provide minimal amusement. However, the plastic components are the most distinctive characteristic of the banks, as they are the bulk of the article as well as the component in which the coins are stored. The subject merchandise in NY N005466, NY C85171 and NY L86796 are also properly classified in heading 3924, HTSUS as household articles of plastic by application of GRI 3(b).

HOLDING:

By application of GRI 1 and GRI 3(b), the subject merchandise, is classified in heading 3924, HTSUS. The “piggy” banks are specifically described in subheading 3924.90.56, HTSUSA (Annotated), which provides for: “Tableware, kitchenware, other household articles and hygienic or toilet articles, of plastics: Other: Other.” The 2019 column one general rate of duty for subheading 3924.90.56, HTSUSA, is 3.4% ad valorem.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at www.usitc.gov/tata/hts.

EFFECT ON OTHER RULINGS

New York Ruling Letter L82296, dated February 22, 2005 is hereby MODIFIED in accordance with the above analysis.

New York Ruling Letters I87269, dated October 11, 2002, D84404, dated December 2, 1998, 816190, dated October 31, 1995, N005466, dated January 26, 2007, C85171, April 2, 1998, and L86796, dated August 5, 2005 are hereby REVOKED in accordance with the above analysis.

In accordance with 19 U.S.C. § 1625(c), this ruling will become effective 60 days after its publication in the *Customs Bulletin*.

Sincerely,
for

CRAIG CLARK,
Director

Commercial and Trade Facilitation Division

⁴ See, e.g., *Alcan Food Packaging (Shelbyville) v. United States*, 771 F.3d 1364, 1366 (Fed. Cir. 2014) (“The ‘essential character’ of merchandise is a fact-intensive issue.”); see also EN VIII to GRI 3(b) (“The factor which determines essential character will vary as between different kinds of goods.”).

⁵ *Structural Indus. v. United States*, 360 F. Supp. 2d 1330, 1336 (Ct. Int’l Trade 2005).

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U.S. Court of Appeals for the Federal Circuit

THE DIAMOND SAWBLADES MANUFACTURERS' COALITION, Plaintiff-Appellee
v. UNITED STATES, Defendant-Appellee v. BOSUN TOOLS Co., LTD.,
Defendant-Appellant

Appeal No. 2020–1478

Appeal from the United States Court of International Trade in No. 1:17-cv-00167-
CRK, Judge Claire R. Kelly.

Decided: January 27, 2021

MAUREEN E. THORSON, Wiley Rein, LLP, Washington, DC, argued for plaintiff-appellee. Also represented by STEPHANIE MANAKER BELL, TESSA V. CAPELOTO, LAURA EL-SABAOWI, CYNTHIA CRISTINA GALVEZ, DERICK HOLT, DANIEL B. PICKARD, ADAM MILAN TESLIK.

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Before PROST, *Chief Judge*, CLEVINGER and TARANTO, *Circuit Judges*.

TARANTO, *Circuit Judge*.

Since 2006, importation of diamond sawblades from the People's Republic of China (PRC) has been governed by an antidumping duty order issued by the United States Department of Commerce under 19 U.S.C. § 1673. In 2016, Commerce launched an administrative review, under 19 U.S.C. § 1675, of duties owed on subject merchandise sold to unaffiliated U.S. purchasers from November 1, 2014, through October 31, 2015. In that review, Commerce investigated the dumping margin of Bosun Tools Co., Ltd. (Bosun), an exporter and producer of diamond sawblades from the PRC, that it sends directly to one of its two U.S. importer-affiliates for sale to unaffiliated U.S. purchasers. The second importer-affiliate imports diamond sawblades from a Bosun entity in Thailand (which are not covered by the antidumping duty order). The two importer-affiliates trade between themselves, so both end up selling PRC-originating and Thailand-originating sawblades.

To determine the domestic-price component of the dumping margin calculation, Commerce had to identify which diamond sawblades sold

by the Bosun importer-affiliates to unaffiliated U.S. purchasers were from the PRC (not Thailand). Because Bosun's affiliates (and Bosun's overall database) did not record the country of origin on each sale to those purchasers, Bosun supplied country-of-origin information from three sources: (1) the particular product code (which was country-specific for some products); (2) the unit price (which allowed origin identification for some products); and (3), for remaining products, an inference as to origin based on the premise that the importer-affiliates generally sold products in the order they received them (the first-in, first-out, or FIFO, inference).

To calculate Bosun's margin, Commerce used the information Bosun provided, finding it sufficiently verified. The domestic-industry Diamond Sawblades Manufacturers' Coalition challenged Commerce's determination in the Court of International Trade, which remanded the matter to Commerce for further explanation. *Diamond Sawblades Mfrs.' Coalition v. United States*, No. 17-00167, 2018 WL 5281941 (Ct. Int'l Trade Oct. 23, 2018) (*DSMC I*). On remand, Commerce noted problems with some of Bosun's information—perhaps only with the small subset of products for which the FIFO-inference step was used for origin identification—and concluded that it would use “the facts otherwise available” under 19 U.S.C. § 1677e(a), and indeed draw adverse inferences under § 1677e(b), as to the totality of the Bosun-sawblade sales during the period of review. The Trade Court affirmed Commerce's determination. *Diamond Sawblade Mfrs.' Coalition v. United States*, 415 F. Supp. 3d 1365, 1369 (Ct. Int'l Trade 2019) (*DSMC II*).

We now conclude that some of the bases on which Commerce invoked § 1677e(a) are unsupported by substantial evidence, while some—which involve only a gap in reliable information—are adequately supported. We also conclude, however, that, in light of the limited bases for applying § 1677e(a), Commerce may have applied that subsection—and hence § 1677e(b), which applies only where subsection (a) applies—too broadly by disregarding *all* of Bosun's country-of-origin information. It appears that the errors Commerce identified in Bosun's information are limited in their reliability-undermining effect to a defined subset of sold sawblades (the subset of sawblades whose origin Bosun identified only through the FIFO-inference step). If the unreliable information is confined to some or all sawblades within such a defined subset, then there is no substantial evidence to support Commerce's determination that all of the Bosun-supplied origin information was unreliable, and Commerce articulated no supported basis for disregarding the reliable portion of the origin information Bosun supplied. We remand for further

proceedings to determine the extent to which unreliability is so confined, and the consequence for Bosun's dumping margin. We leave to the Trade Court the decision whether a further remand to Commerce is needed.

I

A

Under 19 U.S.C. § 1673, Commerce must determine whether merchandise at issue is being sold or is likely to be sold in the United States “at less than fair value,” which the statute identifies as “dumping,” *id.* § 1677(34). To make that determination, Commerce must assess the difference between the “normal value” of the goods at issue (reflecting the home-market value) and the “export price or constructed export price” of those goods (reflecting the price at which they are sold into the United States). *See id.* § 1677b(a) (stating that the determination of the existence of sales “at less than fair value” is to be based on a comparison of “the export price or constructed export price and normal value”); *see also id.* § 1677a (addressing “export price” and “constructed export price”); *id.* § 1677b (addressing “normal value”). That difference is the “dumping margin.” *Id.* § 1677(35)(A) (defining “dumping margin”). If Commerce finds dumping, and the International Trade Commission makes specified findings about injury to domestic industries, Commerce is to issue an antidumping duty order that imposes duties to offset the dumping. *Id.* § 1673.

Thereafter, Commerce typically conducts annual reviews to determine the antidumping duty margin for a given 12-month period for relevant exporters. *Id.* § 1675. In particular, § 1675(a)(1)(B) states that “[a]t least once during each 12-month period beginning on the anniversary of the date of publication[,] . . . [Commerce], if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall . . . review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty,” and, under subsection (a)(2), “(i) the normal value and export price (or constructed export price) of each entry of the subject merchandise, and (ii) the dumping margin for each such entry.” Commerce then “shall determine the individual weighted average dumping margin for each known exporter and producer of the subject merchandise,” *id.* § 1677f-1(c)(1), and may elect to rely on “a sample of exporters, producers, or types of products that is statistically valid based on the information available” or “exporters and producers accounting for the largest volume of the subject merchandise” if “it is

not practicable to make individual [determinations] because of the large number of exporters or producers involved in the investigation or review,” *id.* § 1677f-1(c)(2).

In the administrative-review context, Commerce’s use of the collected information is guided in part by 19 U.S.C. § 1677e. Subsection (a) states:

If—

- (1) necessary information is not available on the record, or
- (2) an interested party or any other person—
 - (A) withholds information that has been requested by the administering authority or the Commission under this subtitle,
 - (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,
 - (C) significantly impedes a proceeding under this subtitle, or
 - (D) provides such information but the information cannot be verified as provided in section 1677m(i) of this title,

[Commerce] shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.

Id. § 1677e(a). Where subsection (a) applies, subsection (b) adds that if an additional condition is also met, Commerce “may” draw inferences adverse to an interested party “in selecting from among the facts otherwise available” whose use subsection (a) authorizes:

If [Commerce] finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from [Commerce], [Commerce], in reaching the applicable determination under this subtitle, may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available[.]

Id. § 1677e(b).

Section 1677e(a) refers to four portions of 19 U.S.C. § 1677m. Two of those are referred to in § 1677e(a)(2)(B). One is § 1677m(c)(1), which says that, in certain circumstances, Commerce must consider an interested party’s inability to submit requested information “in the requested form and manner” and may modify the requirements to avoid an unreasonable burden on the party. The other is § 1677m(e), which provides that, in a § 1675 review (among other proceedings), Commerce “shall not decline to consider” party-submitted information needed for Commerce’s determination, even though the submis-

sion does not meet all Commerce-established requirements, if certain conditions keyed to reliability are nevertheless met.¹

The third subsection of § 1677m to which § 1677e(a) refers (in § 1677e(a)(2)(D)) is § 1677m(i). That subsection states that verification of information is required in an administrative review like this one if, *first*, certain interested parties timely request verification and, *second*, either there was no verification in the previous two administrative reviews or there is good cause for a new verification. *Id.* § 1677m(i). The final subsection of § 1677m to which § 1677e(a) refers is § 1677m(d), referred to in § 1677e(a)'s concluding clause—Commerce “shall, subject to section 1677m(d) of this title, use the facts otherwise available” Subsection 1677m(d) provides, *first*, that if a response to an information request “does not comply with the request,” Commerce “shall, to the extent practicable, provide . . . an opportunity to remedy or explain the deficiency in light of the time limits” set for the proceeding and, *second*, that if a further submission made in response to the deficiency is untimely or Commerce “finds that such response is not satisfactory,” Commerce “may, subject to subsection (e) [quoted *supra*], disregard all or part of the original and subsequent responses.” *Id.* § 1677m(d).²

Interested parties, including foreign producers or exporters of subject merchandise, importers of such merchandise, and specified domestic trade associations, are allowed to participate in administrative reviews. *See* 19 U.S.C. § 1677(9)(A), (E); 19 C.F.R. § 351.309(c). An interested party that was a party before Commerce may file an action in the Trade Court under 19 U.S.C. § 1516a to challenge

¹ “In reaching a determination under section . . . 1675 of this title [Commerce] shall not decline to consider information that is submitted by an interested party and is necessary to the determination but does not meet all the applicable requirements established by [Commerce], if—

- (1) the information is submitted by the deadline established for its submission,
- (2) the information can be verified,
- (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination,
- (4) the interested party has demonstrated that it acted to the best of its ability in providing the information and meeting the requirements established by the administering authority or the Commission with respect to the information, and
- (5) the information can be used without undue difficulties.” *Id.* § 1677m(e).

² “If [Commerce] determines that a response to a request for information under this subtitle does not comply with the request, [Commerce] shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of investigations or reviews under this subtitle. If that person submits further information in response to such deficiency and either—

- (1) [Commerce] finds that such response is not satisfactory, or
 - (2) such response is not submitted within the applicable time limits,
- then [Commerce] may, subject to subsection (e), disregard all or part of the original and subsequent responses.” *Id.* § 1677m(d).

Commerce's final determination in an administrative review. 28 U.S.C. § 2631(c); *id.* § 1581(c).

B

Commerce issued an antidumping duty order in 2006 covering “diamond sawblades and parts thereof” (hereafter “sawblades”) from the PRC. Final Determination of Sales at Less Than Fair Value and Final Partial Affirmative Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the People's Republic of China, 71 Fed. Reg. 29,303 (May 22, 2006). Commerce thereafter conducted annual administrative reviews under 19 U.S.C. § 1675. This case involves the sixth such review, initiated on January 7, 2016. Initiation of Antidumping and Countervailing Duty Admin. Revs., 81 Fed. Reg. 736 (Jan. 7, 2016).

1

Commerce initially selected Jiangsu Fengtai Diamond Tool Manufacture Co., Ltd. (Jiangsu), the largest exporter of sawblades from the PRC, along with a second firm, for individual investigation, but on April 27, 2016, Commerce, while retaining Jiangsu for investigation, dropped the initially selected second firm and substituted Bosun—which was the third largest sawblades exporter listed on the initiation notice and which had been selected for individual investigation in three earlier annual reviews. J.A. 56–57. Bosun responded to Section A of Commerce's antidumping questionnaire on May 25, 2016, and Sections C and D on July 1, 2016. Bosun's responses included aggregate data about the quantity and value of its U.S. sales. J.A. 785–93. Bosun explained that it imported sawblades both from the PRC and from Thailand through its U.S.-based affiliated importers; specifically, Bosun Tools, Inc. (Bosun USA) imported only from the PRC; Pioneer Tools, Inc. (Pioneer) imported only from Thailand. J.A. 732. Bosun's responses also noted that its two importer-affiliates sold sawblades between themselves before selling to unaffiliated U.S. customers, thus intermixing the PRC and Thailand sawblades in the affiliates' hands. J.A. 732. It is undisputed that Bosun's U.S.-sales database, which operated as an omnibus repository for both importers' sales records, did not record the intra-family sales and did not record the country of origin of sawblades at the time they were sold by the importer-affiliates to unaffiliated U.S. customers (the sales that matter for the annual review). J.A. 732–33, 2886. Bosun accepts that its importer-affiliates did not record the country of origin, on invoices or otherwise, at the time of sale of sawblades to unaffiliated U.S. customers. *See DSMC I*, 2018 WL 5281941, at *2. Bosun told Commerce that it had derived the origin of sawblades sales by using a

multistep method: The product codes for the sawblades often distinguished the country of origin; the unit prices of sales did so for some of the sawblades whose origin was not identified in the first step; and a premise that the importer-affiliates sold on a “first-purchase first-sale” basis allowed an inference as to origin for remaining sales, using the sales dates along with the dates of the affiliates’ receipt of sawblades. J.A. 733–34.

On August 3, 2016, Commerce issued a first supplemental questionnaire asking Bosun to describe how Pioneer “segregated subject merchandise [*i.e.*, sawblades from the PRC] from diamond sawblades that it purchased from Thailand.” J.A. 1141; J.A. 2967 n.82. Bosun responded on September 7, 2016, explaining that Pioneer purchased sawblades only from Bosun’s Thai affiliate and from Bosun USA, so the subject merchandise in Pioneer’s sales records would be only those products purchased from Bosun USA. J.A. 1155. Bosun also elaborated on its earlier explanation of the method by which it had segregated the subject merchandise, *i.e.*, identified the PRC-origin sawblades. First, Bosun identified models of sawblades by identifying unique “product codes” assigned to each affiliate; if those codes were not affiliated with Bosun USA, the sale was not of subject merchandise. J.A. 1141–42, 1154–56. Second, Bosun compared the unit purchase price of sawblades whose origin had not been identified based on the product code to the unit purchase price of sawblades whose origin had been so identified. *Id.* Third, for sawblade sales by affiliates to unaffiliated customers for which the first two steps did not identify the country of origin, Bosun applied what the parties now call a FIFO inference, based on the assumption that Bosun’s U.S. affiliates sold their oldest inventory first (and knew the dates of sales and arrivals of inventory). *Id.*

Commerce issued a second supplemental questionnaire on October 17, 2016, asking that Bosun “provide a key to the product codes of Bosun’s subject merchandise” and “explain how you identified these products as produced in China and exported from China, produced in Thailand and exported from Thailand, or produced in China and exported through Thailand.” J.A. 2139–40; J.A. 2968 n.84. Bosun timely responded to the second supplemental questionnaire on November 10, 2016, illustrating the already-described process as applied to certain “sales trace[s]”—seemingly the sequence of documents in Bosun’s sales database that culminated in the invoice to an unaffiliated U.S. customer. J.A. 2140–42.

Commerce published its preliminary results on December 9, 2016. *See Diamond Sawblades and Parts Thereof From the People’s Republic of China: Preliminary Results of Antidumping Duty Admin. Rev.;*

2014–2015, 81 Fed. Reg. 89,045 (Dec. 9, 2016). On January 17, 2017, Diamond Sawblades requested, as an interested party under 19 C.F.R. § 351.309(c), that Commerce invoke 19 U.S.C. § 1677e(a) and (b) to use adverse inferences in calculating Bosun’s export prices (and hence dumping margin). J.A. 2578–87. Diamond Sawblades argued, in particular, that Bosun’s information about country of origin was defective and that Bosun did not cooperate to the best of its ability because it and its importer-affiliates did not record the country of origin for each individual sale to an unaffiliated U.S. customer (or therefore have such records to provide to Commerce). J.A. 2579–87.

Commerce issued a letter on April 28, 2017, informing Bosun that it would verify Bosun’s questionnaire responses, and asking Bosun to provide a number of “sales-trace package[s]” for sales that Commerce identified. J.A. 2612, 2619. On May 27, 2017, Commerce issued its verification report (2017 Verification Report), which explained that the analysts “recreated [Bosun’s] segregation between Chinese and Thai origin products” and “found no discrepancies” in the first two steps of Bosun’s method. J.A. 2891–92. The 2017 Verification Report also stated that one of the identified sales traces reported a lower quantity of PRC-originating products than had actually occurred, J.A. 2892–93, a discrepancy that was “a result of the FIFO methodology Bosun used to identify the country of origin,” J.A. 2892. The report stated, however, that “[o]ther than the on-site selected sales trace 6, [the analysts] did not find discrepancies in the sales traces that [they] reviewed for sales identification methodology.” J.A. 2893.

2

Commerce issued its final Issues and Decision Memorandum on June 6, 2017, recommending that Commerce use Bosun’s verified data to calculate the proper antidumping duty margin. J.A. 2942, 2966. Commerce published its final results based on that conclusion (Final Determination) on June 12, 2017. *Diamond Sawblades and Parts Thereof From the People’s Republic of China: Final Results of Antidumping Duty Admin. Rev.*; 2014–2015, 82 Fed. Reg. 26,912 (June 12, 2017). In the memorandum, Commerce explained that it would not apply “the facts otherwise available” under 19 U.S.C. § 1677e(a) or, therefore, draw adverse inferences in selecting from such facts under § 1677e(b). J.A. 2967–70.

Diamond Sawblades challenged Commerce’s determination before the Trade Court on June 27, 2017, alleging that Commerce should have applied 19 U.S.C. § 1677e(a) and (b) in calculating Bosun’s dumping margin. The Trade Court decided that a remand was warranted on this issue. Quoting *Peer Bearing Co.-Changshan v. United*

States, 766 F.3d 1396, 1400 (Fed. Cir. 2014), and *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003), the Trade Court concluded that it was unclear if Commerce sufficiently considered precedent to the effect that “the ‘best of its ability’ standard ‘requires the respondent to do the maximum it is able to do,’ inclusive of ‘maintain[ing] full and complete records’ of relevant data.” *DSMC I*, 2018 WL 5281941, at *4 (alteration in original); see also *id.* at *4–7. The Trade Court considered both of the “best of its ability” statutory provisions quoted above: § 1677m(e)’s criterion for using information that does not meet all Commerce requirements (the interested party “acted to the best of its ability in providing the information and meeting [Commerce’s] requirements”), which plays a role in § 1677e(a)(2)(B) and (indirectly) in the last clause of § 1677e(a); and § 1677e(b)’s precondition to using an adverse inference (“an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from” Commerce). *DSMC I*, 2018 WL 5281941, at *4–8. The Trade Court also noted that Commerce, during verification, had identified errors in Bosun’s information regarding some of the sales for which the FIFO step was used to infer origin; and the court concluded that Commerce had not sufficiently explained its determination that the errors were isolated enough not to warrant use of an adverse inference under § 1677e(b). *Id.* at *7–8. The Trade Court remanded for further explanation. *Id.* at *8.

3

Commerce issued a Final Remand Redetermination on April 17, 2019. This time, Commerce found § 1677e applicable, disregarded all of Bosun’s information about the country of origin for all of its importer-affiliates’ sales during the period of review, and assigned Bosun an antidumping dumping margin of 82.05%. J.A. 3048–51, 3062–63. That figure was the margin Commerce assigned to Jiangsu, the other individually investigated exporter; Jiangsu’s margin was itself based on adverse inferences under § 1677e(b). J.A. 3062 (citing J.A. 2945–54).

As to the premises of its new conclusion: Commerce reasoned that it would “resort to the facts otherwise available” under § 1677e(a) because four of the statutorily specified conditions for doing so were met here. J.A. 3046 (relying on § 1677e(a)(1), (a)(2)(B)–(D)). Commerce noted that it had identified certain errors in Bosun’s information during verification, referring specifically (perhaps only—this is unclear) to sales for which “the FIFO methodology” was used. J.A. 3049 & n.37. Commerce disregarded all of Bosun’s information about

origin for the entirety of the importer-affiliates' sales, even the sales for which Bosun identified origin based on product type or unit price. J.A. 3049. It stated that "Bosun had the ability to maintain [country-of-origin] records" at the point of sale to unaffiliated U.S. purchasers, "but failed to do so," and that "Bosun is familiar with Commerce's antidumping duty proceedings and should have understood the importance of maintaining adequate country of origin information." J.A. 3047. On that basis, Commerce declared Bosun's information in its entirety "not satisfactory," leaving Commerce with "no reliable information on the country of origin of Bosun's sales." J.A. 3049 (quoting § 1677m(d)). Finally, having decided to disregard all of Bosun's origin information, Commerce concluded that, in selecting from the information otherwise available, it should use an adverse inference under § 1677e(b) because Bosun flunked the "best of its ability" standard of that subsection when it failed to maintain point-of-sale records. J.A. 3048–49, 3058–59, 3062. For that reason, Commerce used the § 1677e(b)-based Jiangsu margin for Bosun (applying that margin to the imports covered by the administrative review). J.A. 3050, 3062–63.

Bosun challenged Commerce's remand redetermination at the Trade Court. One of Bosun's arguments was that the errors identified during the verification stage all fell into a circumscribed subset of the affiliates' sales during the period of review, representing less than 2.5% of the total volume of such sales (by unit, not value). J.A. 3075–76. The Trade Court affirmed the Final Remand Redetermination, concluding that the failure to make a record of origin at the point of sale by the importer-affiliates, together with the errors identified by Commerce during verification, supported Commerce's invocation of both § 1677e(a) and § 1677e(b). *DSMC II*, 415 F. Supp. 3d at 1370–73.

The Trade Court entered a final judgment on December 16, 2019. Bosun timely appealed. We have jurisdiction under 28 U.S.C. § 1295(a)(5).

II

A

Bosun challenges the Trade Court's decision in *DSMC I* insofar as it remanded the matter to Commerce for additional explanation. We reject this challenge.

"We review decisions of the Court of International Trade that remand decisions of the Commission for further explanation (based on an inability to evaluate on the basis of the record before the court)

with the more deferential abuse-of-discretion standard.” *Diamond Sawblades Mfrs.’ Coalition v. United States*, 612 F.3d 1348, 1356 (Fed. Cir. 2010). “In reviewing the trial court’s discretion, this court examines its reasons for remand for any legal error.” *Id.* at 1359 (internal quotation marks omitted). Remands are common, and they serve an important function—to ensure the adequacy of agency explanation that is crucial to judicial review, including review of whether substantial evidence exists for the premises of Commerce’s exercise of discretion. *See, e.g., CP Kelco US, Inc. v. United States*, 949 F.3d 1348, 1355 (Fed. Cir. 2020) (four remands by Trade Court for further explanation); *Mid Continent Steel & Wire, Inc. v. United States*, 941 F.3d 530, 537–38 (Fed. Cir. 2019). We see no abuse of discretion in the remand in the present matter.

The Trade Court in *DSMC I* expressed reasonable uncertainty about whether Commerce had properly considered the two “best of its ability” standards regarding a person’s supply of information—the one in 19 U.S.C. § 1677e(b); and the one in 19 U.S.C. § 1677m(e) (a subsection referred to directly in § 1677e(a)(2)(B) and indirectly through the concluding phrase of § 1677e(a)’s reference to § 1677m(d), which refers to § 1677m(e)). For purposes of assessing the *DSMC I* remand, Bosun has shown no material legal error in the Trade Court’s view of this court’s precedents, which explain, while focusing on § 1677e(b), that the “best of [a person’s] ability,” in proper circumstances, may be tested by reference to the person’s pre-questionnaire recordkeeping. *See Peer Bearing*, 766 F.3d at 1400; *Nippon Steel*, 337 F.3d at 1382. Nor has Bosun shown an abuse of discretion on the particular facts. Specifically, we see no abuse of discretion in the Trade Court decision to remand for a fuller explanation from Commerce of its initial judgment that the standards did not apply, even in part, to Bosun’s recordkeeping, given that country of origin was not recorded at the point of sale to the first unaffiliated U.S. purchaser.

The Trade Court also reasonably sought additional explanation from Commerce about the ramifications of the errors Commerce identified in verifying Bosun’s submissions. Noting Commerce’s examination of four sales traces, the court stated: “Given the maximum sample size of four sales traces, Commerce’s conclusion that the error [in Bosun’s FIFO methodology] was ‘isolated’ and did not affect other sales is not sufficiently explained.” *DSMC I*, 2018 WL 5281941, at *7. The Trade Court suggested that the errors all involved sales whose origin Bosun had used the FIFO step to identify, but that fact left a question about why Commerce had not applied § 1677e to any of the Bosun sales, not even the full subset of sales for which Bosun had relied on the FIFO step. The Trade Court reasonably concluded:

“[E]ven if the FIFO step was applied only in the last resort, Commerce has yet to explain its conclusion that the error discovered at verification was not replicated in other sales, which were not reviewed at verification, to which the FIFO step applied.” *Id.* at *8.

In short, the Trade Court’s *DSMC I* remand to Commerce for further explanation was not an abuse of discretion.

B

Bosun also challenges the Trade Court’s affirmance, in *DSMC II*, of Commerce’s Remand Redetermination. We agree in part with this challenge.

On this appeal from the Trade Court, we carefully consider that court’s informed opinion, *US Magnesium LLC v. United States*, 839 F.3d 1023, 1027 (Fed. Cir. 2016) (citing *Diamond Sawblades*, 612 F.3d at 1356), but we must apply the same standard of review in considering the challenges to Commerce’s actions as the standard that was applicable in the Trade Court, *Apex Exports v. United States*, 777 F.3d 1373, 1377 (Fed. Cir. 2015). For a final determination under 19 U.S.C. § 1675, we consider whether Commerce’s decision is “unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i); see *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002). We generally decide legal issues de novo, *CP Kelco US*, 949 F.3d at 1356; and here, there is no invocation of deference under *Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and no legal issue we decide for which such deference would make a difference. We review factual determinations, including determinations of facts relevant to application of 19 U.S.C. § 1677e(a) and (b), for substantial-evidence support, which is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion,” considering “the record as a whole, including evidence that supports as well as evidence that ‘fairly detracts from the substantiality of the evidence.’” *Nippon Steel*, 337 F.3d at 1379; see also *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487–88 (1951); *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938); *In re Gartside*, 203 F.3d 1305, 1312 (Fed. Cir. 2000).

Bosun challenges Commerce’s choice to disregard the entirety of its origin information, and to turn to “the facts otherwise available” for all of the period-of-review U.S. sales, as an application of § 1677e(a) not supported by substantial evidence. Bosun Opening Br. at 24–26, 42–46. We agree with Bosun’s challenge in part. We address the preconditions to use of “the facts otherwise available” and then the

premise for Commerce's decision to disregard *all* of Bosun's origin information as unreliable.

1

Under 19 U.S.C. § 1677e(a), Commerce “shall” resort to “the facts otherwise available” (subject to § 1677m(d)) when any of five preconditions are met. The first precondition, stated by itself in paragraph (1), is not tied to the conduct of any interested party or other person: it is simply that “necessary information is not available on the record.” *Id.* § 1677e(a)(1). The other four preconditions, stated in paragraph (2), are tied to the conduct of “an interested party or any other person”: Each specifies conduct of a person that triggers the directive to Commerce to “use the facts otherwise available.” *Id.* § 1677e(a)(2)(A)–(D). In its Remand Redetermination in this matter, Commerce invoked four of the five preconditions for such use. J.A. 3046. We find substantial-evidence support as to two of them.

The one that Commerce did not rely on is § 1677e(a)(2)(A), which requires that a person have “withh[e]ld[] information that has been requested” by Commerce. 19 U.S.C. § 1677e(a)(2)(A). Commerce did not find that Bosun withheld requested information.

Commerce found that § 1677e(a)(2)(C) applies. That provision applies here only if Bosun “significantly impede[d] the proceeding.” *Id.* § 1677e(a)(2)(C). Although Commerce so found, that finding is not supported by substantial evidence. Commerce has not identified a withholding or misrepresentation of information that lengthened or otherwise impeded the proceeding. *Cf. Ad Hoc Shrimp Trade Action Comm. v. United States*, 802 F.3d 1339, 1355 (Fed. Cir. 2015). Indeed, Commerce has not identified any additional effort it had to expend because of Bosun's reporting method that it would not have expended if point-of-sales records had been kept. For example, Commerce did not find, and the record supplies no basis for finding, that Commerce would have accepted such records without verification under 19 U.S.C. § 1677m(i) or with a less burdensome verification effort than the one Commerce actually expended.

Commerce also found that § 1677e(a)(2)(B) applies here. For that provision to apply, the record must support a finding that Bosun “fail[ed] to provide [necessary] information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title.” 19 U.S.C. § 1677e(a)(2)(B). But the record does not contain substantial evidence to support such a finding.

Commerce did not find that Bosun missed a deadline in providing requested information. *Cf. Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1355–56 (Fed. Cir. 2015). Commerce did find that Bosun failed to provide information “in the form and manner requested,” but that finding is not supported by substantial evidence.³ Commerce has not identified any language in its requests to Bosun that specified a particular form or manner of the country-of-origin information Bosun should submit. *See generally* J.A. 732, 1140–41, 2140. Commerce’s initial questionnaire asked that Bosun provide “a chart for reporting the sales quantity and value,” which Bosun provided. J.A. 65, 84–85. Commerce asked in questionnaire Section C that Bosun “prepare a separate computer data file containing each sale made during the [period of review],” which Bosun provided. J.A. 735, 784–91. The 2017 Verification Report addressing Bosun’s information similarly recognized that Bosun provided the pre-selected “sales trace packages” Commerce requested, J.A. 2889, and also provided Microsoft Excel spreadsheets (*i.e.*, a “computer data file,” as requested) that assisted Commerce’s inquiry, J.A. 2890. Although the Trade Court spoke of Commerce having requested “direct” origin information, *DSMC II*, 415 F. Supp. 3d at 1371, Commerce has supplied no evidentiary support for that characterization.

For those reasons, essential requirements for applicability of § 1677e(a)(2)(B) are not met here. It is immaterial, in this circumstance, whether the “subject to subsections (c)(1) and (e) of section 1677m” phrase is met. That phrase merely obliges Commerce to consider excusing deadline or form-or-manner violations in certain situations. It has no application when there is no evidence-supported deadline or form-or-manner violation in the first place, as here.

Commerce found applicable two other triggers for the use of the facts otherwise available under § 1677e(a). It found that “necessary information is not available on the record,” 19 U.S.C. § 1677e(a)(1), and, referring to information requested by Commerce, that Bosun “provide[d] such information but the information cannot be verified,” *id.* § 1677e(a)(2)(D). Substantial evidence supports the finding as to the second and, *a fortiori*, as to the first. During verification Commerce found problems in several of Bosun’s origin identifications; and putting to one side the important question of how much of Bosun’s overall origin information those problems render unreliable, we think it clear that Commerce could reasonably find the problems sufficient

³ Contrary to a contention made by Diamond Sawblades, but not by Commerce, we think that Bosun sufficiently challenged the applicability of § 1677e(a)(2)(B) in the Trade Court when it argued that the information it provided complied with Commerce’s requests.

to deem unreliable at least a portion of Bosun's information, *i.e.*, the portion resorting to the FIFO step for identifying the origin of particular U.S. sales. *See* J.A. 3049, 3061; *see also* *DSMC II*, 415 F. Supp. 3d at 1371. As to those sales, the evidence supports a finding that the information submitted could not be adequately verified and that, as a result, origin information about those sales was missing. Commerce therefore properly found § 1677e(a) to apply in this matter.

2

Having permissibly concluded that there were (limited) bases for applying the command to use “the facts otherwise available” under § 1677e(a), Commerce had to determine, under the “otherwise” language, which facts constituted “other[]” facts that had to be disregarded. Commerce ultimately concluded that it would disregard all of Bosun's origin information. J.A. 3049. The basis on which Commerce did so, however, leaves a significant question about substantial-evidence support, and the answer to that question seems consequential, because the record appears to suggest that there is no sufficient support for disregarding more than 2.5% of the U.S. sales of Bosun's affiliates.

Commerce did not decide that the “otherwise” phrase, without more, itself demands, or should be interpreted to demand, disregard of *all* information of any person whose conduct comes within one of the § 1677e(a) preconditions, even if the only applicable preconditions are § 1677e(a)(1) and (a)(2)(D) and most of the information that person supplied is verified and not otherwise soundly deemed unreliable. Nor did Commerce advance a categorical position of that sort when it relied on § 1677m(d), to which § 1677e(a) refers in its concluding phrase. Subsection 1677m(d) states that, in certain circumstances involving a person's submission attempting to cure an earlier failure to “comply with [an information] request,” if Commerce finds the submission “not satisfactory,” it “may, subject to subsection (e), disregard all or part of the original and subsequent responses.” 19 U.S.C. § 1677m(d). We may assume *arguendo* that the provision applies here. When Commerce invoked the provision, by deeming Bosun's submissions unsatisfactory, it did not say that it was applying § 1677m(d)'s “disregard” clause based on a policy decision to disregard all of the Bosun-supplied origin information no matter how limited the basis was for finding Bosun's information not satisfactory, *i.e.*, even if the reliability-undermining effect of any deficiency was cabined.

Commerce likewise asserted no such position based on § 1677m(e). That provision, which does not directly apply here because there is no

supported finding under § 1677e(a)(2)(B), is only of indirect relevance to § 1677e(a) in this matter based on § 1677e(a)'s statement that Commerce's use of the facts otherwise available is "subject to section 1677m(d)"—which itself authorizes disregard of information only "subject to [§ 1677m(e)]." Section 1677m(e) on its face is only a requirement that Commerce sometimes use party-supplied information that, in the absence of the requirement, Commerce could or must disregard; its language is not a directive to expand the amount of party-supplied information Commerce must disregard. Regardless, Commerce did not, under this clause, adopt a position that it would disregard all reliable information submitted by a person that includes some unverifiable information within § 1677e(a)(2)(D), whenever the person did not act to the best of its ability in keeping records.

Such rationales, had Commerce adopted them, would raise serious questions in a case like this one, where only § 1677e(a)(1) and (a)(2)(D) undergird application of § 1677e(a), about conformity to the statutory policies that must guide any agency's exercise of discretion. *See, e.g., Judulang v. Holder*, 565 U.S. 42, 55 (2011) (discussing "may" authority in 8 U.S.C. § 1182(c) (1994)). We have explained that "[a]n overriding purpose of Commerce's administration of antidumping laws is to calculate dumping margins as accurately as possible." *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1379 (Fed. Cir. 2013) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)); *see also Mid Continent Steel*, 941 F.3d at 542. More particularly, we have often focused, when applying § 1677e(a), on the subsection's role as a command to Commerce "to fill a gap in the record" when information is missing or compromised. *Zhejiang DunAn Hetian Metal Co., Ltd. v. United States*, 652 F.3d 1333, 1348 (Fed. Cir. 2011); *see also Nippon Steel*, 337 F.3d at 1381. To the extent that information supplied is reliable, *i.e.*, not in fact tainted by its supplier's conduct, "gap" seems an inapt characterization. And the authoritative Statement of Administrative Action, *see* 19 U.S.C. § 3512(d), states that subsection 1677e(a) pertains to situations "where requested information is missing from the record or cannot be used because, for example, it has not been provided, it was provided late, or Commerce could not verify the information," and when needed information is missing, Commerce "must make [its] determinations based on all evidence of record, weighing the record evidence to determine that which is most probative of the issue under consideration," H.R. Doc. No. 103-316, vol. 1, at 869 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4179. That explanation, on its own, suggests an information-specific consideration of probativeness rather

than any blanket disregard of all information supplied by a person whenever some of the information supplied by that person is unreliable.⁴

Notably, this is not a case involving withholding of information, failure to meet timing, form, or manner requirements, or significant impeding of a proceeding, under § 1677e(a)(2)(A), (B), and (C). Such situations implicate a policy of cooperation with Commerce that is evident on the face of those statutory provisions, as it is evident on the face of § 1677e(b). The relevance of such a policy is not as facially evident at the § 1677e(a) stage where, as here, applying § 1677e(a) involves only missing or unverifiable information, under § 1677e(a)(1) and (a)(2)(D). We need not go further than note the facial difference between these and the other preconditions for application of § 1677e(a). In particular, we do not pursue a full statutory analysis or, therefore, conclude that Commerce is statutorily precluded from doing more than filling in gaps in reliable information when applying § 1677e(a) even when the only preconditions are § 1677e(a)(1) and (a)(2)(D).

We need not confront questions raised about a blanket policy of that sort because Commerce did not announce (or therefore explain) such a policy. Instead, Commerce justified its disregard of all of Bosun's information based on its determination that the defects in Bosun's origin-identifying methodology left Commerce with "no reliable information on the country of origin of Bosun's sales." J.A. 3049. That premise asserts a reliability problem with all the Bosun information. We assess Commerce's decision to disregard all of Bosun's information on the basis Commerce gave for that decision. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

We conclude that Commerce has not satisfactorily explained why substantial evidence supports its determination of unreliability of all of Bosun's origin information. Commerce has not explained why, as a general matter, records other than point-of-sale records are categorically less reliable than point-of-sale records (both of which may require verification)—or, therefore, why the entirety of Bosun's three-step origin-identification process is "not satisfactory" just because it

⁴ See also *Shandong Rongxin Imp. & Exp. Co. v. United States*, 355 F. Supp. 3d 1365, 1370 (Ct. Int'l Trade 2019) ("This subsection thus gives Commerce a way to fill informational gaps in the administrative record."); *Xiping Opeck Food Co. v. United States*, 34 F. Supp. 3d 1331, 1347 (Ct. Int'l Trade 2014) ("Commerce shall fill in the gaps with 'facts otherwise available' if any respondent significantly impedes the Department's ability to conduct a proceeding." (citing *Nippon Steel*, 337 F.3d at 1381)); *Dorbest Ltd. v. United States*, 462 F. Supp. 2d 1262, 1318 (Ct. Int'l Trade 2006) ("Section 1677e(a) requires that there be a gap in the record of verifiable information due to a party's failure to supply necessary or reliable information in response to an information request from Commerce.")

does not involve point-of-sale records. Nor has Commerce identified a methodological problem with the first two steps of Bosun's identification process. *See* J.A. 2891–92. And neither in its Remand Redetermination decision, *e.g.*, J.A. 3049, 3060, nor in its brief in this court, has Commerce provided a comprehensible explanation for why, if so, the errors found in Bosun's submissions have a reliability-undermining effect outside the category of sales to unaffiliated U.S. purchases whose origin Bosun identified through the FIFO inference. The language used by Commerce, especially at J.A. 3049 & n.37, can easily be understood as limited to the FIFO-inference step.

This deficiency in Commerce's explanation appears to matter considerably to the outcome of this proceeding. Bosun has argued that any absence of or taint on origin information lies entirely within the category of sales for which Bosun relied on the FIFO inference—a category that Bosun asserts, without apparent contradiction, involves less than 2.5% of the sales during the period of review. Bosun Opening Br. at 38–39. The government's evidentiary argument for a broader gap or taint is distinctly limited. In its Remand Redetermination, Commerce noted some problems identified during verification, seemingly limited to the FIFO-inference step, J.A. 3049, and it stated, in a footnote, “that Bosun's errors in reporting physical characteristics ‘affected three out of sixteen transactions identified at verification, and related to multiple product characteristics,’” *id.* at 3049 n.37 (quoting *DSMC I*, 2018 WL 5281941, at *8). Whether that statement even refers to an effect beyond the FIFO-inference step is not apparent; still less clear is an evidentiary basis for a finding to that effect.⁵ The text of the paragraph in which the footnote appears suggests that any taint is confined to the FIFO-inference category of sales. *See id.* at 3049 (“For this reason, we now find that, based on our verification process, Bosun's supplemental responses explaining the FIFO methodology were not satisfactory, because Bosun could have maintained adequate country of origin information for its products in the first place.”).

We are not persuaded, on the briefing and other materials presented to us, that there is a supported basis for finding the Bosun-supplied information unreliable outside the category of sales for which origin was identified using only the FIFO-inference step (rather than the two earlier steps). But we also are not confident that there is no such basis. We think that a remand is advisable for the

⁵ For the control numbers incorrectly reported in two sales traces, Commerce's 2017 Verification Report credits Bosun's explanation that “because this control number is unique to a particular product code, these errors to the physical characteristics and the control number should not affect the calculation of the margin for Bosun.” J.A. 2889–90.

parties to address this focused issue, which may have substantial consequences for the bottom-line result of the proceeding.

3

Neither Commerce nor the Trade Court misinterpreted our holdings in *Nippon Steel* or *Peer Bearing* regarding the “best of its ability” standard of § 1677e(b). Before applying that standard, however, the appropriate threshold determination under § 1677e(a) requires that Commerce determine what are “the facts otherwise available.” It is only for “selecting from among the facts otherwise available,” as properly determined under § 1677e(a), that § 1677e(b) authorizes Commerce to use an adverse inference. 19 U.S.C. § 1677e(b); see *Zhejiang DunAn*, 652 F.3d at 1346 (“As these two subsections make clear, Commerce first must determine that it is proper to use facts otherwise available before it may apply an adverse inference.”).

Nor did Commerce or the Trade Court misinterpret the governing precedent that, on the facts that properly come within § 1677e(a) and hence § 1677e(b), the “inference” that Commerce “may use” in “selecting from among the facts otherwise available” must “be a reasonably accurate estimate of the respondent’s actual rate, albeit with some built-in increase intended as a deterrent to non-compliance.” *F.Lii de Cecco di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (“[T]he purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins.”); see also *Essar Steel Ltd. v. United States*, 678 F.3d 1268, 1276 (Fed. Cir. 2012); *Gallant Ocean (Thailand) Co. v. United States*, 602 F.3d 1319, 1324 (Fed. Cir. 2010). If, on remand, it is determined that, as currently appears, there is no basis for Commerce to disregard under § 1677e(a) the Bosun-supplied origin information for the sales to unaffiliated U.S. customers during the period of review outside the category of sales analyzed via the FIFO methodology, a redetermination of how § 1677e(b) applies to this matter will be needed.

III

For the foregoing reasons, we affirm in part, reverse in part, and vacate in part, and we remand for further proceedings in accordance with this opinion.

The parties shall bear their own costs.

**AFFIRMED IN PART, REVERSED IN PART,
VACATED IN PART, AND REMANDED**

U.S. Court of International Trade

Slip Op. 21–08

PRIMESOURCE BUILDING PRODUCTS, INC., Plaintiff, v. UNITED STATES, et al., Defendants.

Before: Timothy C. Stanceu, Chief Judge
Jennifer Choe-Groves, Judge
M. Miller Baker, Judge
Court No. 20–00032

[Granting defendants’ motion to dismiss plaintiff’s amended complaint as it pertains to all claims therein except the claim stated as Count 2; denying the motion to dismiss as to the claim in Count 2 but also denying plaintiff’s motion for summary judgment as to that remaining claim. In a separate opinion, Judge Baker concurs in the dismissal of Counts 1, 3, 4, and 5 and dissents from the denial of defendants’ motion to dismiss Count 2.]

Dated: January 27, 2021

Jeffrey S. Grimson, Mowry & Grimson, PLLC, of Washington, D.C., for plaintiff. With him on the brief were *Kristin H. Mowry*, *Jill A. Cramer*, *Sarah M. Wyss*, *James C. Beaty*, *Bryan P. Cenko*, and *Wenhui Ji*.

Jeanne E. Davidson, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendants. With her on the brief were *Tara K. Hogan*, Assistant Director, *Stephen C. Tosini*, Senior Trial Counsel, and *Meen Geu Oh* and *Kyle S. Beckrich*, Trial Attorneys.

OPINION AND ORDER

Stanceu, Chief Judge:

Plaintiff PrimeSource Building Products, Inc. (“PrimeSource”), a U.S. importer of steel nails, challenges on various grounds a proclamation issued by the President of the United States (“Proclamation 9980”) that imposed 25% tariffs on, *inter alia*, various imported products made of steel (identified in the proclamation as “derivatives” of steel products), including steel nails. Arguing that plaintiff’s complaint does not state a claim on which relief can be granted, defendants move to dismiss this action according to USCIT Rule 12(b)(6). Plaintiff opposes defendants’ motion to dismiss and moves for summary judgment, urging us to declare Proclamation 9980 invalid and order the refund of any duties that previously may have been collected on its affected entries. In moving to dismiss and in their response to PrimeSource’s summary judgment motion, defendants argue that the President’s action was within the authority delegated by Congress and must be upheld.

We grant defendants' motion to dismiss as to four of plaintiff's claims, which are set forth as Counts 1, 3, 4, and 5 of the Amended Complaint, and deny it as to Count 2, in which plaintiff claims that Proclamation 9980 is invalid because it was issued after the authority delegated to the President by the governing statute had expired. Because plaintiff has not shown "that there is no genuine dispute as to any material fact," USCIT R. 56(a), we deny plaintiff's summary judgment motion as to the remaining claim.

I. BACKGROUND

A. The Challenged Presidential Proclamation

On January 24, 2020, President Trump issued Proclamation 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States*, 85 Fed. Reg. 5,281 (Exec. Office of the President Jan. 29, 2020) ("*Proclamation 9980*"). Proclamation 9980 imposed a duty of 25% *ad valorem* on various imported products made of aluminum and of steel, including steel nails and other steel fasteners as well as "bumper stampings of steel" for motor vehicles and "body stampings of steel" for agricultural tractors. *Id.* at 5,291, 5,293.

The 25% duties imposed by Proclamation 9980 went into effect on February 8, 2020. *Id.* at 5,290. As authority for the President's action, Proclamation 9980 cited Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 ("Section 232"),¹ and certain previous proclamations of the President that also invoked Section 232, including Proclamations 9704, *Adjusting Imports of Aluminum Into the United States*, 83 Fed. Reg. 11,619 (Exec. Office of the President Mar. 15, 2018) ("*Proclamation 9704*"), and 9705, *Adjusting Imports of Steel Into the United States*, 83 Fed. Reg. 11,625 (Exec. Office of the President Mar. 15, 2018) ("*Proclamation 9705*"). *Proclamation 9980* ¶¶ 9–10, 85 Fed. Reg. at 5,283.

Proclamation 9705 imposed 25% duties on various steel products in basic and semi-finished form but did not impose duties on the products that were the subject of Proclamation 9980,²

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

² The products affected by Proclamation 9705 are certain iron and steel products classified within chapters 72 and 73 of the Harmonized Tariff Schedule of the United States ("HTSUS"), as follows:

(1) *Flat-rolled products* provided for in HTSUS headings 7208 (of iron or nonalloy steel, 600 mm or more in width, hot-rolled, not clad, plated or coated), 7209 (of iron or nonalloy steel, 600 mm or more in width, cold-rolled, not clad, plated or coated), 7210 (of iron or nonalloy steel, 600 mm or more in width, clad, plated or coated), 7211 (of iron or non-alloy steel, less than 600 mm in width, not clad, plated or coated), 7212 (of iron or non-alloy steel, less than 600 mm in width, clad, plated or coated), 7225 (of alloy steel other than stainless, 600 mm or more in width) or 7226 (of alloy steel other than stainless, less than 600 mm in width);

which Proclamation 9980 described as “Derivatives of Steel Products.”³

- (2) *Bars and rods* provided for in HTSUS headings 7213 (hot-rolled, in irregularly wound coils, of iron or nonalloy steel), 7214 (other, of iron or nonalloy steel, not further worked than forged, hot-rolled, hot-drawn or hot-extruded, but including those twisted after rolling), 7215 (other, of iron or nonalloy steel), 7227 (hot-rolled, in irregularly wound coils, of alloy steel other than stainless), or 7228 (other bars and rods of alloy steel other than stainless; angles, shapes and sections, of alloy steel other than stainless; hollow drill bars and rods, of alloy or nonalloy steel); *angles, shapes and sections* of HTSUS heading 7216 (angles, shapes and sections of iron or nonalloy steel) except products not further worked than cold-formed or cold-finished, of subheadings 7216.61.00, 7216.69.00, or 7216.91.00; *wire* provided for in HTSUS headings 7217 (wire of iron or nonalloy steel) or 7229 (wire of alloy steel other than stainless); *sheet piling* provided for in HTSUS subheading 7301.10.00; *rails* provided for in HTSUS subheading 7302.10 (rail and tramway track construction material of iron or steel: rails); *fish-plates and sole plates* provided for in HTSUS subheading 7302.40.00 (rail and tramway track construction material of iron or steel: fish plates and sole plates); and other products of iron or steel provided for in HTSUS subheading 7302.90.00 (other railway or tramway track construction material of iron or steel, other than switch blades, crossing frogs, point rods and other crossing pieces, fish plates and sole plates);
- (3) *Tubes, pipes, and hollow profiles* provided for in HTSUS headings 7304 (seamless, of iron (other than cast iron) or steel), or 7306 (other (for example, open seamed or welded, riveted or similarly closed), of iron or steel); *tubes and pipes* provided for in HTSUS heading 7305 (other tubes and pipes (for example, welded, riveted or similarly closed), having circular cross sections, the external diameter of which exceeds 406.4 mm, of iron or steel);
- (4) *Ingots, other primary forms and semi-finished products* provided for in HTSUS heading 7206 (iron and nonalloy steel in ingots or other primary forms (excluding certain iron in lumps, pellets or similar forms, of heading 7203)), 7207 (semi-finished products of iron or nonalloy steel) or 7224 (alloy steel other than stainless in ingots or other primary forms; semi-finished products of alloy steel other than stainless); and
- (5) *Products of stainless steel* provided for in HTSUS heading 7218 (stainless steel in ingots or other primary forms; semi-finished products of stainless steel), 7219 (flat-rolled products of stainless steel, 600 mm or more in width), 7220 (flat-rolled products of stainless steel, less than 600 mm in width), 7221 (bars and rods, hot-rolled, in irregularly wound coils, of stainless steel), 7222 (other bars and rods of stainless steel; angles, shapes and sections of stainless steel), or 7223 (wire of stainless steel).

Proclamation 9705, *Adjusting Imports of Steel Into the United States*, Annex (“To Modify Chapter 99 of the Harmonized Tariff Schedule of the United States”), 83 Fed. Reg. 11,625, 11,629 (Exec. Office of the President Mar. 15, 2018).

³ Proclamation 9980 imposed 25% tariffs on four categories of products that it described as “Derivatives of Steel Articles.” The four categories of products are as follows:

- (1) *Threaded steel fasteners suitable for use in powder-actuated handtools*, classified in subheading 7317.00.30, HTSUS (nails, tacks (other than thumb tacks), drawing pins, corrugated nails, staples (other than staples in strips of HTSUS heading 8305) and similar articles, of iron or steel, whether or not with heads of other material, but excluding such articles with heads of copper);
- (2) *Certain other steel fasteners: nails, tacks* (other than thumb tacks), *drawing pins, corrugated nails, staples* (other than staples in strips of HTSUS heading 8305) and *similar articles*, of iron or steel, of one piece construction, made of round wire (other than certain collated roofing nails), classified in HTSUS statistical subheadings 7317.00.5503 (collated, assembled in a wire coil, not galvanized), -5505 (collated, assembled in a plastic strip, galvanized), -5507 (collated, assembled in a plastic strip, not galvanized), -5560 (not collated, coated, plated, or painted), -5580 (vinyl, resin or cement coated), and other steel fasteners of one-piece construction (other

B. Proceedings Before the Court of International Trade

Plaintiff commenced this action on February 4, 2020, naming as defendants the United States, the U.S. Department of Commerce, U.S. Customs and Border Protection, and various officers of the United States in their official capacities (the President of the United States, the Secretary of Commerce, and the Acting Commissioner of Customs and Border Protection). Summons, ECF No. 1; Compl., ECF Nos. 8 (conf.), 9 (public).

Plaintiff amended its complaint on February 11, 2020. First Am. Compl., ECF Nos. 21 (conf.), 22 (public) (“Am. Compl.”). Defendants filed their Rule 12(b)(6) motion to dismiss the amended complaint on March 20, 2020. Defs.’ Mot. to Dismiss for Failure to State a Claim, ECF No. 60 (“Defs.’ Mot.”). On April 14, 2020, plaintiff opposed defendants’ motion to dismiss and moved for summary judgment. Rule 56 Mot. for Summ. J., Pl. PrimeSource Bldg. Prods. Inc.’s Mem. of Points and Authorities in Supp. of Mot. for Summ. J. and Resp. to Defs.’ Mot. to Dismiss for Failure to State a Claim, ECF No. 73–1 (“Pl.’s Br.”). Defendants replied in support of their motion to dismiss and responded to plaintiff’s summary judgment motion on May 12, 2020. Defs.’ Reply in Supp. of their Mot. to Dismiss and Resp. to Pl.’s Mot. for Summ. J., ECF No. 78 (“Defs.’ Reply”). Plaintiff replied in support of its summary judgment motion on June 9, 2020. Pl. PrimeSource Bldg. Prods. Inc.’s Reply Br. in Supp. of its Mot. for Summ. J., ECF No. 91 (“Pl.’s Reply”).

II. DISCUSSION

A. Subject Matter Jurisdiction

We exercise subject matter jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(i)(2), (i)(4). Paragraph (i)(2) of § 1581 grants this Court jurisdiction of a civil action “that arises out of any law of the United States providing for . . . tariffs, duties, fees, or other taxes on the importation of merchandise

than thumb tacks), not made of round wire, and other than cut, classified in HTSUS statistical subheading 7317.00.6560;

- (3) *Bumper stampings of steel for motor vehicles* (classified in HTSUS subheading 8708.10.30 (parts and accessories of the motor vehicles of HTSUS headings 8701 to 8705: bumpers); and
- (4) *Body stampings of steel for tractors suitable for agricultural use*, classified in HTSUS subheading 8708.29.21 (parts and accessories of the motor vehicles of headings 8701 to 8705: other parts and accessories of bodies (including cabs): other: body stampings: for tractors suitable for agricultural use).

Proclamation 9980, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States*, Annex II (“Derivatives of Steel Articles”), 85 Fed. Reg. 5,281, 5,290 (Exec. Office of the President Jan. 29, 2020).

for reasons other than the raising of revenue.” *Id.* § 1581(i)(2). Paragraph (i)(4) grants this Court jurisdiction of a civil action arising “out of any law of the United States providing for . . . administration and enforcement with respect to the matters referred to in paragraphs (1)–(3) of this subsection.” *Id.* § 1581(i)(4).

B. Standards of Review

A court reviewing a challenge to Presidential action taken pursuant to authority delegated by statute does so according to a standard of review that is highly deferential to the President. “For a court to interpose, there has to be a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.” *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985). Review of Proclamation 9980 according to the Administrative Procedure Act, 5 U.S.C. § 706 (“APA”), is not available because the President is not an agency for purposes of the APA. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992). In an action such as this one, where a statute commits a determination to the President’s discretion, a reviewing court lacks authority to review the President’s factual determinations. *United States v. George S. Bush & Co.*, 310 U.S. 371, 379–80 (1940); *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1349 (Fed. Cir. 2018) (“In particular, courts have repeatedly confirmed that, where the statute authorizes a Presidential ‘determination,’ the courts have no authority to look behind that determination to see if it is supported by the record.” (citing *George S. Bush & Co.*, 310 U.S. at 379)); *Maple Leaf Fish Co.*, 762 F.2d at 89 (“The President’s findings of fact and the motivations for his action are not subject to review.” (citing *Florsheim Shoe Co. v. United States*, 744 F.2d 787, 795 (Fed. Cir. 1984))).

To avoid dismissal for failure to state a claim on which relief can be granted, a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” USCIT R. 8(a)(2). A court will grant a motion to dismiss if the complaint fails to allege “enough facts to state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

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

C. Defendants' Motion to Dismiss

Plaintiff raises five claims in its complaint. Am. Compl. In its first claim (“Count 1”), *id.* ¶¶ 62–69, PrimeSource alleges that the Secretary of Commerce violated the Commerce Department’s regulations, 15 C.F.R. § 705, and the Administrative Procedure Act in various ways when providing the “assessments” on which the President based Proclamation 9980. PrimeSource alleges, *inter alia*, that the Secretary failed to initiate an investigation, failed to notify the Secretary of Defense of an initiation of an investigation, failed to publish an Executive Summary in the Federal Register, and failed to provide for public hearings, as required by its regulation, *id.* ¶¶ 66–67, and violated the APA when he “failed to provide interested parties with sufficient notice and an opportunity to comment” on the imposition of the duties on derivatives, *id.* ¶ 68, and when he failed to provide a reasoned explanation for its assessments, *id.* ¶ 69.

PrimeSource’s second claim (“Count 2”) is that Proclamation 9980 was issued in violation of the time limits specified in Section 232. *Id.* ¶¶ 70–73. Specifically, plaintiff alleges: (1) noncompliance with Section 232(c)(1)(A), 19 U.S.C. § 1862(c)(1)(A), which directs the President to make a determination on a report submitted by the Commerce Secretary under 19 U.S.C. § 1862(b)(3)(A) within 90 days of receiving such report, and (2) noncompliance with 19 U.S.C. § 1862(c)(1)(B), which directs the President to implement any determination the President makes to adjust tariffs on an article and its derivatives within 15 days after the President makes such a determination. *Id.* Maintaining that the relevant report issued under § 1862(b)(3)(A) was the report the President received on January 11, 2018, which resulted in Proclamation 9705, a Presidential action that imposed 25% duties on steel products other than the derivatives affected by Proclamation 9980, PrimeSource alleges that “[i]n issuing Proclamation 9980 a full 653 days since the 90-day window closed for the President to determine what action must be taken and 638 days after the 15-day window to implement such action, the President failed to follow the mandated procedures set forth in Section 232.” *Id.* ¶ 73.

In Count 3, *id.* ¶¶ 74–78, plaintiff asserts that it has a property interest in its imports of steel derivative products, *id.* ¶ 76, and that “[b]y failing to provide parties with notice and an opportunity to comment before issuing Proclamation 9980 imposing Section 232 tariffs on steel and aluminum derivative products, the President violated PrimeSource’s due process rights protected under the Fifth Amendment,” *id.* ¶ 78.

Count 4, *id.* ¶¶ 79–80, alleges that “Section 232 is unconstitutional and not in accordance with the law because it represents an over-

delegation by Congress to the President of its legislative powers by failing to set forth an intelligible principle for the President to follow when implementing Section 232,” *id.* ¶ 80.

Finally, Count 5, *id.* ¶¶ 81–82, asserts that “[t]he Secretary of Commerce violated Section 232 by making ‘assessments’, ‘determinations’ and providing other ‘information’ to the President without following any of the statutory procedures for new action and by doing so outside the statutory time periods applicable to the 2017–18 investigation conducted by the Secretary of Commerce that resulted in Proclamation 9705,” *id.* ¶ 82.

1. Plaintiff’s First, Third, Fourth, and Fifth Claims Must Be Dismissed

Plaintiff’s first claim (Count 1), in challenging the “assessments” of the Secretary of Commerce addressing steel and aluminum derivatives, alleges various violations of the Commerce Department’s regulations, 15 C.F.R. § 705, and the APA. The assessments by the Commerce Secretary merely provided facts and recommendations for potential action by the President rather than impose duties under the authority of Section 232. These actions had no direct or independent effect on PrimeSource. They were, therefore, not final actions PrimeSource could challenge in a cause of action brought under the APA. *See* 5 U.S.C. § 704 (“final agency action for which there is no other adequate remedy in a court are subject to judicial review”); *Motion Sys. Corp. v. Bush*, 437 F.3d 1356, 1362 (Fed. Cir. 2006) (*en banc*) (citing *Franklin*, 505 U.S. at 798); *DRG Funding Corp. v. Sec’y of HUD*, 76 F.3d 1212, 1214 (D.C. Cir. 1996) (citing 5 U.S.C. § 704).

PrimeSource argues that the Commerce Secretary’s actions should be deemed “final,” and therefore judicially reviewable, because the Secretary’s actions “represent the consummation of the Secretary’s decision-making process that have direct legal consequences on importers of derivative steel products like PrimeSource, and, therefore, are reviewable under the APA.” Pl.’s Br. 26 (citing *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (agency action held final where it marks consummation of agency’s decision-making process and is one that either determines rights or obligations or is one from which legal consequences flow)). Here, however, the legal consequence, which is the imposition of tariffs on imported steel “derivatives,” resulted from an exercise of the President’s broad discretion, not from the actions of the Commerce Secretary.

For its “finality” argument, PrimeSource relies, erroneously, on *Corus Group PLC v. U.S. Int’l Trade Comm’n*, 352 F.3d 1351 (Fed. Cir. 2003). Pl.’s Br. 28–32. *Corus Group* considered whether a “serious injury” determination of the U.S. International Trade Commission

(“ITC”) in an “escape clause” investigation involving the U.S. steel industry under Section 201 of the Trade Act of 1974 could be challenged in this Court as a final agency action. 352 F.3d at 1358. Under the statutory scheme, an affirmative determination of serious injury to a U.S. domestic industry is a statutory prerequisite to the exercise of the President’s discretion to impose temporary tariff protection. *Id.* at 1359. If the ITC commissioners were equally divided on the question of serious injury (as occurred in that case, in which the vote on injury was a three-to-three tie), the President could consider the decision agreed upon by either group of commissioners as the determination of the ITC. The President considered the decision of the three commissioners voting affirmatively to be the ITC determination and, on that basis, imposed safeguard duties on certain steel imports. In the situation presented, and under the unique statutory scheme, the ITC vote, which itself was challenged in the litigation, had legal consequence and therefore could be contested in the Court of International Trade. *Id.* The Court of Appeals for the Federal Circuit (the “Court of Appeals”) distinguished *Corus Group in Michael Simon Design, Inc. v. United States*, 609 F.3d 1335 (Fed. Cir. 2010), a case more closely analogous to this case. In *Michael Simon*, the Court of Appeals held that ITC recommendations to the President for modifications to the Harmonized Tariff Schedule of the United States could not be subjected to judicial challenge because, lacking any binding legal effect, they did not constitute “final agency action” within the meaning of 5 U.S.C. § 704. 609 F.3d at 1339–40.

In further support of the claim in Count 1, PrimeSource argues that the Commerce Secretary’s assessments regarding steel and aluminum derivatives are the product of “rulemaking” that, under the APA, 5 U.S.C. § 553(b)–(c), required the Secretary to provide the public notice and an opportunity for comment. Pl.’s Br. 34–38. This argument lacks merit. The Secretary’s assessments did not themselves impose the tariffs on derivatives or implement any other measure. They did not “implement, interpret, or prescribe law or policy” within the meaning of the APA, 5 U.S.C. § 551(4).

Because the claim stated as Count 1 does not assert a valid cause of action, it must be dismissed.

Plaintiff’s third claim, alleging a due process violation stemming from the President’s failure to provide parties with notice and the opportunity to comment before issuing Proclamation 9980, also must be dismissed. The Due Process Clause of the Fifth Amendment did not require the President, in order to avoid a deprivation of due process, to provide notice or the opportunity to comment before imposing duties on imported merchandise under delegated legislative

authority, and neither Section 232 nor any other statute required such a procedure. Moreover, PrimeSource fails to identify any authority for its theory that, on the facts it has pled, it had a protected property interest in maintaining the tariff treatment applicable to its imported merchandise that existed prior to Proclamation 9980. Plaintiff relies on *NEC Corp. v. United States*, 151 F.3d 1361 (Fed. Cir. 1998) in support of that theory, Pl.’s Br. 41, but *NEC Corp.* is not on point, having arisen from an action brought (unsuccessfully) to enjoin the conducting of an antidumping duty investigation based on alleged “prejudgment” on the part of the Commerce Department. PrimeSource also relies upon *Schaeffler Grp. USA, Inc. v. United States*, 786 F.3d 1354 (Fed. Cir. 2015), Pl.’s Br. 41, but that case also is inapposite. Rejecting a claim that the petition support requirement of the Continued Dumping and Subsidy Offset Act of 2000 (the “CDSOA”) was impermissibly retroactive according to the Due Process Clause, the Court of Appeals “assume[d] without deciding, for purposes of our analysis, that Schaeffler had a protected property interest implicating the Due Process Clause.” 786 F.3d at 1361. The property interest claimed by plaintiff Schaeffler Group USA, Inc. was not pre-existing tariff treatment but a claimed right that arose “because, when it checked the box to oppose a petition, it believed that it would not be subjecting itself to competitive harm through the aggrandizement of its competitors.” *Id.* Reasoning that the CDSOA was not impermissibly retroactive, the appellate court chose not to reach the question of whether there was a vested property right “because we find that Congress had a rational basis for the retroactive effect of the petition support requirement.” *Id.*

PrimeSource’s fourth claim, that Section 232 is impermissible under the U.S. Constitution as an impermissibly broad delegation of legislative authority from Congress to the Executive Branch, is foreclosed by the decision of the U.S. Supreme Court in *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976). Therefore, it too must be dismissed.

The fifth count in PrimeSource’s complaint contains only one substantive paragraph, as follows:

The Secretary of Commerce violated Section 232 by making “assessments”, “determinations” and providing other “information” to the President without following any of the statutory procedures for new action and by doing so outside the statutory time periods applicable to the 2017–18 investigation conducted by the Secretary of Commerce that resulted in Proclamation 9705.

Am. Compl. ¶ 82. This claim, which is similar to the claim in Count 1 but grounded in alleged violations of Section 232 instead of alleged violations of the Commerce Department regulations or the APA, also must be dismissed. Section 232 does not provide for judicial review of any action taken thereunder. Accordingly, for PrimeSource’s fifth count to be cognizable, judicial review must exist under the APA. But as with Count 1, this claim cannot be brought under the APA, which “limits nonstatutory judicial review to ‘final’ agency actions.” *DRG Funding Corp.*, 76 F.3d at 1214 (citing 5 U.S.C. § 704); see *Motion Sys. Corp.*, 437 F.3d at 1362.

We address below plaintiff’s remaining claim, which is set forth as Count 2.

2. Defendants’ Motion to Dismiss the Claim in Count 2 Must Be Denied

Section 232, 19 U.S.C. § 1862, grants the President broad authority to “adjust the imports of the article and its derivatives” that threaten to impair the national security, *id.* § 1862(c)(1)(A). Congress conditioned the delegation of this authority upon the President’s receipt of a report by the Secretary of Commerce on the findings of an investigation “to determine the effects on the national security of imports” of an article that is the subject of a request for such an investigation by “the head of any department or agency” or that is the subject of an investigation initiated upon the Commerce Secretary’s “own motion.” *Id.* § 1862(b)(1)(A). In conducting the investigation, the Commerce Secretary must consult with the Secretary of Defense “regarding the methodological and policy questions raised” in the investigation and seek “information and advice from, and consult with, appropriate officers of the United States.” *Id.* § 1862(b)(2)(A)(i), (ii). The statute further provides that “if it is appropriate and after reasonable notice,” the Commerce Secretary shall “hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation.” *Id.* § 1862(b)(2)(A)(iii). The Secretary of Commerce is directed to submit the report of the investigation to the President within 270 days after the investigation is initiated. *Id.* § 1862(b)(3)(A). The statute lists numerous non-exclusive factors the Commerce Secretary and the President are to consider in making their determinations. *Id.* § 1862(d).

Plaintiff’s claim in Count 2 is that Proclamation 9980 is invalid as untimely because the President’s authority to adjust imports of a new set of products made of steel (i.e., the “derivatives”) had expired.⁴

⁴ Although plaintiff has named the President (among other officers of the United States) in his official capacity as a defendant in this action, we do not construe the claim in Count 2

PrimeSource argues that Section 232 expressly limited, according to the time periods set forth in 19 U.S.C. § 1862(c)(1), any action the President could take to adjust imports of such products, including steel nails. Under PrimeSource’s interpretation of Section 232, the action effected by Proclamation 9980 could have been valid only had it been implemented within 105 days (i.e., the 90 days allowed by § 1862(c)(1)(A)⁵ plus the 15 days allowed by § 1862(c)(1)(B)⁶) of the receipt of a report of the Commerce Secretary submitted under § 1862(b)(3)(A). *See* Am. Compl. ¶¶ 70–73. According to PrimeSource, Proclamation 9980 was issued 638 days after the transmittal of that report to the President and is, therefore, null and void. *Id.* ¶ 73.

Plaintiff’s Count 2 claim rests upon a “plain meaning” interpretation of Section 232(c)(1), 19 U.S.C. § 1862(c)(1). This provision, in subparagraph (A), requires the President to make certain determinations within 90 days of receiving the Commerce Secretary’s report under Section 232(b)(3)(A). In subparagraph (B), it directs the President, if determining to take action “to adjust imports of an article and its derivatives,” to implement that action within 15 days of making that determination.

The Secretary of Commerce, following an investigation initiated under Section 232, submitted a report to the President under 19 U.S.C. § 1862(b)(3)(A) (the “Steel Report”)⁷ on January 11, 2018. *Defs.’ Mot.* 5–6; *Pl.’s Br.* 3–4; *see Proclamation 9980* ¶ 1, 85 Fed. Reg. at 5,281. That report was the basis for Proclamation 9705. Proclamation 9980 states that the President, based on certain “assessments” of the Secretary of Commerce, concluded that it was “necessary and

as a claim against the President. The claim is directed against Proclamation 9980 itself, not the President, against whom no remedy is sought.

⁵ The provision setting forth the 90-day time period reads as follows:

Within 90 days after receiving a report submitted under subsection (b)(3)(A) of this section [19 U.S.C. § 1862(b)(3)(A)] in which the Secretary [of Commerce] finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the President shall—(i) determine whether the President concurs with the finding of the Secretary, and (ii) if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.

19 U.S.C. § 1862(c)(1)(A).

⁶ The provision setting forth the 15-day time period reads as follows:

If the President determines under subparagraph (A) [19 U.S.C. § 1862(c)(1)(A)] to take action to adjust imports of an article and its derivatives, the President shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A).

19 U.S.C. § 1862(c)(1)(B).

⁷ The Secretary’s Report was published in the Federal Register earlier this year. *Publication of a Report on the Effect of Imports of Steel on the National Security: An Investigation Conducted Under Section 232 of the Trade Expansion Act of 1962, as Amended*, 85 Fed. Reg. 40,202 (Dep’t of Commerce July 6, 2020). We take judicial notice of this published document.

appropriate in light of our national security interests to adjust the tariffs imposed by previous proclamations to apply to the derivatives of aluminum articles and steel articles described in Annex I and Annex II to this proclamation.” *Proclamation 9980* ¶ 9, 85 Fed. Reg. at 5,283. While mentioning these “assessments” of the Commerce Secretary, Proclamation 9980 does not state that the President was taking action pursuant to any report the Commerce Secretary issued under Section 232(b)(3)(A), 19 U.S.C. § 1862(b)(3)(A), subsequent to the January 2018 Steel Report.

Defendants do not dispute that the 2018 Steel Report is, for purposes of Section 232(c), 19 U.S.C. § 1862(c), the report issued according to Section 232(b)(3)(A), 19 U.S.C. § 1862(b)(3)(A), upon which the President based his adjustment to imports of steel derivatives, including steel nails. *See* Defs.’ Mot. 24–29. Instead, they offer a different interpretation of Section 232(c)(1) (19 U.S.C. § 1862(c)(1)) than does plaintiff, arguing that in issuing Proclamation 9980, the President remained free to adjust imports of articles not addressed in Proclamation 9705 that the President designates as “derivatives” of those articles, despite the time limitation of Section 232(c)(1), including, specifically, the 15-day window of § 1862(c)(1)(B). *See id.*

Defendants advance two arguments in support of their statutory interpretation. Their first argument holds that the President complied with the time limits in Section 232(c)(1) when, in 2018, he issued Proclamation 9705 within 105 days of the President’s receipt of the Steel Report. Their theory is that Proclamation 9980, rather than being an “action,” or an implementation, separate from Proclamation 9705, was permissible under Section 232(c)(1) as a “modification” of that earlier action. Def.’s Mot. 25–34. Their second argument is in the alternative. The gist of this second argument is that even if the issuance of Proclamation 9980 was not in compliance with the time limitations of Section 232(c)(1), the court still should sustain Proclamation 9980 because the time limitations are merely “directory” and therefore did not preclude the President from adjusting imports of the products named therein. *Id.* at 34–36.

Defendants’ first argument is, essentially, that Proclamation 9980 was timely according to Section 232(c)(1) because Proclamation 9705, of which Proclamation 9980 was a permissible modification, was timely. Further to this argument, defendants maintain that “section 232 delegates broad authority to the President to make adjustments to actions taken pursuant to the statute.” *Id.* at 25. They direct our attention, specifically, to the words “nature and duration” in Section 232(c)(1)(A)(ii), 19 U.S.C. § 1862(c)(1)(A)(ii), arguing that “[i]f the

Secretary's report recommends that action be taken to protect the national security, and if the President concurs, the President 'must determine the *nature and duration of the action* that, *in the judgment of the President*, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.'" *Id.* at 25 (quoting 19 U.S.C. § 1862(c)(1)(A)(ii)) (emphasis in original). Defendants characterize the terms "nature and duration" as "necessarily flexible and broad." *Id.* They also argue that the word "implement" appearing in Section 232(c)(1)(B), 19 U.S.C § 1862(c)(1)(B), "should not be read with the finality that PrimeSource appears to ascribe to it." *Id.* at 26. They urge that we interpret Section 232(c)(1) to mean that "[t]he statute contemplates continued monitoring and adjustments to section 232(c) actions, as circumstances change." *Id.* While acknowledging that amendments made to Section 232 by the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, Title I, 102 Stat. 1107, Title I, §§ 1501(a), (b)(1) (the "1988 amendments") imposed the time limits in current Section 232(c)(1), they argue that the President's authority to modify actions previously taken predated those amendments, which they view as having preserved, rather than having curtailed, that modification authority. *Id.* at 29-32.

Although defendants would define the issue before us in broad and general terms, we conclude that the precise question is not whether, or to what extent, Section 232 provides general authority for "monitoring and adjustments" of an action previously taken. We conclude, instead, that the question before us is a narrower one: whether the President's having characterized the articles affected by Proclamation 9980 as "derivatives" of the steel products affected by Proclamation 9705 is, by itself, sufficient for us to conclude that Proclamation 9980 was timely according to Section 232(c)(1).⁸ In considering this question, we conclude that Section 232(c)(1) would have empowered the President, upon a timely issuance of Proclamation 9705 in 2018, to include an adjustment to imports of, in addition to the specific articles identified by the Commerce Secretary in the Steel Report, "derivatives" of those articles. Section 232(c) allows the President the discretion to do so regardless of whether derivative products were identified and recommended to him in a report the Secretary submits under Section 232(b)(3)(A). Further, we presume that had the Presi-

⁸ Because Proclamation 9980 imposed tariffs on a new set of articles ("derivatives" of previously affected articles) rather than raise the tariff on an article already the subject of a Presidential action taken under Section 232, this case presents a different factual circumstance than the one this Court addressed in *Transpacific LLC v. United States, et al.*, 43 CIT __, 415 F. Supp. 3d 1267 (2019) and *Transpacific Steel LLC v. United States, et al.*, 44 CIT __, 466 F. Supp. 3d 1246 (2020).

dent done so, he would have acted within his discretion in characterizing the products affected by Proclamation 9980 as derivatives of the articles affected by Proclamation 9705. We note that Section 232 does not confine the President's discretion by defining the term "derivatives," and, in any event, we do not construe plaintiff's claim as contesting this characterization.

Two provisions in Section 232—the only provisions in the statute that mention "derivatives"—bear on the question before us. Section 232(c)(1)(A) directs the President to make two determinations "[w]ithin 90 days after receiving a report submitted under subsection (b)(3)(A) of this section [19 U.S.C. § 1862(b)(3)(A)] in which the Secretary [of Commerce] finds that *an article* is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A) (emphasis added). Subparagraph (i) of Section 232(c)(1)(A) provides that the President must determine whether he concurs with the affirmative finding of the Commerce Secretary in the report submitted under Section 232(b)(3)(A). Subparagraph (ii), the first of the two statutory provisions addressing derivatives, provides that the President, if concurring, "shall . . . determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article *and its derivatives* so that such imports will not threaten to impair the national security." *Id.* § 1862(c)(1)(A)(ii) (emphasis added). Section 232(c)(1)(B), the second of the two statutory provisions mentioning derivatives, directs that, if determining "under subparagraph (A) [19 U.S.C. § 1862(c)(1)(A)] to take action to adjust imports of an article *and its derivatives*, the President shall implement that action by no later than the date that is 15 days after the day on which the President determines to take action under subparagraph (A)." *Id.* § 1862(c)(1)(B) (emphasis added).

A predecessor to the current Section 232, Section 7 of the Trade Agreements Extension Act of 1955,⁹ did not contain the current reference to "derivatives." In pertinent part, Section 7 provided as follows:

In order to further the policy and purpose of this section, whenever the Director of the Office of Defense Mobilization has reason to believe that any article is being imported into the United States in such quantities as to threaten to impair the national

⁹ The immediate predecessor of this provision, enacted as Section 2 of the Trade Agreements Extension Act of 1954, contained a very brief national security provision: "No action shall be taken pursuant to such section 350 [negotiating authority] to decrease the duty on any article if the President finds that such reduction would threaten domestic production needed for projected national defense requirements." Pub. L. No. 83-464, 68 Stat. 360 (1954). This provision remains in current law as Section 232(a), 19 U.S.C. § 1862(a).

security, he shall so advise the President, and if the President agrees that there is reason for such belief, the President shall cause an immediate investigation to be made to determine the facts. If, on the basis of such investigation, and the report to him of the findings and recommendations made in connection therewith, the President finds that the article is being imported into the United States in such quantities as to threaten to impair the national security, he shall take such action as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security.

Trade Agreements Extension Act of 1955, Pub. L. No. 86-169, § 7, 69 Stat. 162, 166. As defendants point out, Defs.' Mot. 27, the conference report on this legislation stated that "[i]t is the understanding of all the conferees that the authority granted to the President under this provision is a continuing authority." H.R. Rep. No. 84-745 at 7 (1955).

In renewing trade agreement authority in the Trade Agreements Extension Act of 1958, Congress made numerous changes to the national security provisions. Among the changes was a lengthy new subsection describing the factors to be considered when determining the effects of imports on national security; this provision is continued in current law as current Section 232(d), 19 U.S.C. § 1862(d). The Trade Agreements Extension Act of 1958, in § 8(a), streamlined the existing national security investigative procedure by eliminating the requirement that the President initiate an investigation and placing that responsibility instead upon the Director of the Office of Defense and Civilian Mobilization. Most pertinent to this case is that Congress also granted the President, if advised by the Director that imports of an "article" threaten to impair the national security, the authority to adjust the imports of "such article and its derivatives":

Upon request of the head of any Department or Agency, upon application of an interested party, or upon his own motion, the Director of the Office of Defense and Civilian Mobilization (hereinafter in this section referred to as the "Director") shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from other appropriate Departments and Agencies, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. If, as a result of such investigation, the Director is of the opinion that the *said article* is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall promptly so advise the President, and, unless

the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security as set forth in this section, he shall take such action, and for such time, as he deems necessary to adjust the imports of such article *and its derivatives* so that such imports will not so threaten to impair the national security.

Pub. L. No. 85–686, § 8(a), 72 Stat. 673, 678 (1958) (emphasis added). This provision authorized the President, on his own authority, to adjust the imports of derivatives of the article that was investigated and reported to him.

The language on derivatives was added to the legislation (H.R. 12591, the “Trade Agreements Extension Bill of 1958”) by an amendment (Amendment No. 20) in the Senate, to which the House receded. Trade Agreements Extension Bill of 1958, Conference Report [to accompany H.R. 12591], Rep. No. 2502, 85th Cong., 2d Sess., at 7 (1958). The debate in the House on the Conference Report on H.R. 12591 indicates that the purpose of Amendment No. 20 in the Senate was to ensure that the President could address the possibility that derivatives of the investigated article would circumvent the measures taken to adjust imports of the article itself. 104 Cong. Rec. 16,537, 16,542 (1958). There was a specific concern involving derivatives of imports of crude oil and other natural resources, but Amendment 20 effected a change that was without limitation as to the type of product involved.¹⁰ *See id.* Significantly, Proclamation 9980 identified “circumvention” of the tariffs on the steel products affected by Proclama-

¹⁰ The floor statement of House Ways and Means Chairman Mills, 104 Cong. Rec. 16,537, 16,542 (1958), included the following:

The Senate further authorized the President that if he should take such action as he deems necessary to adjust the imports of the particular article, he may also adjust the imports of its derivatives. The effect of the addition of the language with respect to derivatives in the statute serves the same purpose as the expression of intent on the part of the Committee on Ways and Means which was elaborated in a colloquy between the gentleman from Texas [Mr. IKARD] and myself on the floor of the House when the legislation was under consideration by the House. At that time, in response to an inquiry from the gentleman from Texas, I observed that prudent administration of this provision of the law would require that, if action in the interest of national security is indicated with respect to the imports of a particular article, it would follow that appropriate action with respect to the derivatives of such article would also be in order if it has been found that the imports of such derivatives would have the effect of threatening to impair the national security.

The colloquy to which Chairman Mills referred included the following:

Mr. IKARD. Is it intended that when the imports of a natural resource are controlled under the provisions of the national security section of the committee bill, and with particular reference to petroleum, that such control should take into consideration the importation of products, derivatives, or residues of petroleum so that these products and derivatives could not be imported in a way that would circumvent the control of the imports of the basic natural resource?

tion 9705 as a justification for the President's decision. *Proclamation 9980*, ¶ 8, 85 Fed. Reg. at 5,282.

In enacting Section 232 of the Trade Expansion Act of 1962, Congress essentially carried over the language of § 8(a) of the 1958 statute, reassigning the investigative responsibility from the Director of the Office of Defense and Civilian Mobilization to the Director of the Office of Emergency Planning.¹¹ Neither the 1958 version nor the 1962 version of the statute placed any time limits on the President's authority to adjust imports of the investigated article or derivatives of that article, and in that respect the authority delegated to the President by the 1962 statute could be described as "continuing."

Congress again amended Section 232 in 1975. The investigative responsibility was transferred from the Director of the Office of Emergency Planning to the Secretary of the Treasury,¹² the current language on public participation was added, and, for the first time, Congress placed a time limit on the investigation:

The Secretary [of the Treasury] shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation. The Secretary shall report the findings of his investigation under this subsection with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, his recommendation for action or inaction under this section to the President within one year

Mr. MILLS. Yes. Clearly, when a decision is taken to restrict imports in the interest of national security, it is our intention that the decision be effective and not rendered ineffective by circumvention.

House debate on H.R. 12591, 104 Cong. Rec. 10,672, 10,750 (1958).

¹¹ The new provision read as follows:

Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Director of the Office of Emergency Planning (hereinafter in this section referred to as the "Director") shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from other appropriate departments and agencies, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. If, as a result of such investigation, the Director is of the opinion that the said article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall promptly so advise the President, and, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security as set forth in this section, he shall take such action, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security.

Trade Expansion Act of 1962, Pub. L. No. 87-794, § 232(b), 76 Stat. 872, 877.

¹² Along with certain other responsibilities pertaining to international trade, this responsibility was transferred to the Secretary of Commerce by *Reorganization Plan No. 3 of 1979*, § 5(a)(1)(B), eff. Jan. 2, 1980, 44 Fed. Reg. 69,273, 69,274, 93 Stat. 1381, 1383.

after receiving an application from an interested party or otherwise beginning an investigation under this subsection.

Pub. L. No. 93–618, 88 Stat. 1978, 1993–94 (1975). Congress placed no time limit on the exercise of discretion by the President.

Congress next made major changes to Section 232 in the 1988 amendments, which resulted in the current Section 232.¹³ Among a number of new procedural requirements, including requirements for reporting to the Congress on actions taken or declined to be taken, the 1988 amendments imposed, for the first time, time limits on the exercise of discretion by the President. These were the aforementioned 90-day time period in which the President is 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 . . . ,” 19 U.S.C. § 1862(c)(1)(A)(ii), and the 15-day time period in which the President, if determining “to take action to adjust imports of an article and its derivatives,” is directed to “implement that action,” *id.* § 1862(c)(1)(B).

Defendants maintain that “[n]othing in the 1988 amendments’ text or legislative history . . . suggests that Congress intended to alter, let alone withdraw, its long-standing delegation of authority to take continuing action” and that “[t]he circumstances leading to passage of the 1988 amendments make clear Congress’ desire to prevent *inaction*, not to curtail further action.” Defs.’ Mot. 29–30. Turning first to the text of the 1988 amendments, we are unconvinced by defendants’ argument that these amendments maintained, unchanged, the “continuing” authority of the President.

As amended, the statute expressly requires the President, “[w]ithin 90 days after receiving a report submitted under subsection (b)(3)(A),” (i.e., the report the Commerce Secretary is to issue within 270 days of the initiation of an investigation under 19 U.S.C. § 1862(b)) 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*” *Id.* § 1862(c)(1)(A)(ii) (emphasis added). Section 232(c)(1)(B) provides that “[i]f the President determines . . . to take *action* to adjust imports of an article *and its derivatives*, the President *shall implement that action* by no later than the date that is 15 days after the day on which the President determines to take action” *Id.* § 1862(c)(1)(B) (emphasis added). Contrary to defendants’ urging that we read Section 232(c)(1) broadly

¹³ An intervening amendment in 1980 added current Section 232(f), which provided that Congress could invalidate Presidential action to adjust imports of petroleum or petroleum products upon a “disapproval resolution.” Crude Oil Windfall Profit Tax Act of 1980, Pub. L. No. 96–223, Title IV, § 402, 94 Stat. 229.

and flexibly, we find no ambiguity in the time limitations it imposes. Nor do we find the provision ambiguous in its application of those time limits to an action taken to adjust imports of “derivatives.” In short, there is no “flexible” reading of this provision under which the express time limitations on a Presidential “action,” and implementation thereof, do not apply. And we find no indication anywhere in the text of the statute as amended by the Omnibus Trade and Competitiveness Act that the President retained authority to adjust imports of articles identified in the Secretary’s report and then, after an extended period of time, adjust imports of derivatives of those articles without complying with the detailed procedures of Section 232(b) and (c). To the contrary, the 90- and 15-day time limitations in Section 232(c)(1) expressly confine the exercise of the President’s discretion *regardless* of whether the President determines to adjust imports only of the “article” named in the Secretary’s report or, instead, to adjust imports of the “article and its derivatives.” See 19 U.S.C. § 1862(c)(1). No other provision in Section 232 provides to the contrary or, for that matter, addresses in any way the authority to adjust imports of derivatives. Had Congress intended, in the 1988 amendments, to preserve Presidential authority to adjust imports of derivatives after the close of the 105-day period, presumably it would have created an exception to the general time limitation it imposed in Section 232(c)(1). But we see no indication of such an intent in the plain meaning of the statute and find indications to the contrary.

Defendants’ “flexible” reading of Section 232(c)(1) would require us to interpret the “action” taken by Proclamation 9980 and that taken by Proclamation 9705 as parts of the same “action.” This presents several interpretive problems. For one, it is contrary to the plain and ordinary meaning of the words “action” and “implement” as used in Section 232(c)(1). There can be no question, as a factual matter, that the two, separately-published proclamations stemmed from two separate Presidential determinations and were directed at two different sets of products. Each necessarily required its own implementation. See 19 U.S.C. § 1862(c)(1)(B) (“[T]he 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”). The President “implemented” the “action” he determined to take following his receipt of the Steel Report when he issued Proclamation 9705 in 2018. In enacting Section 232(c)(1) as part of the 1988 amendments, Congress placed time limits on the exercise of the President’s discretion for the first time in the history of the statute. The straightforward language by which Congress did so did not leave room for an interpretation that the President retained, indefinitely, discretion to

adjust imports of derivatives of an article affected by an earlier action and implementation. Despite the express time limitation Congress imposed, defendants insist that the President may resume his “implementation” indefinitely—presumably even repeatedly through subsequent measures, and even many years later—and thereby sidestep the express time limitations Congress imposed.

Additionally, defendants’ interpretation of Section 232 would require us to ascribe a different meaning to the word “action” as used in Section 232(c)(1) than that indicated by the use of that term in another provision added to the statute by the 1988 amendments, Section 232(c)(3) (19 U.S.C. § 1862(c)(3)). In Section 232(c)(3), Congress created an exception to the time limitations in Section 232(c)(1), and an alternate procedure, to apply when the “action” the President chooses to take under Section 232(c)(1) is to pursue a trade agreement “which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to impair national security.” 19 U.S.C. § 1862(c)(3)(A)(i). Under this alternate procedure, if, after 180 days, no agreement is reached or if an agreement “is ineffective in eliminating the threat to the national security posed by imports of such article,” the President may “take such other *actions* as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security.” *Id.* § 1862(c)(3)(A)(ii) (emphasis added). Section 232(c)(1) uses the singular term “action”—which Section 232(c)(3) also uses to refer to the determination taken under Section 232(c)(1)—and then distinguishes that term by using the term “*other actions*” (also identified as “*additional actions*”), 19 U.S.C. § 1862(c)(3)(B)(ii) (emphasis added), that the President is authorized to take under Section 232(c)(3) in the event the Section 232(c)(1) “action,” i.e., any trade agreement, or attempt to obtain one, is deemed by the President to be insufficient to eliminate the threat from imports of the article. Thus, defendants’ reading of the word “action” as used in Section 232(c)(1) to encompass, broadly, a series of continuing measures to adjust imports, as opposed to a discrete action that may be implemented, cannot be reconciled with the use of that term in Section 232(c)(3). We disfavor an interpretation that ascribes different meanings to the same term as used in different provisions of the same statute. *See Brown v. Gardner*, 513 U.S. 115, 118 (1995) (“[T]here is a presumption that a given term is used to mean the same thing throughout a statute.”).

Although placing no express time limits on the “other actions” in Section 232(c)(3), as it did in Section 232(c)(1), Congress limited these “additional actions” to those that adjust imports of the article that

was, or would have been, affected by the trade agreement. *Id.* § 1862(c)(3)(A) (confining the additional actions to actions “to adjust the imports of *such article*” (emphasis added)). In substance, Proclamation 9980 concludes that the previously-imposed tariffs on steel articles were (in the words of 19 U.S.C. § 1862(c)(3)) “ineffective in eliminating the threat to the national security.” But Proclamation 9980 differs from an “additional action” taken under Section 232(c)(3) in two critical respects: it did not follow a determination to enter into a trade agreement (a determination of which the President must give timely notification to Congress under Section 232(c)(2)), and even if it had, it would not have conformed to the procedure thereunder because the “additional action” was not directed to the same article as was the original action.

Where a statute creates an exception to a general rule (as Section 232(c)(3) does in creating an exception to the time limitations of Section 232(c)(1)), such exception is to be read narrowly and not interpreted to apply where Congress did not expressly provide for it. *Comm’r v. Clark*, 489 U.S. 726, 739 (1989) (“In construing provisions . . . in which a general statement of policy is qualified by an exception, we usually read the exception narrowly in order to preserve the primary operation of the provision.”) (citing *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (“To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people.”)). When we read the statute as a whole, we see the detailed, specialized procedure Congress set forth as Section 232(c)(3) as another indication that Proclamation 9980 must be viewed as untimely under Section 232(c)(1) if considered to be an action that was taken based solely on the Steel Report.

Defendants’ argument referring to the words “nature and duration” in Section 232(c)(1)(A)(ii) also fails to convince us that the President retains authority, indefinitely, to take additional steps to adjust imports of articles not addressed in his original action. Because different products were affected, the “nature” of the action the President took in 2020 differed from the nature of the action he took in 2018.

Defendants argue that specific factors set forth in Section 232(d), 19 U.S.C. § 1862(d), that the President is to consider in exercising his authority under Section 232 signify that “[t]he statute contemplates continued monitoring and adjustments to section 232(c) actions, as circumstances change.” Defs.’ Mot. 26. According to defendants, “[m]any of these factors, including the ‘domestic production needed for projected national defense requirements,’ the ‘capacity of domestic industries to meet such requirements,’ and ‘the impact of foreign

competition on the economic welfare of individual domestic industries,' are dynamic by nature and invite ongoing evaluation and, as necessary, course correction." *Id.* (quoting 19 U.S.C. § 1862(d)). This argument, too, is unpersuasive, confusing the non-exclusive list of factors the President is to consider in his determination of what action is needed with the time periods in which he must make and implement that determination. As we discussed above, the list of non-exclusive factors set forth in current Section 232(d) were added by Trade Agreements Extension Act of 1958. We find nothing in the text of Section 232(d) that creates an exception to the time limits Congress imposed, as Section 232(c)(1), thirty years later.

In support of their motion to dismiss, defendants argue, additionally, that "[i]t is no defect that the Secretary's investigation covered steel articles and not derivatives of steel articles, such as nails." Defs.' Mot. 37 (citing Compl. ¶¶ 41–42); Defs.' Reply 2 (arguing that "Commerce plays no statutory role with respect to derivative articles."). According to defendants, "the President is authorized to adjust imports of derivatives of articles, even when the Secretary's investigation and report addressed only the article itself." Defs.' Mot. 37 (quoting 19 U.S.C. § 1862(c)(1)(A)(ii) ("if the President concurs, determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article *and its derivatives*. . . .")). As we discussed above, the President is empowered to adjust imports of derivatives of the investigated article regardless of whether the investigation, and the Commerce Secretary's Section 232(b)(3)(A) report, included them. Defendants' argument does not confront the question of timeliness: PrimeSource challenges the timeliness of the President's action on the ground that the time limitations of Section 232(c)(1) apply regardless of whether or not the President's action is directed to derivatives of an article affected by an earlier action.

In support of their argument that nothing in the legislative history of the 1988 amendments evinces congressional intent to limit the Presidents' discretion as to modifications of earlier actions, defendants cite congressional testimony showing, they argue, that the 1988 amendments were motivated by frustration on the part of certain members of Congress with President Reagan's delay in taking actions under Section 232, in particular with respect to machine tools. *Id.* at 30–31 (citing Hearings Before the Comm. on Ways & Means on H.R. 3 Trade and International Economic Policy Other Proposals Reform Act, 100th Cong. (1987); Hearings Before the Subcomm. on Trade of H. Comm. On Ways & Means, 99th Cong., 2d Sess. 1282 (1986)).

A Senate report on the legislation, while noting that then-current law imposed a one-year requirement for the investigation (shortened to 270 days by the 1988 amendments), also noted that under current law “[t]here is no time limit for the President’s decision.” Report of the Committee on Finance on S. 490, S. Rep. 100–71, at 135 (1987). “The basic need for the amendment arises from the lengthy period provided by present law—one year for investigations and no time limit for decisions by the President—before actions to remove a threat posed by imports of particular products to the national security are taken. For example, in the machine tools case, the President waited over 2½ years before taking any action to assist the domestic industry.” *Id.* “The Committee [on Finance] believes that if the national security is being affected or threatened, this should be determined and acted upon as quickly as possible.” *Id.*

At least arguably, the legislative history defendants cite, and the quoted Senate report, are consistent with a view that Congress could have intended that the President retain “modification” authority such as defendants posit, so long as he imposes an initial measure within the time limits. But Section 232(c)(1) as effected by the 1988 amendments unambiguously placed time limits on the President’s authority to adjust imports of derivatives as well as the imports of the investigated article. Were there intent to retain the authority to impose subsequent measures to adjust imports of derivatives after the expiration of the 105-day period, we would expect to see at least some indication of that intent in the legislative history. However, we find nothing in the legislative history to indicate that Congress intended to do so. Such indications as we are able to find are to the contrary. The conference agreement on the Omnibus Trade and Competitive-ness Act of 1988 summarizes the amendment to Section 232 as follows:

- A. Amends section 232 of the Trade Expansion Act of 1962 to require the Secretary of Commerce to report to the President within 270 days of initiating an investigation.
- B. Requires the Secretary of Commerce to consult with the Secretary of Defense regarding the methodological and policy questions raised by the investigation; and requires the Secretary of Defense, upon request of the Commerce Secretary, to provide defense requirements with respect to the article under investigation.
- C. Requires the President to decide, within 90 days of receiving the Commerce Secretary’s report, on whether to take action and if so to proclaim such action within 15 days.

- D. Requires the President to report to Congress within 30 days on the action taken and reasons for such action.
- E. Authorizes the enforcement of the quantitative restrictions negotiated with respect to machine tool imports.

Summary of the Conference Agreement on H.R. 3, The Omnibus Trade and Competitiveness Act of 1988 at 15–16 (Comm. Print 1988). The use of the words “proclaim such action” in paragraph C, above, casts further doubt on defendants’ expansive and flexible interpretation of the word “implement” as used in 19 U.S.C. § 1862(c)(1)(B). “Proclaim” is the verb form of the noun “proclamation,” and “proclaim *such action*” is inconsistent with an interpretation under which Congress intended the President to have authority to proclaim additional “actions” indefinitely (through subsequent proclamations), after the time period had passed.

In summary, we view defendants’ argument on legislative history as confusing an apparent motivation with the specific statutory means Congress chose to achieve its objective, which is reflected in the plain meaning of the language of the amendments. The solution Congress adopted was to require, generally, that the President implement an import adjustment (whether on the investigated article or on that article and its derivatives) within the 105-day time period following receipt of the report the Secretary submits under Section 232(b)(3)(A) (with the limited “trade agreement” exception discussed previously). The statute did not provide general authority for the President to take, or implement, another “action” (or actions) on derivatives after that time period elapsed.

According to defendants, “[t]hat the statute also involves foreign affairs and national security cautions against an inflexible reading” of the provisions governing the exercise of the President’s Section 232 authority. Defs.’ Mot. 33. In support of this argument, they cite *B-West Imports, Inc. v. United States*, 75 F.3d 633, 636 (Fed. Cir. 1996), *Florsheim*, 744 F.2d at 793, and *American Ass’n of Exporters & Importers-Textile & Apparel Grp. v. United States*, 751 F.2d 1239, 1248 (Fed. Cir. 1985). While the statutory interpretation principle defendants identify is a valid one, it does not serve the arguments they make in favor of their particular interpretation of Section 232. As we have explained, there is no “flexible” reading of Section 232(c)(1) that suffices to allow the President to adjust, through new tariffs, imports of derivatives of previously-affected articles outside of the time limits Congress imposed, and the appellate decisions on which defendants rely do not lend support to any such reading.

In *B-West Imports* and in *Florsheim Shoe Co.*, the Court of Appeals addressed interpretations of statutes conferring Presidential author-

ity in matters involving import regulation. Each of these cases rejected an appellant's statutory interpretation that was plainly unreasonable. *B-West Imports* held that a provision in the Arms Export Control Act, 22 U.S.C. § 2778, which granted the President authority to "control" arms imports, encompassed the authority to revoke previously-issued permits for importations of munitions from the People's Republic of China. The Court of Appeals rejected the interpretation of § 2778 advanced by appellants, who conceded that the term "control" is broad enough to allow the President to ban imports by denying licenses or permits for future imports." 75 F.3d at 635. The opinion states that "if the term 'control' includes the power to prohibit, as appellants concede that it does, we are unable to discern any basis for construing the statute to convey the power to deny permits and licenses in advance, but to withhold the power to revoke them once they have been issued." *Id.* at 636. The case did not involve an attempt to invoke *delegated* authority to adjust imports that was claimed to have expired. *Florsheim Shoe Co.* rejected an importer's challenge to an action by the President that withdrew duty-free treatment provided under the Generalized System of Preferences ("GSP") program for certain leather articles from India. The Court of Appeals, upon interpreting statutory language providing that "[t]he President may withdraw, suspend, or limit the application of the duty-free treatment accorded under section 2461 of this title with respect to any article or with respect to any country . . .," 19 U.S.C. § 2464 (1982) (amended to 19 U.S.C. § 2463(c)(1) (1996)), rejected appellant's argument that "the President may only limit duty-free treatment for a particular article from all countries or for all articles from a particular country" and therefore lacked authority to withdraw duty-free treatment from a specific article from a particular beneficiary country. 744 F.2d at 794. The Court of Appeals viewed appellant's argument as based on an "over-emphasis on the word 'or'" in § 2464 that was at odds with the overall provision. In the instant case, plaintiff advocates a "plain meaning" construction of Section 232(c)(1), rather than one such as that advocated in *Florsheim Shoe Co.*, which was a strained interpretation of a provision delegating tariff authority to the President that failed to recognize that the greater power the provision granted must be read to include the lesser.

The third decision defendants cite, *American Ass'n of Exporters & Importers-Textile & Apparel Grp.*, adjudicated, and rejected, claims that an administrative agency, the Committee on the Implementation of Textile Agreements, "failed to abide by its statutory authority," "acted arbitrarily," and violated "the statutory and constitutional

rights” of members of plaintiff’s organization “to have notice of the proposed actions and an opportunity to be heard.” 751 F.2d at 1246. In disposing of appellant’s “statutory authority” claim, the Court of Appeals disagreed with a narrow construction of section 204 of the Agricultural Act of 1956, under which the President negotiated agreements on importations of textiles and textile products. The Court of Appeals rejected the argument that Congress, in authorizing the President “to issue regulations governing the entry or withdrawal from warehouse of any such commodity, product, textiles, or textile products to carry out such agreements,” 7 U.S.C. § 1854 (1982), “intended to incorporate the terms of any agreements concluded pursuant to section 204 into that statute itself.” 751 F.2d at 1241, 1247 (footnote omitted). The Court reasoned that the statutory phrase “to carry out” as used in § 1854 “does not imply that Congress restricted the President’s discretion in this regard by requiring him to implement the agreements in the particular manner seen by appellant” but rather “is a broad grant of authority to the President in the international field in which congressional delegations are normally given a broad construction.” *Id.* This case, in contrast, does not involve delegated authority to promulgate implementing regulations, and there is no “broad construction” of the express time limitations in Section 232(c)(1) that plausibly supports defendants’ argument.

In summary, the action taken by Proclamation 9980 to adjust imports of derivatives was not implemented during the 105-day time period set forth in § 1862(c)(1), if that time period is considered to have commenced upon the President’s receipt of the Steel Report. The President’s having characterized the articles affected by Proclamation 9980 as “derivatives” of the steel products affected by Proclamation 9705 is, therefore, insufficient by itself to support a conclusion that Proclamation 9980 was timely according to Section 232(c)(1).

We turn next to defendants’ second argument, which is that the statutory deadlines in Section 232(c)(1) are directory, not mandatory, an argument apparently in the alternative to their argument that the President complied with all procedural requirements. Defs.’ Mot. 35. They maintain that where Congress did not expressly state the consequences of failures to meet deadlines, the deadlines ordinarily should not be construed as mandatory, and the court should so construe them here. But as we pointed out above, accepting this logic would require us to conclude that Congress established the time limitations, which were central to the 1988 amendments and related to other procedural requirements imposed by those amendments, while at the same time intending that these limitations would have no binding effect on the exercise of the President’s discretion. It also

would require us to conclude that the President could take virtually any action he chose, even one adjusting imports of products that are not derivatives of those affected by an earlier action, despite the express time limitations in Section 232(c)(1). Such an interpretation essentially renders Section 232(c)(1), as added by the 1988 amendments, a nullity. As the court has explained, the plain meaning and structure of Section 232 are to the contrary.

The aforementioned Section 232(c)(3), another provision added by the 1988 amendments, also is inconsistent with an interpretation that the Section 232(c)(1) time limitations are merely directory. As the court has discussed, this alternate procedure applies when the President determines that the appropriate “action” is to seek a trade agreement limiting or restricting the importation into, or exportation to, the United States of “the article that threatens to impair national security.” 19 U.S.C. § 1862(c)(3)(A)(i). But it is axiomatic that when interpreting a statute, a court is to give effect to every word and every provision. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (“It is our duty ‘to give effect, if possible, to every clause and word of a statute.’”) (citing *United States v. Menasche*, 348 U.S. 528, 538–39 (1955)); *see also Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing the above rule as the “cardinal principle of statutory construction”). The procedure Congress spelled out in detail in Section 232(c)(3) would appear to be rendered superfluous if the time limitations in Section 232(c)(1) were interpreted to have no binding effect. In summary, defendants’ conception of a “flexible” statutory scheme under which the Section 232(c)(1) time limits are merely directory is inconsistent with the elaborate procedural mechanisms Congress included to ensure oversight generally, and to provide, specifically, for the special situation arising from the President’s negotiation of a trade agreement.

In support of their argument that the time limitations in Section 232(c)(1) are merely directory, defendants cite *Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 159 (2003) (citing *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993)), *Hitachi Home Elecs., Inc. v. United States*, 661 F.3d 1343, 1345–46 (Fed. Cir. 2011), *Gilda Industries, Inc. v. United States*, 622 F.3d 1358, 1365 (Fed. Cir. 2010), and *Canadian Fur Trappers Corp. v. United States*, 884 F.2d 563, 566 (Fed. Cir. 1989). Defs.’ Mot. 35. These cases are inapposite. They did not involve an express limitation Congress imposed on the delegation to the Executive Branch of a legislative power the Constitution vested in the Congress. *See* U.S. CONST. art. I, § 8, cl. 1 (conferring the power to lay and collect Duties) & cl. 3 (conferring the power to regulate commerce with foreign nations). In each, the Supreme Court or the Court of Appeals, using established methods of

statutory interpretation, concluded that Congress intended for the time limitation at issue to be merely directory. We approach the issue in this case not by applying a blanket presumption as to whether a deadline is directory or mandatory, as defendants would have us do, but by examining the statute as a whole, giving effect to “every clause and word,” *Duncan*, 533 U.S. at 174, to discern congressional intent as to the statutory time limits in question. Here, the nature of the delegation (a delegation of a legislative power reserved by the Constitution to the Congress), the plain meaning of Section 232(c)(1), and the indicia of congressional intent appearing elsewhere in Section 232 preclude us from concluding that the time limits are merely directory.

Barnhart v. Peabody Coal Co. arose from a statutory requirement in the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. § 9706(a) (“Coal Act”), that the Secretary of Labor assign, before October 1, 1993, retired coal miners whose former employers were no longer in business to extant “signatory operators,” who would assume the annual premium obligations for those retirees’ benefits. After the Department of Labor was unable to complete the lengthy assignment process by the statutory due date, it proceeded to assign some 10,000 previously-unassigned beneficiaries to signatory operators. 537 U.S. at 155–56. The issue in the case was whether those assignments were valid regardless of the untimeliness of the Department’s actions. From a comprehensive examination of the Coal Act, including the legislative purpose of requiring the assignments and the consequence of holding assignments made after the deadline to be invalid, which the Court considered to be contrary to the overall intent of the statute, the Court held that the statutory date for the assignments did not invalidate the subsequent assignments. *Id.* at 172 (“The way to reach the congressional objective, however, is to read the statutory date as a spur to prompt action, not as a bar to tardy completion of the business of ensuring that benefits are funded, as much as possible, by those identified by Congress as principally responsible.”). The case at bar does not present an analogous situation. Rather than spur agency action to complete a complex administrative task such as that required by the Coal Act, Congress endeavored in the 1988 amendments to Section 232 to impose new controls, through time limitations and reporting requirements, on the exercise of Presidential discretion.

Hitachi Home Elecs., Inc. involved the requirement in Section 515(a) of the Tariff Act that Customs and Border Protection act on a protest within two years. Rejecting the plaintiff’s argument that a protest not acted upon within the two-year period is “deemed allowed,” the Court of Appeals noted that a protestant desiring to

obtain expeditious allowance or denial, or alternatively judicial review, may seek accelerated disposition under Section 515(b). 661 F.3d at 1348–49. Nothing in the Tariff Act even suggested congressional intent that a protest not acted upon during the two-year period should be deemed to have been allowed, and the provision for accelerated disposition is contrary to such an intent.

Gilda Industries, Inc. held that a failure of the U.S. Trade Representative to make a notification required by 19 U.S.C. § 2417(c)(2) to be made to domestic parties of the impending termination of a retaliatory trade action occurring by operation of § 2417(c)(1) four years after its imposition, in the absence of a written request from a domestic party for continuation, did not nullify the statutorily-required termination. Under the reasoning of the Court of Appeals, the termination of the retaliatory trade action on the four-year anniversary date, absent a continuation request by a party already on notice of the termination, was unaffected by the absence of the notification required by § 2417(c)(2). 622 F.3d at 1365.

Canadian Fur Trappers Corp. involved a previous version of Section 504(d) of the Tariff Act, which directed the Customs Service to liquidate an entry within 90 days of removal of a suspension of liquidation but did not provide a consequence for a failure by the Customs Service to do so. The Court of Appeals rejected the importers' argument that such failure resulted in a deemed liquidation at the entered duty rate, a highly consequential result for which the statute did not then provide. 884 F.2d at 566.

In summary, we are not convinced by either of the two arguments defendants put forth to support their motion to dismiss plaintiff's Count 2 claim. The President's characterization of the articles affected by Proclamation 9980 as derivatives of the articles affected by Proclamation 9705 is insufficient, by itself, to support a conclusion that the challenged decision satisfied the time limitations in Section 232(c)(1), and Congress did not intend for those time limits to be merely directory. Count 2 of plaintiff's complaint states "a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570, and we decline to dismiss it at this stage of the proceedings.

D. Plaintiff's Motion for Summary Judgment

PrimeSource characterizes its motion as a USCIT Rule 56 motion for summary judgment, Pl.'s Br. 1 (moving pursuant to USCIT Rule 56 "because there is no genuine dispute as to any material fact and PrimeSource is entitled to judgment as a matter of law"). Nevertheless, it appears that plaintiff also is moving for relief under USCIT Rule 56.1 ("Judgment on an Agency Record for an Action Other Than

That Described in 28 U.S.C. § 1581(c)(1)”). Plaintiff refers to its motion as a “Motion for Judgment on the Agency Record,” Pl.’s Br. 50, and in this way identifies its motion as one brought under USCIT Rule 56.1. To date, neither plaintiff nor defendants have raised the question of whether an administrative agency record will be relevant to this litigation.

Rule 56.1 applies when “a party believes that the determination of the court is to be made solely on the basis of the record made before an agency.” USCIT R. 56.1(a). Certain of the claims we have dismissed in this litigation were APA claims, which we dismissed for the reason discussed above, which is that there is no final agency action that may be contested under the APA. The remaining claim, that of Count 2, is not an APA claim as it contests an action of the President, not an agency action. Therefore, we consider plaintiff’s motion as a Rule 56 motion for summary judgment, not a motion under Rule 56.1. But it does not necessarily follow that an agency record will be irrelevant to this proceeding or that individualized procedures similar to those specified under Rule 56.1 will not be useful as this litigation proceeds.

Under USCIT Rule 56(a), the burden is on the moving party to show “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” At this pleading stage of the litigation, we cannot conclude that plaintiff has met this burden. To declare Proclamation 9980 invalid, and on that basis enter summary judgment in plaintiff’s favor, we must find “a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority.” *Maple Leaf Fish Co.*, 762 F.2d at 89. As we discussed previously, defendants conceded that Proclamation 9980 was not based on a report, other than the Steel Report, that was designated as a report issued pursuant to Section 232(b)(3)(A). This concession was relevant to our conclusion that Proclamation 9980 was not issued within the time period imposed by Section 232(c)(1), if that time period is deemed to have begun with the President’s receipt of the Steel Report. But at this stage of the litigation, we cannot conclude that the time period imposed by Section 232(c)(1) necessarily began on January 11, 2018, the date the Steel Report was received by the President. Therefore, we are not now able to determine whether or not the claim in Count 2 is validly based on a “significant procedural violation,” *Maple Leaf Fish Co.*, 762 F.2d at 89.

Although Proclamation 9980 was issued long after the 105-day period beginning with the receipt of the Steel Report, it also was

issued pursuant to what Proclamation 9980 describes as an “assessment” (or “assessments”) of the Commerce Secretary. Proclamation 9980 states that “[i]t is the Secretary’s *assessment* that foreign producers of these derivative articles have increased shipments of such articles to the United States to circumvent the duties on aluminum articles and steel articles imposed in Proclamation 9704 and Proclamation 9705, and that imports of these derivative articles threaten to undermine the actions taken to address the risk to the national security” *Proclamation 9980* ¶ 8, 85 Fed. Reg. at 5,282 (emphasis added). It further states that “[t]he Secretary has *assessed* that reducing imports of the derivative articles . . . would reduce circumvention” and identifies the reduction of those imports as a measure to address the threatened impairment of the national security. *Id.* (emphasis added). The Proclamation states that the adjustment of the tariffs on the derivative articles is being taken “[b]ased on the Secretary’s assessments.” *Id.* ¶ 9, 85 Fed. Reg. at 5,283 (“Based on the Secretary’s *assessments*, I have concluded that it is necessary and appropriate in light of our national security interests to adjust the tariffs imposed by previous proclamations to apply to the derivatives of aluminum articles and steel articles described in Annex I and Annex II to this proclamation.”) (emphasis added).

The Secretary of Commerce is the official Section 232 identifies as having the responsibility of conducting a Section 232(b) investigation and preparing a Section 232(b)(3)(A) report. Proclamation 9980 did not characterize as a “report” submitted under Section 232(b)(3)(A) the communication or communications by which the Secretary of Commerce transmitted his recommendation to the President to adjust tariffs on the aluminum and steel products Proclamation 9980 identified. Nevertheless, it is clear from the text of Proclamation 9980 that the Secretary of Commerce undertook certain preparations prior to the President’s action and also that the Secretary made a recommendation relating to the subject matter of Section 232(b)(3)(A) (“If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, the Secretary shall so advise the President in such report.”).

Even though the Secretary’s communications to the President on derivative articles were not designated in Proclamation 9980 as having been made pursuant to Section 232(b)(3)(A), we are not in a position to ascertain the extent to which these communications nevertheless met the fundamental requirements of Section 232(b)(3)(A), for the straightforward reason that those communications, and any related records, are not before us. Although concluding that Procla-

mation 9980 was untimely under Section 232(c)(1) when viewed solely as an action taken in response to the Steel Report, we also conclude that there are genuine issues of material fact that bear on the extent to which the subsequent “assessment” or “assessments” of the Commerce Secretary identified in Proclamation 9980 validly could be held to have served a function analogous to that of a Section 232(b)(3)(A) report. Nor do we know what form of inquiry or investigation, if any, the Commerce Secretary conducted prior to his submission of these communications to the President and whether, or to what extent, any such inquiry or investigation satisfied the essential requirements of Section 232(b)(2)(A), 19 U.S.C. § 1862(b)(2)(A).

We do not imply that the Secretary’s actions are judicially reviewable in this case. We conclude instead that factual information pertaining to the Secretary’s communicating to the President on the derivative articles would be required in order for us to examine whether, and to what extent, there was or was not compliance by the President with the procedural requirements of Section 232 and whether any noncompliance that occurred was a “significant procedural violation,” *Maple Leaf Fish Co.*, 762 F.2d at 89. Moreover, at this early stage of the litigation, we lack a basis to presume that these unresolved factual issues are unrelated to the issue of whether the President clearly misconstrued the statute or the issue of whether the President took action outside of his delegated authority.

In summary, there remain genuine issues of material fact precluding us from granting plaintiff’s motion for summary judgment, and as a result plaintiff has not met the burden required to obtain a judgment in its favor on its Count 2 claim. It would appear that the filing of a complete administrative record could be a means of resolving, or helping to resolve, these factual issues, but rather than directing a specific procedure, we believe it advisable that the parties first consult on these matters and report to the court on a scheduling order that will govern the remainder of this litigation.

III. CONCLUSION AND ORDER

We grant the government’s motion to dismiss as to Counts 1, 3, 4, and 5 of the amended complaint and deny it as to Count 2. We deny plaintiff’s motion for summary judgment as to Count 2 because plaintiff has not met the burden of showing “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” USCIT R. 56(a). Therefore, upon consideration of all papers and proceedings herein, and upon due deliberation, it is hereby

ORDERED that the claims stated as Counts 1, 3, 4, and 5 of the amended complaint be, and hereby are, dismissed for failure to state a claim on which relief can be granted; it is further

ORDERED that plaintiff's motion for summary judgment be, and hereby is, denied with respect to the claim stated in Count 2 of the amended complaint; it is further

ORDERED that the parties shall consult and submit to the court, by February 26, 2021, a joint schedule to govern the remainder of this litigation; and it is further

ORDERED that if the parties are unable to agree upon a schedule, each shall submit a proposed schedule by February 26, 2021 that includes a justification for its position.

Dated: January 27, 2021

New York, New York

/s/ Timothy C. Stanceu

TIMOTHY C. STANCEU, CHIEF JUDGE

/s/ Jennifer Choe-Groves

JENNIFER CHOE-GROVES, JUDGE

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

I respectfully dissent from my colleagues' parrying the question of whether we have subject-matter jurisdiction over claims against the President. In my view, both Federal Circuit precedent and the separation of powers compel that we *sua sponte* raise the question and then dismiss him from the case.

On the merits, I concur in my colleagues' decision to grant the government's motion to dismiss (and deny PrimeSource's cross-motion for summary judgment as to) Counts 1, 3, and 4 of the amended complaint and therefore join the majority opinion's discussion of those claims. I also concur in dismissing (and denying PrimeSource's cross-motion as to) Count 5 but write separately to explain my views on why that claim fails.

Finally, although I concur in my colleagues' denial of PrimeSource's cross-motion for summary judgment as to Count 2 of the amended complaint, my reasons differ, and I respectfully dissent from their denial of the government's motion to dismiss that claim, which alleges that the President violated Section 232 by imposing tariffs on steel derivative products after the statutory implementation deadline.

In my view, if the President timely implements Section 232 action to restrict imports—and there is no dispute that the President did so in the original Proclamation 9705 restricting steel *articles*—the statute also permits him to later modify such restrictions, and that

modification power is coextensive with the original power to act in the first instance. Because the President could have also acted as to steel *derivatives* when he initially restricted steel article imports in Proclamation 9705, Section 232 permitted him to later extend those restrictions to derivatives. I would therefore grant the government's motion to dismiss Count 2 for failure to state a claim.

Statutory and Factual Background

A. Section 232

As its title indicates, Section 232 of the Trade Expansion Act of 1962, as amended, authorizes the President to impose import restrictions to “[s]afeguard[] national security.” 19 U.S.C. § 1862. In short, the statute directs that in various circumstances, the Secretary of Commerce is to investigate the national security effects of specified imports. *Id.* § 1862(b)(1)(A).

Once the Secretary initiates an investigation, the statute prescribes the following steps:

- The Secretary is to give the Secretary of Defense immediate notice of the investigation, *id.* § 1862(b)(1)(B), and is then to consult with him about “the methodological and policy questions raised in any investigation,” *id.* § 1862(b)(2)(A)(i).
- The Secretary is to “seek information and advice from, and consult with, appropriate officers of the United States.” *Id.* § 1862(b)(2)(A)(ii).
- “[I]f it is appropriate and after reasonable notice,” the Secretary is to “hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation.” *Id.* § 1862(b)(2)(A)(iii). In other words, hearings or other opportunity for comment are not mandatory.
- The Secretary may also ask the Secretary of Defense to assess “the defense requirements of any article that is the subject of an investigation.” *Id.* § 1862(b)(2)(B).

Section 232 requires the Secretary to submit a report to the President by no later than the date that is 270 days after the date on which the investigation commenced. *Id.* § 1862(b)(3)(A).¹ The report is to discuss “the effect of the importation of such article in such quantities or under such circumstances upon the national security” and to set

¹ The statute directs that in executing their duties, the Secretary and the President are to keep in mind, among other things, various enumerated considerations bearing on national security. *See* 19 U.S.C. § 1862(d).

forth the Secretary's recommendations for action or inaction; in addition, if the Secretary believes the importation threatens "to impair the national security," the report must so state. *Id.*

If the Secretary finds a threat to national security, the President then has 90 days to determine whether he "concurs" with the Secretary's finding. *Id.* § 1862(c)(1)(A)(i). If he so concurs, the President must

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

Id. § 1862(c)(1)(A)(ii).²

The statute further directs that if the President determines to take action to restrict imports to protect national security, he must "implement" that action within 15 days of determining to do so. *Id.* § 1862(c)(1)(B). Taken together, the two deadlines (to "determine" and then to "implement") give the President 105 days to act after receiving the Secretary's report.

If the President's action is to attempt to negotiate an agreement restricting the imports in question, the statute provides that if such an agreement is not reached within 180 days of his decision, *id.* § 1862(c)(3)(A)(ii)(I), or if such an agreement, having been reached, is "not being carried out or is ineffective," § 1862(c)(3)(A)(ii)(II), the President may "take such other actions as [he] deems necessary to adjust imports of such article so that they do not threaten national security." *Id.* § 1862(c)(3)(A)(ii).³

B. Proclamation 9705's steel tariffs

Following a Section 232 investigation, the Secretary here issued a report finding that steel imports threatened national security.⁴ Based on this report, in 2018 the President issued Proclamation 9705, which imposed 25 percent duties on imported raw steel. *See* Proclamation

² The statute also requires the President to submit a written statement to Congress within 30 days of his determination explaining his reasons for acting or declining to act on the Secretary's report. 19 U.S.C. § 1862(c)(2).

³ The statute further requires that when there has been such a failure to conclude an agreement restricting imports or that such an agreement, if reached, was ineffective, the President must publish in the Federal Register notice of either (1) any such "additional actions" taken, *see* 19 U.S.C. § 1862(c)(3)(A)(ii), or (2) his determination not to take any such additional actions. *See id.* § 1862(c)(3)(A)(B).

⁴ *See generally* U.S. Dep't of Commerce, Bureau of Industry & Security, The Effect of Imports of Steel on the National Security (Jan. 11, 2018), <https://www.bis.doc.gov/index.php/documents/steel/2224-the-effect-of-imports-of-steel-on-the-national-security-with-redactions-20180111/file>, 85 Fed. Reg. 40,202 (Dep't Commerce July 6, 2020).

No. 9705 of March 8, 2018, *Adjusting Imports of Steel into the United States*, 83 Fed. Reg. 11,625 (Mar. 15, 2018). The proclamation further directed the Secretary to monitor steel imports and their effect on national security and, after appropriate consultations with other Executive Branch officials, inform the President of “any circumstances that . . . might indicate” the need for further Section 232 duties or that “the increase in duty rate provided for in this proclamation is no longer necessary.” *Id.* at 11,628.

C. Proclamation 9980’s extension of tariffs to steel derivative products

On January 24, 2020, the President issued Proclamation 9980, which stated that the Secretary had informed him as follows:

[I]mports of certain derivatives of steel articles have significantly increased since the imposition of the tariffs and quotas [in Proclamation 9705]. The net effect of the increase of imports of these derivatives has been to erode the customer base for U.S. producers of . . . steel and undermine the purpose of the proclamations adjusting imports of . . . steel articles to remove the threatened impairment of the national security.

Proclamation No. 9980 of January 24, 2020, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States*, 85 Fed. Reg. 5281, 5282 (Jan. 29, 2020). The President further explained that the Secretary had advised him that foreign producers of steel derivative products had “increased shipments of such articles to the United States to circumvent . . . Proclamation 9705.” *Id.*

Based on that information and recommendation from the Secretary, the President extended Proclamation 9705’s 25-percent duties to certain steel *derivative* products (e.g., steel nails) not previously addressed by the Secretary’s report on steel article imports or by Proclamation 9705. *Id.* at 5283.⁵ The government implicitly concedes that unlike Proclamation 9705, Proclamation 9980 was not preceded by a Section 232 investigation and report by the Secretary. *See* ECF 60, at 49 (“The Secretary was not required to conduct another investigation or to follow the procedures for an investigation”); ECF 78, at 37 (referring to PrimeSource’s “incorrect belief that the President had to request an entirely separate investigation . . .”).

⁵ Proclamation 9980 also extended tariffs to certain aluminum article derivatives not at issue in this case.

D. This suit and the pending motions

Plaintiff PrimeSource Building Products, Inc., brought this suit challenging Proclamation 9980. ECF 1.⁶ PrimeSource's amended complaint alleges that it is an importer of steel nails injured by duties imposed by Proclamation 9980. ECF 22, at 7–10.⁷ An affidavit of a PrimeSource executive attached to its amended complaint provides evidentiary substantiation of these allegations. ECF 22–1, at 16–17.

PrimeSource's amended complaint names the United States, the President, the U.S. Department of Commerce, the Secretary of Commerce, U.S. Customs and Border Protection, and the Acting Commissioner of Customs as defendants. ECF 22, at 7.

PrimeSource asserts the following claims: Count 1—an Administrative Procedure Act claim based on the Secretary's alleged violations of Section 232's procedural requirements, *id.* at 19–21; Count 2—a nonstatutory review claim based on the President's alleged violation of Section 232's procedural requirements, *id.* at 22; Count 3—a due process claim based on the President's alleged actions, *id.* at 22–23; Count 4—a constitutional claim based on Congress's alleged overdelegation of authority to the President in Section 232, *id.* at 23–24; and Count 5—a nonstatutory review claim based on the Secretary's alleged violations of Section 232's procedural requirements, *id.* at 24.

PrimeSource requests that the Court “[e]njoin Defendants from implementing or further enforcing Proclamation 9980,” “declare Proclamation 9980 unlawful,” and order a “[r]efund to PrimeSource [of] any duties that may be collected on its imported articles pursuant to Proclamation 9980.” *Id.* at 25.

The government moves to dismiss for failure to state a claim, *see* USCIT R. 12(b)(6). ECF 60. PrimeSource opposes and cross-moves for summary judgment, *see* USCIT 56. ECF 73.⁸

⁶ Chief Judge Stanceu thereafter assigned this case to this three-judge panel. *See* 28 U.S.C. § 255(a) (authorizing the chief judge to designate a three-judge panel to hear and determine any civil action which “(1) raises an issue of the constitutionality of . . . a proclamation of the President . . . ; or (2) has broad or significant implications in the administration or interpretation of the customs laws.”). Chief Judge Stanceu concurrently assigned several other related cases challenging Proclamation 9980 to the same panel.

⁷ In this opinion, pagination references in citations to the Court record are to the pagination found in the ECF header at the top of each page.

⁸ The affidavit attached to the amended complaint establishes PrimeSource's constitutional standing for purposes of its cross-motion for summary judgment.

Analysis

I. We have no jurisdiction to enter relief directly against the President and should dismiss him from the case.

In my view, we should dismiss the President as a party for two separate and independent reasons.⁹ First, the statute giving us jurisdiction to hear this case does not confer jurisdiction over such claims. Second, even if our jurisdictional statute permitted us to award relief against the President, the separation of powers does not.

Although the government has not questioned our jurisdiction to enter relief against the President, our subject-matter jurisdiction, like standing, “is not dispensed in gross.” *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Jurisdiction must exist as to “each claim” a plaintiff “seeks to press and for each form of relief that is sought.” *Town of Chester, N.Y. v. Laroe Estates*, 137 S. Ct. 1645, 1650 (2017) (quoting *Davis v. FEC*, 554 U.S. 724, 734 (2008)).

Thus, we have an independent obligation to determine whether we have subject-matter jurisdiction to enter relief directly against the President, *see Arbaugh v. Y&H Corp.*, 546 U.S. 500, 514 (2006) (federal courts have an independent duty to examine their jurisdiction), even though the practical consequences of our decision may be the same because we can enjoin the President’s subordinates from executing his unlawful orders in limited situations through nonstatutory review.¹⁰ *Cf. McGirt v. Oklahoma*, 140 S. Ct. 2452, 2504 (2020) (Thomas, J., dissenting) (“The Court might think that, in the grand

⁹ My colleagues avoid the jurisdictional issue, stating “we do not construe the claim in Count 2 [the lone claim surviving today’s decision] as a claim against the President. The claim is directed against Proclamation 9980 itself, not the President, against whom no remedy is sought.” *Ante* at 18 n.4. Unfortunately, we cannot so easily wish this jurisdictional problem away. The *President*, not Proclamation 9980, is a defendant in this litigation. Count 2, which alleges that Proclamation 9980 is invalid, is merely a legal claim asserted against the President and the other defendants. *See* ECF 22, at 22. As relief for this claim, PrimeSource requests that the Court issue a declaratory judgment and injunction against all defendants, including the President. *Id.* at 25. There is no plausible basis upon which to state that Count 2 is directed against every defendant except the President, or that—even if we withhold injunctive relief against the President—any declaratory relief that we might ultimately grant would merely apply against Proclamation 9980, as opposed to the defendants, including the President. Declaratory relief under 28 U.S.C. § 2201 binds parties, not things. *See Restatement (Second) of Judgments* § 33 (1982) (“A valid and final judgment in an action brought to declare rights or other legal relations of the parties is conclusive in a subsequent action between them as to the matters declared, and, in accordance with the rules of issue preclusion, as to any issues actually litigated by them and determined in the action.”).

¹⁰ “Nonstatutory review” is “the type of review of administrative action which is available, not by virtue of those explicit review provisions contained in most modern statutes which create administrative agencies, but rather through the use of traditional common-law remedies—most notably, the writ of mandamus and the injunction—against the officer who is allegedly misapplying his statutory authority or exceeding his constitutional power.” 33 Wright & Miller, *Federal Practice and Procedure* § 8304(2d ed. 2020) (quoting Antonin

scheme of things, this jurisdictional defect is fairly insignificant. After all, we were bound to resolve this . . . question sooner or later. But our desire . . . for . . . convenience and efficiency must yield to the overriding and time-honored concern about keeping the Judiciary's power within its proper constitutional sphere.”) (cleaned up).

Our obligation to consider our jurisdiction is even more pronounced in this case because the Judiciary has the “responsibility to police the separation of powers in litigation involving the executive,” *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 402 (2004) (Ginsburg, J., dissenting) (cleaned up), even if, as here, the Executive Branch declines to defend its own constitutional prerogatives. The “separation of powers does not depend on the views of individual Presidents, see *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 879–80 (1991), nor on whether ‘the encroached-upon branch approves the encroachment.’” *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497 (2010) (quoting *New York v. United States*, 505 U.S. 144, 182 (1992)). The President “cannot . . . choose to bind his successors by diminishing their powers.” *Id.* The government’s failure to seek dismissal of the President does not relieve us of our obligations under the separation of powers.

Scalia, *Sovereign Immunity Nonstatutory Review of Federal Administrative Action: Some Conclusions from the Public-Lands Cases*, 68 Mich. L. Rev. 867, 870 (1969–70)).

Federal courts entertain claims for nonstatutory review against the President’s subordinates to enjoin them from enforcing allegedly unlawful Presidential orders. See *Franklin v. Massachusetts*, 505 U.S. 788, 828 (1992) (Scalia, J., concurring) (“Review of the legality of Presidential action can ordinarily be obtained in a suit seeking to enjoin the officers who attempt to enforce the President’s directive . . .”). The Supreme Court has assumed, but never directly recognized, the availability of such nonstatutory review for claims against Presidential subordinates based on the President’s alleged violation of a statutory mandate. See *Dalton v. Specter*, 511 U.S. 462, 474 (1994) (“We may assume 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.”).

In the Federal Circuit, nonstatutory review claims against Presidential subordinates for the President’s alleged violation of a statute are “only rarely available,” *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed. Cir. 2018), and are limited to whether the President has violated “an explicit statutory mandate.” *Id.* (quoting *Motion Sys. Corp. v. Bush*, 437 F.3d 1356, 1361 (Fed. Cir. 2006) (en banc)); see also *Maple Leaf Fish Co. v. United States*, 762 F.2d 86, 89 (Fed. Cir. 1985) (federal court review of Presidential action under a statute is limited to situations involving “a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority”). Thus, dismissal of the President from this suit would not preclude us from granting declaratory and injunctive relief against the President’s subordinates based on his alleged violation of Section 232’s procedural requirements in issuing Proclamation 9980.

A. Jurisdiction under 28 U.S.C. § 1581(i) does not encompass claims against the President.

PrimeSource invokes 28 U.S.C. § 1581(i) as the jurisdictional basis for this suit. ECF 22, at 4.¹¹ In 2003, the Federal Circuit held that § 1581(i) jurisdiction does not encompass claims against the President, noting that while “the President’s *actions* are subject to judicial review, it does not necessarily follow that a claim for relief may be asserted against the President directly.” *Corus Grp. PLC v. ITC*, 352 F.3d 1351, 1359 (Fed. Cir. 2003) (emphasis added). The court recognized the principle that the APA does not authorize an action directly against the President¹² and then explained as follows:

This reasoning seems equally applicable to actions under 28 U.S.C. § 1581(i), which refers only to actions “against the United States, its agencies, or its officers” and does not specifically include the President. We conclude that section 1581(i) does not authorize proceedings directly against the President.

Since the complaint in this action relied solely on section 1581 as the basis of jurisdiction, the President should have been dismissed as a party.

Corus Grp., 352 F.3d at 1359 (cleaned up).

Six months later, a decision of this court held that *Corus Group* was wrongly decided because it misread an earlier Federal Circuit decision holding that § 1581(i) waived the sovereign immunity of the President and other officials. *See Motion Sys. Corp. v. Bush*, 342 F. Supp. 2d 1247, 1254–56 (CIT 2004) (discussing *Corus Group* and *Humane Society of the United States v. Clinton*, 236 F.3d 1320 (Fed. Cir. 2001)).

On appeal in *Motion Systems*, the Federal Circuit granted rehearing en banc to consider whether *Corus Group* should “be overruled *en banc* insofar as it holds that § 1581(i) does not authorize relief against the President.” *Motion Sys. Corp. v. Bush*, 140 F. App’x 257, 258 (Fed. Cir. 2005) (en banc) (per curiam). Significantly, the later merits opinion never addressed this question, apparently because the en banc court found the President’s actions not subject to judicial review.

¹¹ The statute provides in relevant part that our Court “shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for,” *inter alia*, “(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue.” 28 U.S.C. § 1581(i).

¹² *See, e.g., Franklin*, 505 U.S. at 801 (“As the APA does not expressly allow review of the President’s actions, we must presume that his actions are not subject to its requirements.”).

See Motion Sys. Corp. v. Bush, 437 F.3d 1356, 1359 (Fed. Cir. 2006) (en banc).¹³

In my view, *Corus Group* is binding on us, notwithstanding the earlier Federal Circuit decision in *Humane Society* allowing the President and other officers to be sued under § 1581(i).¹⁴ First, the *Corus Group* court explained that *Humane Society* “dealt only with the general issue of the government’s sovereign immunity and not with the applicability of § 1581(i) to the President individually.” *Corus Grp.*, 352 F.3d at 1359 n.5. Thus, in the eyes of the Federal Circuit, the two cases do not conflict. If judicial hierarchy means anything, it must mean that the Federal Circuit’s reading of its own cases binds this Court.

Because the *Corus Group* court distinguished *Humane Society*, we are bound to follow *Corus Group* and to dismiss the President as a party. *See Preminger v. Sec’y of Veterans Affairs*, 517 F.3d 1299, 1309 (Fed. Cir. 2008) (“A prior precedential decision on a point of law by a panel of this court is binding precedent and cannot be overruled or avoided unless or until the court sits *en banc*.”) (emphasis added).

Second, even if *Corus Group*’s reading of *Humane Society* is not binding on us, my own reading of *Humane Society* is the same as *Corus Group*’s. As the *Humane Society* panel merely assumed that § 1581(i)’s jurisdictional grant includes claims against the President, that drive-by jurisdictional assumption is not entitled to any weight, *see supra* note 13, and *Corus Group* controls that question.

B. The separation of powers prevents us from issuing injunctive or declaratory relief directly against the President in the performance of his official duties.

For separation of powers purposes, “[t]he President’s unique status under the Constitution distinguishes him from other executive officials.” *Nixon v. Fitzgerald*, 457 U.S. 731, 750 (1982); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.17 (1982) (“Suits against other

¹³ Because it did not directly address the question, *Motion Systems* cannot be read as implicitly endorsing the conclusion that the President can be sued under § 1581(i). The Supreme Court has “described such unrefined dispositions as ‘drive-by jurisdictional rulings’ that should be accorded ‘no precedential effect’ on the question whether the federal court had authority to adjudicate the claim in suit.” *Arbaugh*, 546 U.S. at 511 (quoting *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 91 (1998)); *cf. Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2100 (2019) (Gorsuch, J., concurring) (explaining that “drive-by jurisdiction” means that a court’s failure to directly address issues such as standing or jurisdiction “cannot be mistaken as an endorsement of it”).

¹⁴ Where two Federal Circuit panel decisions *directly* conflict, the earlier opinion controls unless and until the en banc court rules otherwise. *Newell Cos. v. Kenney Mfg. Co.*, 864 F.2d 757, 765 (Fed. Cir. 1988).

officials—including Presidential aides—generally do not invoke separation-of-powers considerations to the same extent as suits against the President himself.”).

Because of these separation of powers considerations, any request for relief directly against the President “should . . . raise[] judicial eyebrows.” *Franklin*, 505 U.S. at 802 (plurality opinion of O’Connor, J.). The *Franklin* plurality of four justices¹⁵ observed that “in general, ‘this court has no jurisdiction of a bill to enjoin the President in the performance of his official duties.’” *Id.* at 802–03 (plurality opinion of O’Connor, J.) (quoting *Mississippi v. Johnson*, 4 Wall. 475, 501 (1867)). On this point, Justice Scalia agreed with the plurality and explained that “[t]he apparently unbroken historical tradition supports the view that . . . the President and the Congress (as opposed to their agents)—may not be ordered to perform particular executive or legislative acts at the behest of the Judiciary.” *See id.* at 827 (Scalia, J., concurring).¹⁶

If the Supreme Court cannot grant injunctive relief against the President in the performance of his official duties, as five justices of the Court agreed that it cannot do, then lower federal courts may not do so either.¹⁷

¹⁵ Chief Justice Rehnquist and Justices White and Thomas joined the relevant portion of Justice O’Connor’s opinion in *Franklin*.

¹⁶ Although the Supreme Court has recognized that the President is not totally immune to judicial process, *see, e.g., Trump v. Vance*, 140 S. Ct. 2412, 2421–24 (2020) (tracing over 200 years of case law involving subpoenas directed to presidents), the critical distinction is that in those cases the President was to “provide information relevant to an ongoing criminal prosecution [or, in *Trump v. Vance*, a grand jury investigation], which is what any citizen might do; [the court orders] did not require him to exercise the ‘executive Power’ in a judicially prescribed fashion.” *Franklin*, 505 U.S. at 826 (Scalia, J., concurring). In *Franklin*, the plurality also noted that “[w]e have left open the question whether the President might be subject to a judicial injunction requiring the performance of a purely ‘ministerial’ duty.” *Id.* at 802 (plurality opinion of O’Connor, J.); *see also id.* at 827 n.2 (Scalia, J. concurring) (making the same observation). The President’s issuance of Proclamation 9980 plainly does not involve “ministerial” duties.

¹⁷ *See, e.g., In re Trump*, 958 F.3d 274, 297 (4th Cir. 2020) (en banc) (Wilkinson, J., dissenting) (“Over the course of this nation’s entire existence, there has been an unbroken historical tradition implicit in the separation of powers that a President may not be ordered by the Judiciary to perform particular Executive acts.”) (cleaned up), *vacated as moot*, No. 20–331 (U.S. Jan. 25, 2021); *Hawaii v. Trump*, 859 F.3d 741, 788 (9th Cir.) (“Finally, the Government argues that the district court erred by issuing an injunction that runs against the President himself. This position of the government is well taken. Generally, we lack jurisdiction of a bill to enjoin the President in the performance of his official duties. . . . [T]he extraordinary remedy of enjoining the President is not appropriate here.”) (cleaned up), *vacated on other grounds*, 138 S. Ct. 377 (2017) (mem.); *Newdow v. Roberts*, 603 F.3d 1002, 1013 (D.C. Cir. 2010) (“The only apparent avenue of redress for plaintiffs’ claimed injuries would be injunctive or declaratory relief against all possible President-elects and the President himself. But such relief is unavailable. . . . With regard to the President, courts do not have jurisdiction to enjoin him and have never submitted the President to declaratory relief.”) (cleaned up); *Anderson v. Obama*, 2010 WL 3000765, at *2 (D. Md. July 28, 2010) (denying motion for preliminary injunction seeking to prevent President Obama from

Nor may we issue even declaratory relief against the President. In at least two different contexts, the Supreme Court has recognized that because declaratory relief is functionally equivalent to injunctive relief, any bar on the latter also applies to the former. *See, e.g., California v. Grace Brethren Church*, 457 U.S. 393, 407–08 (1982) (holding that “because there is little practical difference between injunctive and declaratory relief,” the Tax Injunction Act bars federal court jurisdiction over suits seeking declaratory as well as injunctive relief to “enjoin, suspend or restrain the . . . collection of any tax under State law”) (quoting 28 U.S.C. § 1341); *Samuels v. Mackell*, 401 U.S. 66, 73 (1971) (holding that because “the practical effect of the two forms of relief will be virtually identical,” *Younger* abstention principles apply to declaratory relief as much as injunctive relief). Lower courts have applied this principle in additional contexts. *See, e.g., Tex. Emps.’ Ins. Ass’n v. Jackson*, 862 F.2d 491, 506 (5th Cir. 1988) (“If an injunction would be barred by [the Anti-Injunction Act, 28 U.S.C.] § 2283, this should also bar the issuance of a declaratory judgment that would have the same effect as an injunction.”) (cleaned up and quoting Charles Alan Wright, *Federal Courts* § 47, at 285 (4th ed. 1983)).

Because declaratory relief is functionally equivalent to injunctive relief, the same structural separation of powers principles that counsel against enjoining the President necessarily also apply to issuing “a declaratory judgment against the President. It is incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court.” *Franklin*, 505 U.S. at 827 (Scalia, J., concurring); *see also Newdow*, 603 F.3d at 1013 (D.C. Cir. 2010) (declaratory relief against the President is unavailable); *In re Trump*, 958 F.3d at 302 (“We have no more power to issue a declaratory judgment against the President regarding the performance of an official duty than we do an injunction.”) (Wilkinson, J., dissenting).

In short, even if § 1581(i) permitted the assertion of claims against the President in our Court, in my view the statute would violate the separation of powers. We should dismiss all claims against the President for lack of jurisdiction. Our failure to do so only invites “more and more disgruntled plaintiffs [to] add his name to their complaints” in our Court and thereby produce “needless head-on confrontations

signing or enforcing the Affordable Care Act “because the Court lacks power to grant the requested relief. The Court has no jurisdiction to issue an injunction against the President in his official capacity and in the performance of non-ministerial actions.”; *Willis v. U.S. Dep’t of Health & Human Servs.*, 38 F. Supp. 3d 1274, 1277 (W.D. Okla. 2014) (finding that suit attempting to enjoin President Obama from enforcing any part of the ACA “contravenes an extensive amount of well-settled law” and “raises serious separation of powers concerns” because “[l]ongstanding legal authority establishes that the judiciary does not possess the power to issue an injunction against the President or Congress”).

between [us] and the Chief Executive.” *Franklin*, 505 U.S. at 827 (Scalia, J., concurring).

II. Count 5 fails because PrimeSource has abandoned any claim for nonstatutory review against the Secretary outside of the APA.

In Count 5, PrimeSource appears to assert a claim against the Secretary outside of the APA for alleged procedural violations of Section 232:

The Secretary of Commerce violated Section 232 by making “assessments”, “determinations” and providing other “information” to the President without following any of the statutory procedures for new action and by doing so outside the statutory time periods applicable to the 2017–18 investigation conducted by the Secretary of Commerce that resulted in Proclamation 9705.

ECF 22, at 24. According to my colleagues, “for PrimeSource’s fifth count to be cognizable, judicial review must exist under the APA” because “Section 232 does not provide for judicial review of any action taken thereunder.” *Ante* at 16. My colleagues therefore conclude that because PrimeSource’s APA claim against the Secretary in Count 1 fails for lack of final agency action, then Count 5 necessarily fails as well.

My colleagues imply that absent a statutory cause of action in the statute under which official action is taken, which Wright and Miller refer to as “special statutory review,” see 33 *Federal Practice & Procedure* § 8301 (2d ed. 2020), the only recourse that a person or entity injured by official action has is an action under the APA, which Wright and Miller denominate as “general statutory review.” *Id.* My colleagues overlook a third possible avenue for judicial relief against official agency action, nonstatutory review.

Courts have recognized that a person threatened with injury by actions of Executive Branch officials may sometimes seek declaratory and injunctive relief against such officials even though the underlying statute provides no cause of action and no relief is available under the APA. Such actions are known as “nonstatutory review.” *Id.*; see also *supra* note 10 (explaining nonstatutory review in the context of challenges to agency enforcement of *Presidential* actions); 33 *Federal Practice & Procedure* § 8304 (2d ed. 2020). “It does not matter . . . whether traditional APA review is foreclosed” because nonstatutory review is available “when an agency is charged with acting beyond its authority.” *Aid Ass’n for Lutherans v. U.S. Postal Serv.*, 321 F.3d 1166,

1172 (D.C. Cir. 2003) (quoting *Dart v. United States*, 848 F.2d 217, 221 (D.C. Cir. 1988)).

Nevertheless, nonstatutory review is available in only very limited circumstances. “Non-statutory review is a doctrine of last resort, ‘intended to be of extremely limited scope’ and applicable only to preserve judicial review when an agency acts ‘in excess of its delegated powers.’” *Schroer v. Billington*, 525 F. Supp. 2d 58, 65 (D.D.C. 2007) (quoting *Griffith v. Fed. Lab. Rel. Auth.*, 842 F.2d 487, 493 (D.C. Cir. 1988)); see also Kathryn E. Kovacs, *Revealing Redundancy: The Tension Between Federal Sovereign Immunity and Nonstatutory Review*, 54 Drake L. Rev. 77, 107 (2005) (to state a claim for nonstatutory review challenging agency action, “[a] plaintiff must allege more than that an agency acted illegally or even interfered with his rights; he must allege that the agency did so in a manner that exceeded its statutory or constitutional authority”). In short, nonstatutory review relief against an agency official is roughly analogous to mandamus relief against a district court or our Court—strong medicine that is only rarely available. *Cf. Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (mandamus “is a ‘drastic and extraordinary’ remedy ‘reserved for really extraordinary causes’” such as when the district court has departed from “the lawful exercise of its prescribed jurisdiction”) (quoting *Ex parte Fahey*, 332 U.S. 258, 259–60 (1947)).

Given these principles, I read Count 5 of PrimeSource’s complaint as asserting a nonstatutory review claim based on the *Secretary’s* alleged violations of Section 232’s procedural requirements, just as Count 2 is a nonstatutory review claim based on the *President’s* alleged violations of Section 232’s procedural requirements.

Nevertheless, PrimeSource has effectively abandoned Count 5 by tethering it to its APA claim in Count 1. See ECF 73–1, at 7 n.1 (characterizing “both Counts 1 and 5 from PrimeSource’s amended complaint” as involving whether the Secretary, “in failing to follow the procedures set forth in Section 232 . . . violated the *Administrative Procedure[] Act*”) (emphasis added). Because I agree with my colleagues that PrimeSource’s APA claim under Count 1 fails for lack of final agency action, see *ante* at 11–14, PrimeSource’s linkage of Count 5 to Count 1 dooms the former.

III. Proclamation 9980 did not violate Section 232.

PrimeSource contends that Proclamation 9980 violated Section 232 by imposing tariffs on steel derivative products outside of the statutory deadlines for implementing such action. Although not expressly framed as such, PrimeSource appears to assert two alternative theories (even as it repeatedly blurs the two theories together).

First, citing the Court’s decision in *Transpacific Steel LLC v. United States*, 415 F. Supp. 3d 1267 (CIT 2019) (*Transpacific I*),¹⁸ PrimeSource argues that after the President timely implements Section 232 import restrictions, he cannot later *modify* such restrictions outside of the 105-day period for taking action upon receiving a report from the Secretary.¹⁹ See ECF 73–1, at 20 (invoking *Transpacific I* against the government’s argument that Section 232 “provide[s] the President with flexibility to modify his actions” outside of the statutory deadline for acting).

Although my colleagues distinguish the *Transpacific* litigation on its facts, see *ante* at 23 n.8 (noting that case involved a modification to the *means* of Section 232 import restrictions rather than—as here—the *products* covered by such restrictions), in denying the government’s motion to dismiss Count 2 my colleagues nonetheless appear to tacitly embrace the *Transpacific* opinions’ rationale, which reads the 1988 amendments as barring modifications to Section 232 action after the statutory implementation deadline has passed. See *ante* at 31 (“[W]e are unconvinced by defendants’ argument that the[] [1988] amendments maintained, unchanged, the ‘continuing authority’ of the President.”); *ante* at 32 (“[T]here is no ‘flexible’ reading of [Section 232] under which the express time limitations on a Presidential ‘action,’ and implementation thereof, do not apply.”); *ante* at 39 (“Section 232(c)(1) . . . unambiguously placed time limits on the President’s authority to adjust imports of derivatives as well as the imports of the investigated article.”). Thus, notwithstanding my colleagues’ distinguishing of the *Transpacific* case on its facts, their rationale would—like *Transpacific’s*—bar modifications of Section 232 import restrictions after the statutory deadline for implementation even as to the means of such restrictions.

PrimeSource also appears to argue in the alternative that even if Section 232 permits such modifications of import restrictions outside of the statutory deadlines for taking new action, Proclamation 9980’s tariffs on steel derivative products nevertheless constituted entirely

¹⁸ In *Transpacific I*, a different three-judge panel of the Court held—in the context of denying the government’s Rule 12(b)(6) motion to dismiss—that the President’s modification of Proclamation 9705 to increase duties on Turkish steel imports violated Section 232 because the statute does not permit such modifications after the statutory implementation deadline has passed absent another formal investigation and report by the Secretary. See 415 F. Supp. 3d at 1273–76; see also *Transpacific Steel LLC v. United States*, 466 F. Supp. 3d 1246, 1253 (CIT 2020) (*Transpacific II*) (holding, in the context of summary judgment, that “nothing in the statute . . . support[s] . . . continuing authority to modify Proclamations outside of the stated timelines.”), *appeal docketed*, No. 20–2157 (Fed. Cir. Aug. 17, 2020).

¹⁹ The “105-day period” reflects the initial 90-day period for the President to determine whether he concurs in the Secretary of Commerce’s finding and, if so, to determine the nature and duration of the action he deems necessary, plus the subsequent 15-day period for him to “implement that action.” See 19 U.S.C. § 1862(c)(1)(A)–(B).

new Section 232 action subject to the statute’s procedural requirements, rather than a permissible modification, because Proclamation 9705 was limited to steel *articles* and did not include steel derivatives. See ECF 73–1, at 30 (contending that Proclamation 9980 “was not “a permissible modification of Proclamation 9705”) (emphasis added); *id.* at 31 (“The instant case goes one step beyond *TransPacific* because here the untimely additional duties are being extended to types of products *that were never even previously investigated.*”) (emphasis added); *id.* at 53 (“Given that the Secretary determined a hearing was appropriate in the initial investigation, he cannot now issue additional recommendations to the President on *new* products that were not subject to initial investigation.”) (emphasis added).

My colleagues also appear to embrace this alternative theory as a basis for denying the government’s motion to Count 2. See *ante* at 33 (stating that Proclamation 9705 and 9980 “stemmed from two separate Presidential determinations and were directed at two different sets of products. Each necessarily required its own implementation.”).

I disagree with both of PrimeSource’s alternative theories, and for that reason would grant the government’s motion to dismiss Count 2. I begin with the *Transpacific* theory—namely, that the 1988 amendments to the statute bar the President from modifying Section 232 import restrictions after the statutory deadline for implementing those restrictions has passed.

A. Section 232 permits the President to modify import restrictions after the statutory implementation deadline has passed.

In my view, Section 232 permits the President to modify import restrictions without repeating the formal procedures necessary for initial action. As explained below, (1) the original statute that Congress enacted in 1955 and later reenacted as Section 232 permitted the President to modify import restrictions; (2) the 1988 amendments to Section 232 did not withdraw the President’s preexisting authority to modify such restrictions; and (3) given that Section 232 import restrictions can last for decades, it would be both incongruous and unworkable to read the statute as precluding later modifications of such restrictions.

1. The pre-1988 statutory language permitted the President to modify import restrictions.

a. The word “action” in the original 1955 statute gave the President continuing authority to modify import restrictions.

Section 232 originated in the Trade Agreements Extension Act of 1955, Pub. L. No. 86–169, § 7, 69 Stat. 162, 166. That statute required the Director of the Office of Defense Mobilization to notify the President whenever the Director had “reason to believe that any article is being imported into the United States in such quantities as to threaten to impair the national security.” *Id.* If the President agreed, the statute required him to order the Director to investigate the matter and report back. If, in turn, the investigation and the subsequent report led the President to conclude that imports of the article threatened national security, the statute required that he “take *such action* as he deems necessary to adjust the imports of such article to a level that will not threaten to impair the national security.” *Id.* (emphasis added).²⁰

In 1975, Attorney General William Saxbe examined this statutory language and opined²¹ that the words “such action” implied a continuing course of conduct that could include modifications:

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

Restriction of Oil Imports, 43 Op. Att’y Gen. No. 20, at 3–4 (Jan. 14, 1975).²²

²⁰ The original 1955 statute did not include the words “and its derivatives” following the words “imports of such article.”

²¹ Although issued in the name of Attorney General Saxbe, the Justice Department official responsible for this memorandum presumably was then–Assistant Attorney General Antonin Scalia, who headed the Office of Legal Counsel from 1974 until 1977.

²² Attorney General Saxbe noted a statement by Congressman Cooper, floor manager for the legislation, that “having taken an action, [the President] would retain flexibility with respect to the continuation, modification, or suspension of any decision that had been made.” 43 Op. Att’y Gen. No. 20, at 3 (quoting 101 Cong. Rec. 8160–61 (1955)). The Attorney General further referenced the Conference Report for the bill, which stated that “it is . . . the understanding of all the conferees that the authority granted to the President under this provision is a continuing authority.” *Id.* (quoting H.R. Rep. 84–745, at 7 (1955)).

Attorney General Saxbe opined that for both modification or continuation of restrictions, the statute presumed that the appropriate agency would monitor the factual situation and the effectiveness of any restrictions and advise the President to act accordingly. 43 Op. Att’y Gen. No. 20, at 3–4. This continued monitoring did “not have to comply with the formal investigation and finding requirements applicable to the original imposition of the restriction.” *Id.* at 4.

b. The 1958 amendments enhanced the President’s power.

In the Trade Agreements Extension Act of 1958, Congress amended the statute while retaining the key language—“such action”—authorizing modifications of import restrictions. As amended, the statute provided:

(b) Upon request of the head of any Department or Agency, upon application of an interested party, or upon his own motion, the Director of the Office of Defense Mobilization (hereinafter in this section referred to as the “Director”) shall immediately make an appropriate investigation, in the course of which he shall seek information and advice from other appropriate Departments and Agencies, to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion. If, as a result of such investigation, the Director is of the opinion that the said article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall promptly so advise the President, and unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security as set forth in this section, *he shall take such action*, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not so threaten to impair the national security.

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

These amendments enhanced the President’s power under the statute in at least three ways. First, Congress eliminated the wasteful requirement that the relevant agency first seek the President’s approval to undertake the investigation, thereby allowing a more streamlined process for initiating action in the first instance. Second, Congress made clear that the President’s discretion regarding “action” also included the “time” that action would last. Third, Congress

gave the President the power to act with respect to *derivatives* of products identified in the agency's report, even if the report itself did not address such derivatives.

As my colleagues observe, the legislative history of these 1958 amendments reflects that Congress authorized the President to act as to derivatives of an investigated article out of concern that such imports might allow circumvention of restrictions on that article. *See ante* at 26–27.

c. Congress made technical changes between 1962 and 1988.

In 1962, Congress reenacted the provision as Section 232 of the Trade Expansion Act of 1962, Pub. L. No. 87–794, 76 Stat. 872, 877. This reenactment and codification did not materially change the statute. *See* S. Rep. 87–2059, 1962 USCCAN 3118.

In the ensuing quarter century after the 1962 reenactment, Congress made various technical changes to the statute, but none of them materially changed the President's powers under the statute conferred by the original 1955 legislation and enhanced by the 1958 amendments.²³ Thus, on the eve of Congress's 1988 amendments, Section 232 provided in relevant part:

Upon request of the head of any department or agency, upon application of an interested party, or upon his own motion, the Secretary of the Treasury (hereinafter referred to as the "Secretary") shall immediately make an appropriate investigation . . . to determine the effects on the national security of imports of the article which is the subject of such request, application, or motion.

The Secretary shall, if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation. The Secretary shall report the findings of his investigation under this subsection with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, his recommendation for action or inaction under this section to the President within one year after receiving an

²³ In 1975, Congress amended the statute for the primary purpose of reassigning duties to different subordinate officials. *See* Trade Act of 1974, § 127(d)(3), Pub. L. No. 93–618, 88 Stat. 1978, 1993 (1975). In 1980, Congress amended Section 232 to establish a procedure whereby Congress could invalidate Presidential action to adjust imports of petroleum or petroleum products upon the enactment of a disapproval resolution. *See* Crude Oil Windfall Profit Tax Act of 1980, § 402, Pub. L. No. 96–223, 94 Stat. 229, 301.

application from an interested party or otherwise beginning an investigation under this subsection.

If the Secretary finds that such article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security, he shall so advise the President and the President *shall take such action*, and for such time, as he deems necessary to adjust the imports of such article and its derivatives so that such imports will not threaten to impair the national security, unless the President determines that the article is not being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.

19 U.S.C. § 1862(b) (1980) (emphasis added).²⁴

d. Presidents repeatedly modified Section 232 import restrictions in the three decades prior to the 1988 amendments.

In 1959, President Eisenhower invoked Section 232 after a formal agency investigation and report found that crude oil and derivatives thereof were “being imported in such quantities and under such circumstances as to threaten to impair the national security.” Proclamation No. 3729 of March 10, 1959, *Adjusting Imports of Petroleum and Petroleum Products into the United States*, 24 Fed. Reg. 1781 (Mar. 12, 1959). President Eisenhower imposed import quotas on “crude oil, unfinished oils, and finished products.” *Id.* He also directed the relevant officials to advise him “of any circumstances which . . . might indicate the need for further Presidential action” under the statute. *Id.* at 1784 § 6(a).²⁵

President Eisenhower and his successors thereafter modified Proclamation 3279 at least 26 times between 1959 and the end of 1974, and none of those amendments involved a further investigation or report even though some involved significant alterations to the means of restricting petroleum imports. *See* 43 Op. Att’y Gen. No. 20, at 3. No new investigation was conducted, and no new report was issued, until 1975.²⁶

²⁴ To enhance readability, the block quotation above separates Section 232(b) into separate paragraphs.

²⁵ The quoted language is strikingly similar to the instruction in Proclamation 9705 directing the Secretary of Commerce to continue to monitor steel imports. *See* 83 Fed. Reg. at 11,628 ¶ (5)(b).

²⁶ Despite General Saxbe’s advice that there was no need to do so, the Secretary of the Treasury decided to go through the investigation-and-report process in the lead up to President Ford issuing Proclamation 4341, which amended Proclamation 3279 and

Reviewing this history in 1975, Attorney General Saxbe emphasized that Congress had acquiesced in this interpretation of Section 232: “The interpretation here proposed, whereby import restrictions once imposed can be modified without an additional investigation and finding, has been sanctioned by the Congress’ failure to object to the President’s proceeding on that basis repeatedly during the past 15 years.” 43 Op. Att’y Gen. No. 20, at 5. After Attorney General Saxbe issued his opinion in 1975, this practice continued. By my count, Presidents modified prior Section 232 action without repeating the statute’s formal investigation and report procedures over a dozen times between 1975 and the 1988 amendments. *See* Addendum.

This unbroken “statutory history” of administrative practice and interpretation “form[s] part of the context of the statute, and . . . can properly be presumed to have been before all the members of [Congress] when they voted” on the 1988 amendments to Section 232. Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 256 (2012); *cf. Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1440–43 (Fed. Cir. 1998) (tracing a statute’s evolution over time to ascertain a word’s meaning); *Holmes v. Sec. Investor Prot. Corp.*, 503 U.S. 258, 267–68 (1992) (interpreting a statute by tracing the history of another provision upon which the one at issue was modeled and noting that “we can only assume [Congress] intended them to have the same meaning that courts had already given them”).

2. The 1988 amendments did not withdraw the President’s preexisting modification power.

a. The 1988 amendments retained the statutory language authorizing modifications.

In 1988, Congress amended Section 232. *See* Omnibus Trade and Competitiveness Act of 1988, § 1501(a), Pub. L. No. 100–418, 102 Stat. 1107, 1258. Some of the amendments were clearly stylistic—the amended version, for example, avoids the masculine pronouns “he” and “his” when referring to the President and cabinet officials in favor of gender-neutral terminology (for example, “as he deems necessary” versus “in the judgment of the President”). Some of the changes were of a structural nature—the old statute contained lengthy paragraphs and the amendments broke those down into shorter, more readable pieces with multiple subparagraphs.

provided for a long-term system of license fees. *See* Proclamation No. 4341 of January 23, 1975, *Modifying Proclamation 3279, Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees*, 40 Fed. Reg. 3965 (Jan. 27, 1975) (referring to the Secretary of the Treasury’s investigation and report).

One of those structural changes entailed moving the provisions conferring authority upon the President to subsection (c)(1), which as discussed below also imposed a 105-day deadline for the President to exercise that authority.²⁷ As so amended, subsection (c)(1) provides:

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

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

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

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

19 U.S.C. § 1862(c)(1) (emphasis added).

Critically for present purposes, subsection (c)(1) retained the statutory language noted by Attorney General Saxbe granting the President’s continuing authority to modify Section 232 action previously taken—the words “the action,” “take action,” and “that action.” See 43 Op. Att’y Gen. No. 20, at 3–4. Under the prior-construction canon of statutory construction, Congress’s reenactment of the same statutory language implicitly ratified Attorney General Saxbe’s interpretation and the prior administrative practice of the preceding three decades. See *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) (“When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.”); see also Scalia & Garner, *supra*, at 324 (explaining that “when a term . . . has been authoritatively interpreted by a high court, or has been given uniform interpretation by the lower courts or the responsible agency . . . [t]he

²⁷ The 1988 amendments also imposed a 270-day deadline for the Secretary to issue a report upon initiating an investigation. See 19 U.S.C. § 1862(b)(3)(A).

term has acquired . . . a technical sense . . . that should be given effect in the construction of later-enacted statutes”).

My colleagues contend that reading “action” as investing the President with continuing authority is “contrary to [its] plain and ordinary meaning.” *Ante* at 33. But they do not proffer any definition of action to support this contention.

Even if their reading of the word “action” were correct, however, my disagreement with my colleagues is that they read the statute as if Congress wrote the 1988 legislation on a blank slate. But 1988 is not Year One for our purposes. The 1988 legislation amended a statute with a preexisting 30-year history of administrative interpretation and practice under which the word “action” invests the President with continuing authority. As Congress is presumed to have been aware of that history when it amended the statute and retained the word “action,” this is one of those contexts in which “[t]he past is never dead. It’s not even past.” William Faulkner, *Requiem for a Nun* 73 (Knopf Doubleday Publishing Group 2011).

In *Transpacific II*, the court acknowledged this history of Presidential modifications to Section 232 import restrictions, but reasoned that the 1988 amendments removed this authority by deleting “language that could be read to give the President the power to continually modify Proclamations.” 466 F. Supp. 3d at 1253. The 1988 amendments changed “the President *shall take such action, and for such time, as he deems necessary,*” 19 U.S.C. § 1862(b) (1980), to the President shall “*determine the nature and duration of the action that, in the judgment of the President, must be taken . . .*” 19 U.S.C. § 1862(c)(1)(A)(ii) (emphasis added). The *Transpacific II* court noted that the 1988 amendments “omit[ted] the clause ‘and for such time.’” 466 F. Supp. 3d at 1253.

In my view, *Transpacific II* erred in ascribing significance to this change. First, the President’s modification authority under the pre-1988 version of the statute stemmed from the words “such action,” *not* “for such time.” See 43 Op. Att’y Gen. No. 20, at 2 (“The normal meaning of the phrase ‘*such action,*’ in a context such as this, is not a single act but rather a continuing course of action.”) (emphasis added).

Second, even if “for such time” in the pre-1988 statute were the source of the President’s modification authority, that clause means the same thing as “the . . . duration” in the current statute: “[T]he length of time something lasts.” Duration, *Black’s Law Dictionary* (11th ed. 2019). Thus, the change from “for such time” to “the duration” was purely stylistic.

The legislative history bears out this reading. For example, the House Committee report included the following side-by-side comparison summaries of the then-existing statutory language and the meaning of the proposed changes. The key elements of the then-existing law and proposed amendments are underscored; notably, there is no underscoring of either “for such time” in the then-existing law or “the . . . duration” in the proposed amendments:

MISCELLANEOUS TRADE LAW PROVISIONS

<i>Item</i>	<i>Present Law</i>	<i>Subcommittee Proposal</i>
1. National security relief	Section 232 of the Trade Expansion Act of 1962, requires the Secretary of Commerce to investigate, upon request or own motion, the effects of imports of an article on national security and report his <i>findings and recommendations</i> , to the President <i>within one year</i> . If he finds “an article is being imported in such quantities or under such circumstances as to threaten to impair the national security,” the President, if he concurs with the finding, must take such action for such time as he deems necessary to “adjust” the imports. There is <i>no time limit for the President’s decision</i> .	Reduces the period for investigation by <i>Commerce to 9 months</i> . Imposes a <i>90-day time limit for the President</i> to determine whether he concurs with the Secretary’s advice and, if so, the nature and duration of action. Requires proclamation of any action within 15 days.

Staff of H. Comm. on Ways and Means, 100th Cong., Amendments to H.R. 3, Comprehensive Trade Policy Reform Legislation, As Reported by the Subcomm. on Trade, Explanation and Comparison with Present Law 92 (Comm. Print 1987).

* * *

If I am correct and Congress’s retention of the word “action” presumptively carried forward the meaning reflected in the preceding three decades of administrative interpretation and practice, the question then becomes whether other language in the 1988 amendments rebuts that presumption by effectively repealing the President’s modification authority in the word “action.” I now turn to that question.

b. The 1988 amendments' insertion of a deadline for the President to implement his action did not impliedly repeal the President's continuing authority to modify action once taken.

According to PrimeSource, the statute's 15-day deadline to "implement" Section 232 action bars later modification of such action. ECF 73–1, at 30. The plain meaning of the word "implement," however, does not foreclose future modifications to action—rather, the word "implement," in its relevant sense, merely means to "put (a decision or plan) into effect." 1 *Shorter Oxford English Dictionary* 1330 (5th ed. 2002);²⁸ see also *The American Heritage Dictionary of the English Language* 660 (1981) (defining "implement" as "[t]o provide a definite plan or procedure to ensure the fulfillment of"). Although my colleagues invoke the plain meaning of "implement" to hold that it repealed the President's preexisting modification authority, see *ante* at 33–34, they do not proffer any competing definition.

As amended in 1988, all the statute requires is that the President "implement" the action within the 15 days of determining to act, that is, to put the plan of action into effect. It does not contain any language limiting the President's preexisting statutory authority to modify that action later as necessary to protect the national security. Put differently, Section 232 does not prohibit the President from "implementing" a plan of continuing action that says, in essence, "We'll try *x*, but if our ongoing monitoring reveals that *x* doesn't work or that the relevant facts have changed, then we'll adjust it as necessary."

Consistent with the practice of his predecessors, that's what the President did here. In Proclamation 9705, he "implemented" a system of tariffs intended to address steel imports on an ongoing basis. Under that action, he directed the Secretary to monitor the effectiveness of the restrictions taken. See 83 Fed. Reg. at 11,628. After the Secretary advised the President that further action was necessary because steel derivative imports circumvented Proclamation 9705, the President issued Proclamation 9980.

To read Section 232 as granting the President ongoing authority to modify his actions, as past presidents did, does not—contrary to *Transpacific I*—read the deadlines out of the statute. See *Transpacific I*, 415 F. Supp. 3d at 1275 n.13 ("If the President has the power to continue to act, to modify his actions, beyond these deadlines, then these deadlines are meaningless."). The new deadlines inserted by

²⁸ The other definitions of "implement" as a transitive verb are of a sort that cannot be relevant in the Section 232 context.

the 1988 amendments require prompt *implementation*, i.e., putting a plan of action into effect, without which the President has no authority to act at all assuming those deadlines are mandatory,²⁹ but those deadlines do not apply to modifications of action that was otherwise timely implemented in the first instance. Thus, as amended in 1988, the statute requires the President to decide on his plan within 90 days of receiving the Secretary's report and put that plan into place within 15 days of so deciding, but so long as he does so, it does not prohibit him from later modifying that plan.

Because the 1988 amendments' insertion of deadlines for the President to "implement action" can peacefully coexist with Congress's retention of the President's modification authority in the word "action" from the pre-1988 statute, those deadlines cannot be read as impliedly repealing the latter. "Repeal by implication is invoked only when an enactment is *irreconcilable* with an earlier statute, or the enactment so comprehensively covers the subject matter of the earlier statute that it must have been intended as a substitute. In either case, Congress' intention to repeal the earlier law must be 'clear and manifest.'" *Todd v. Merit Sys. Prot. Bd.*, 55 F.3d 1574, 1577 (Fed. Cir. 1995) (cleaned up and emphasis added); see also 1A Sutherland Statutes and Statutory Construction § 22:34 (7th ed. 2020 update) ("[P]rovisions introduced by an amendatory act should be read together with provisions of the original section that were reenacted or left unchanged as if they had originally been enacted as one section. Effect is to be given to each part, and they are interpreted so they do not conflict."). Here, because the implementation deadline added by the 1988 amendments is reconcilable with the President's continuing authority to act in the word "action," there is no clear and manifest intention on the part of Congress to repeal that preexisting authority.

The presumption against an implied repeal of the President's preexisting authority to modify Section 232 action is even stronger here because of the three decades of administrative practice and interpretation of Section 232 recognizing that authority prior to the 1988 amendments. If Congress removed the authority, we should expect to find a clear indication that Congress affirmatively sought to make such a radical change. "Here, the applicable principle is that Congress does not enact substantive changes *sub silentio*." *United States v. O'Brien*, 560 U.S. 218, 231 (2010) (citing *Director of Revenue of Mo.*

²⁹ For present purposes, I assume that the statute's deadlines are mandatory. I do not reach, and therefore express no view on, the government's alternative argument that that the statute's deadlines are directory rather than mandatory. See ECF 60, at 45–47.

v. CoBank ACB, 531 U.S. 316, 323 (2001)); *see also CoBank ACB*, 531 U.S. at 324 (rejecting interpretation of statutory amendments “that Congress made a radical—but entirely implicit—change” that overruled a “50-year history”); *In re Cuozzo Speed Techs., Inc.*, 793 F.3d 1268, 1277 (Fed. Cir. 2015) (noting that Congress is assumed to recognize longstanding existing law and that it is improper to assume Congress alters that sort of thing *sub silentio*).

To appreciate just how radical a change PrimeSource’s reading of the 1988 amendments represents, it’s worth considering President Reagan’s use of Section 232 authority in the runup to those amendments. In 1982, Muammar Kaddafi’s Libya was a serious, lethal menace to U.S. national security interests.³⁰ That year, without a formal Section 232 investigation and report, President Reagan modified the oil import restrictions of Proclamation 3729—issued by President Eisenhower in 1959—to exclude Libyan oil imports indefinitely. President Reagan explained he did so because the applicable cabinet officials had advised him that continued oil imports from Libya were “inimical to the United States national security.” Proclamation No. 4907 of March 10, 1982, *Imports of Petroleum*, 47 Fed. Reg. 10,507 (Mar. 11, 1982).

Under the theory advanced by PrimeSource, Congress in 1988 outlawed President Reagan’s restriction of Libyan oil imports because he failed to receive a formal Section 232 report before acting. This is purportedly so even though only two years earlier, in 1986, Libyan agents had executed a terrorist attack on American service members in West Berlin, and President Reagan ordered military strikes on Libya in retaliation. Hayward, *supra* note 30, at 489–91. In view of this contemporaneous statutory history, PrimeSource’s theory asks us to read the 1988 amendments as implicitly working a revolutionary change in the statute.

In short, because the 1988 amendments requiring the President to exercise Section 232 action within 105 days of receiving the Secretary’s report do not clearly indicate that Congress *also* sought to curtail the “systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned,” *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610–11 (1952) (Frankfurter, J., concurring), of the type taken by President Reagan in 1982 as to Libyan oil imports, we should construe the statute as preserving that authority.

³⁰ Among other things, in late 1981 “American intelligence picked up reports from multiple sources (including an intercepted phone call of Kaddafi himself) that Kaddafi was plotting to assassinate Reagan.” Steven F. Hayward, *The Age of Reagan—The Conservative Counterrevolution 1980–1989* at 178 (Three Rivers Press 2009).

c. The President's continuing authority to act under subsection (c)(3) added by the 1988 amendments is consistent with the President's continuing authority to act retained in subsection (c)(1).

One of the substantive changes made by the 1988 amendments was to add a completely new provision broadening the scope of permissible Section 232 "action" to include seeking to negotiate an agreement restricting the imports of articles threatening national security. This provision was inserted as a new paragraph (3) in subsection (c), where it functions in tandem with the preexisting grant of Presidential authority to take "action" in paragraph (1). It provides:

(3) (A) If—

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

(ii) either—

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

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

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

(B) If—

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

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

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

Subsection (c)(3) thus contains an alternative procedure, with different time periods, applicable when the President decides—as the “action” taken under (c)(1)—to negotiate an agreement restricting the importation of the article that threatens to impair national security. It provides that if either no agreement is reached within 180 days of the President’s decision to negotiate *or* an agreement was reached but is not being carried out or is ineffective, “the President shall *take such other actions* as the President deems necessary to adjust the imports of such article so that imports will not threaten to impair the national security.” 19 U.S.C. § 1862(c)(3)(A) (emphasis added). Under subsection (c)(3), the President plainly has authority to take further action without first obtaining a new report and investigation from the Secretary.

Invoking *Transpacific I*, PrimeSource contends that subsection (c)(3)’s grant of modification authority implies that no similar authority exists under subsection (c)(1). *See* ECF 73–1, at 19 (citing *Transpacific I*, 415 F. Supp. 3d at 1276 n.15). The *Transpacific I* court reasoned that Section 232 did not permit the President to modify import restrictions by increasing them, in part because “[w]here Congress envisioned ongoing action by the President it provided for it.” *Transpacific I*, 415 F. Supp. 3d at 1276 n.15 (citing 19 U.S.C. § 1862(c)(3)). My colleagues make essentially the same point. *See ante* at 34–35.

I disagree with this conclusion for several reasons. To begin with, it ignores that the 1988 amendments were only that—amendments to a preexisting statute that already permitted the President to modify import restrictions. As explained above, the 1988 amendments left intact the statutory language in subsection (c)(1) permitting such modifications—“action”—and under the prior-construction canon Congress is presumed to have incorporated that meaning into the amended Section 232.

Subsection (c)(3), on the other hand, represented an entirely *new* substantive grant of authority un contemplated in the pre-1988 statute. It makes clear that the “action” taken by the President under (c)(1) within the new deadlines now includes—in addition to the unilateral action by the President contemplated by the pre-1988 statute such as tariffs or import quotas—an attempt to negotiate import restrictions with foreign partners, i.e., *bilateral* action. Of course, such negotiations might fail, meaning that the President’s bilateral action within the relevant deadline might be stillborn.

In specifying that the President can take “other actions” in such circumstances, Congress simply made the President’s authority to take bilateral action under the new subsection (c)(3) symmetrical

with the President’s preexisting authority under subsection (c)(1) to make such modifications in the context of unilateral action. Far from implying that no such power exists under subsection (c)(1), Congress’s provision of such authority in subsection (c)(3) simply provides further support that Congress did not repeal such preexisting authority in subsection (c)(1).

Finally, neither PrimeSource nor the *Transpacific* decisions have any answer to this question: Why would Congress *repeal* the President’s preexisting authority to modify Section 232 action in the context of unilateral action, and yet in the same breath expressly *grant* that same authority solely in the limited context of unsuccessful attempts to restrict imports by agreement? It defies common sense that for no apparent reason Congress would take away preexisting authority in every other context that it was simultaneously *confering* in the new context of failed bilateral action.

When statutory interpretation yields such irrational results, it suggests that something is wrong with the interpretation. *See, e.g., W. Air Lines, Inc. v. Bd. of Equalization of State of S.D.*, 480 U.S. 123, 133 (1987) (noting that where an interpretation yields illogical results, it “argue[s] strongly against the conclusion that Congress intended these results”); *Greenlaw v. United States*, 554 U.S. 237, 251 (2008) (citing the foregoing language from *Western Air Lines* to support the conclusion that “[w]e resist attributing to Congress an intention to render a statute so internally inconsistent”); *Bayer AG v. Housey Pharms., Inc.*, 340 F.3d 1367, 1377–78 (Fed. Cir. 2003) (refusing to interpret statute in a way that yielded “an illogical result”).³¹

3. Interpreting Section 232 to bar modifications of import restrictions compromises the statute’s effectiveness.

Section 232 import restrictions might last for years. Proclamation 3729 is a good example—President Eisenhower promulgated it in 1959 and it remained in effect, with a substantial number of modifications, until President Reagan eventually revoked it in 1983. *See* Proclamation No. 5141 of December 22, 1983, *Imports of Petroleum and Petroleum Products*, 48 Fed. Reg. 56,929, 56,929, 98 Stat. 3543,

³¹ My colleagues imply that the President’s authority under subsection (c)(3)—either as to action in the first instance or continuing authority—does not extend to derivatives because, unlike subsection (c)(1), subsection (c)(3) does not expressly encompass derivatives. *See ante* at 34–35. As this case does not involve action under (c)(3), we do not have to resolve that issue today, but I note that (c)(3) cross-references action taken under (c)(1), and therefore (c)(3)’s grant of authority may extend to derivatives as well.

3544, § 1 (Dec. 27, 1983) (“Proclamation No. 3279, as amended, is revoked.”). In effect, Section 232 authorizes the President to establish an ongoing regulatory *program* as to imports of an article and its derivatives.

It is precisely because Section 232 allows the President to establish a regulatory program that it is essential and appropriate for the President to be able to quickly adjust the program after the cumbersome initial machinery of the formal investigative and reporting process has already determined the existence of a national security threat. As General Saxbe noted in 1975, “facts constantly change.” 43 Op. Att’y Gen. No. 20, at 6.

To read the statute as restricting the President’s authority to make adjustments in real time to respond to evolving threats violates the canon of effectiveness, under which “[a] textually permissible interpretation that furthers rather than obstructs the document’s purpose should be favored.” Scalia & Garner, *supra*, at 63. “This canon follows inevitably from the facts that (1) interpretation always depends on context, (2) context always includes evident purpose, and (3) evident purpose always includes effectiveness.” *Id.*

By precluding the President from using Section 232 to establish an ongoing regulatory program to adjust imports, PrimeSource’s theory compromises the effectiveness of the statute as a tool for “[s]afeguarding national security.” 19 U.S.C. § 1862; *cf.* 2A *Sutherland Statutory Construction* § 45:12 (7th ed. 2019 update) (“[A] statute should not be read in an atmosphere of sterility, but in the context of what actually happens when humans fulfill its purpose.”). Even if PrimeSource’s interpretation were textually permissible, it would be disfavored against another textually permissible interpretation that preserves, rather than diminishes, the statute’s effectiveness.³²

Finally, if there is any context where the canon of effectiveness must not be overlooked, it is in this realm of national security. The President’s most solemn duty is to protect the nation in a perilous world, and to that end we should choose a textually permissible interpretation of the statute that allows the President to “anticipate distant danger, and meet the gathering storm[.]” A. Hamilton, *The Federalist No. 25*, at 161 (J. Cooke ed. 1961).³³

³² Indeed, the 1988 amendments were motivated by Congress’s “frustration” with the President’s failure to take timely Section 232 action once the Secretary had identified a national security threat. *See Transpacific II*, 466 F. Supp. 3d at 1252. It is incongruous that in moving to expedite action under the statute, Congress would have simultaneously enfeebled longstanding Presidential authority to adjust such action to respond to changing facts in real time.

³³ On this issue, my colleagues may eventually reach the same destination as I do, but they take a more circuitous route. They deny PrimeSource’s motion for summary judgment as to

B. Proclamation 9980’s extension of import restrictions to steel derivatives was a permissible modification of Proclamation 9705 rather than new action.

PrimeSource appears to argue in the alternative, and my colleagues agree, that even if the President has the power to modify Section 232 action that was otherwise timely implemented, that power is limited to the specific universe of imported articles and derivatives addressed by the original proclamation and that any later action restricting derivatives not included in the original action requires a new Section 232 investigation and report. Specifically, my colleagues conclude that because Proclamation 9705’s restrictions were limited to steel *articles*, Proclamation 9980’s restrictions of steel *derivatives* “implemented” a new action for purposes of Section 232’s procedural requirements. *Ante* at 33.

I disagree for two reasons. First, the President’s power to act in the first instance extends to derivatives of articles that are the subject of an investigation and report by the Secretary, even if such an investigation and report did not address derivatives. Second, if the President has the power to modify Section 232 action, that power is necessarily coextensive with his power to act in the first instance.

1. The President’s power to act in the first instance extends to an article and its derivatives.

Section 232 directs the Secretary to investigate, and report to the President about, the national security effects of imports of “the article.” 19 U.S.C. §§ 1862(b)(1)(A), (b)(2)(B), (b)(3)(A), (c)(1)(A).³⁴ The statute directs the President, provided he concurs with the Secretary’s findings, to take action to adjust the imports “of the article *and*

Count 2, reasoning that there is a genuine issue of material fact in dispute as to whether the Secretary’s “assessments” referenced in Proclamation 9980 might qualify as a Section 232 report, *see ante* at 50–55, notwithstanding the government’s concession to the contrary. While my colleagues may be correct that we might ultimately be able to characterize Proclamation 9980 as a timely “new” Section 232 action by characterizing the Secretary’s assessments as a “report,” I would take the government at its word here rather than invite the President to characterize every recommendation by the Secretary as a Section 232 report authorizing new action. In effect, my colleagues’ reading of the 1988 amendments as revoking the President’s modification authority on the back end compels them to potentially water down the statute’s procedural requirements on the front end to avoid compromising the statute’s effectiveness as a national security tool. *Cf. Transpacific II*, 466 F. Supp. 3d at 1255 (“The President is not authorized to act under Section 232 based on any offhanded suggestion by the Secretary; the statute requires a formal investigation and report.”).

³⁴ 19 U.S.C. § 1862(c)(1)(A) is focused on what actions the President is to take after receiving a report from the Secretary, but it begins by referring to the President’s “receiving a report submitted under subsection (b)(3)(A) in which the Secretary finds that an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.”

its derivatives.” *Id.* § 1862(c)(1)(A)(ii) (emphasis added); *see also id.* § 1862(c)(1)(B) (directing the President to “implement” his decision “to take action to adjust imports of an article *and its derivatives*”) (emphasis added).

Thus, it is indisputable that the Secretary is to investigate imports of an article, but the President can then act as to the article *and its derivatives*, even if the Secretary’s investigation and report did not address derivatives. PrimeSource complains that the Secretary’s investigation and report were focused on “imports of steel” and “did not mention steel nails specifically, nor any derivative articles generally,” and further complains that none of the public comments “put PrimeSource on notice that Commerce was considering” applying tariffs to imported steel nails. ECF 73–1, at 9. But had the President included steel nails—derivatives of the steel articles that were the subject of the Secretary’s report and investigation—in Proclamation 9705, PrimeSource would have no valid objection because Section 232(c)(1)(A)(ii) and (B) allow the President to act to adjust imports of the “article *and its derivatives.*” 19 U.S.C. § 1862(c)(1)(A)(ii), (c)(1)(B) (emphasis added). That the Secretary’s investigation and report did not address derivatives of steel articles did not mean that the President’s proclamation could not do so.

2. The President’s power to modify import restrictions is coextensive with his power to act in the first instance.

If the President has the power to modify Section 232 action without another formal investigation and report by the Secretary—and as discussed above at length, I believe that he does—I see nothing in the statute suggesting that the President’s modification power is narrower than his power to act in the first instance. The statute—not the President’s original Section 232 action—sets the boundaries on the scope of the President’s power to modify such action, and the statute permits the President to take action—both initial action within the 105 days after the Secretary’s report *and* thereafter continuing action under the pre-1988 interpretation ratified by the 1988 amendments—as to an “article *and its derivatives.*” 19 U.S.C. § 1862(c)(1)(A)(ii), (c)(1)(B) (emphasis added). In short, the President’s statutory power to modify is necessarily coextensive with the original power to act in the first instance absent any statutory restriction to the contrary.

Thus, that Proclamation 9705’s import restrictions on steel articles did not encompass steel derivatives did not mean that the President could not later extend those restrictions to such derivatives absent another formal investigation and report. To read the statute otherwise—that is, as prohibiting the President from extending Sec-

tion 232 import restrictions to derivatives unless the Secretary has first formally investigated and reported on those derivatives— makes no sense when the statute permits the President to act as to derivatives in the first instance without any such formal investigation and report by the Secretary *as to derivatives*. What is the point of requiring a formal investigation and report as to derivatives at the modification stage when no such investigation and report (as to derivatives) is even necessary at the implementation stage?

As Attorney General Saxbe opined in 1975, the statute presumes that the relevant officials will advise the President in real time of changes in underlying facts that warrant adjusting Section 232 action. 43 Op. Att’y Gen. No. 20, at 3–4. And there is no question here that the Secretary did just that by timely advising the President that steel article derivative imports were undermining Proclamation 9705 and therefore required prompt remedial action. *See* 85 Fed. Reg. at 5282.

To read the statute as nevertheless demanding that the President defer acting on such advice until the Secretary conducts a formal investigation and report as to the continued existence of a national security threat is to exalt supposed form over actual substance and reintroduces into the statute wasteful inefficiency akin to that which Congress eliminated in 1958. *See supra* at 81–83 (discussing pre-1958 version of the statute that permitted the Secretary to initiate an investigation only after first receiving direction from the President to do so, even though the Secretary had already advised the President of the need for action). Such a reading also violates the canon of effectiveness previously discussed. *See* Scalia & Garner, *supra*, at 63.

Finally, I note that the historical record confirms my reading of the statute. That record shows that Presidents repeatedly modified Proclamation 3279—President Eisenhower’s Section 232 import restrictions on petroleum products that lasted almost a quarter century—to add derivative products not encompassed by the original proclamation. *See, e.g.*, Proclamation No. 3509 of November 30, 1962, *Modifying Proclamation 3279 Adjusting Imports of Petroleum and Petroleum Products*, 27 Fed. Reg. 11,985, 11,985–87, 77 Stat. 963 (Dec. 5, 1962) (adding natural gas); Proclamation No. 3823 of January 29, 1968, *Modifying Proclamation 3279 Adjusting Imports of Petroleum and Petroleum Products*, 33 Fed. Reg. 1171, 1171–73, 82 Stat. 1603 (Jan. 30, 1968) (adding liquids derived from tar sands); Proclamation No. 4178 of January 17, 1973, *Modifying Proclamation No. 3279, Relating to Imports of Petroleum and Petroleum Products*, 38 Fed. Reg. 1719, 1719–21, 87 Stat. 1150 (Jan. 18, 1973) (adding liquid hydrocarbons produced from gilsonite and oil shale).

As discussed above, this history of administrative interpretation and practice forms part of the statutory history that “can properly be presumed to have been before all the members of the legislature when they voted” on the 1988 amendments. Scalia & Garner, *supra*, at 256. If the 1988 amendments retained the President’s power to modify Section 232 action without another formal investigation and report—and, as explained above, my view is that they did—those amendments *also* necessarily retained the President’s power to modify Section 232 action by extending import restrictions to derivatives of an article encompassed by an original action. See *Bragdon*, 524 U.S. at 645 (“When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate its administrative and judicial interpretations as well.”).³⁵

Conclusion

For the reasons set forth above, I respectfully dissent from my colleagues’ decision to avoid confronting the question of whether we have subject-matter jurisdiction over claims against the President. I concur in their decision to grant the government’s motion to dismiss Counts 1, 3, 4, and 5 of the amended complaint for failure to state a claim, as well as in their decision to deny PrimeSource’s cross-motion for summary judgment as to those same counts. I join their opinion as to Counts 1, 3, and 4. Finally, although I concur in their decision to deny PrimeSource’s cross-motion for summary judgment as to Count 2, I respectfully dissent from their decision to deny the government’s motion to dismiss that count for failure to state a claim.

/s/ M. Miller Baker

M. MILLER BAKER, JUDGE

³⁵ This case does not present, and therefore I express no view on, the issue of whether the President’s Section 232 modification authority extends to *articles* that were not the subject of any investigation and report by the Secretary.

**Presidential Modifications of Section 232 Actions
Without New Formal Investigations and Reports
Between 1975 and 1988**

1. Proclamation No. 4355 of March 4, 1975, *Modifying Proclamation 3279, as Amended, Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees*, 40 Fed. Reg. 10,437, 89 Stat. 1248 (Mar. 6, 1975).
2. Proclamation No. 4377 of May 27, 1975, *Modifying Proclamation No. 3279, as Amended, Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees*, 40 Fed. Reg. 23,429, 89 Stat. 1275 (May 30, 1975).
3. Proclamation No. 4412 of January 3, 1976, *Modifying Proclamation No. 3279, as Amended, Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum Products Through a System of License Fees*, 41 Fed. Reg. 1037, 90 Stat. 3073 (Jan. 6, 1976).
4. Proclamation No. 4543 of December 27, 1977, *Modifying Proclamation No. 3279, as Amended, Relating to Imports of Petroleum and Petroleum Products, and Providing for the Long-Term Control of Imports of Petroleum and Petroleum Products Through a System of License Fees*, 42 Fed. Reg. 64,849, 92 Stat. 3907 (Dec. 29, 1977).
5. Proclamation No. 4629 of December 8, 1978, *Imports of Petroleum and Petroleum Products*, 43 Fed. Reg. 58,077, 93 Stat. 1476 (Dec. 12, 1978).
6. Proclamation No. 4655 of April 6, 1979, *Imports of Petroleum and Petroleum Products*, 44 Fed. Reg. 21,243, 93 Stat. 1508 (Apr. 10, 1979).
7. Proclamation No. 4702 of November 12, 1979, *Imports of Petroleum and Petroleum Products*, 44 Fed. Reg. 65,581, 93 Stat. 1554 (Nov. 14, 1979).
8. Proclamation No. 4748 of April 11, 1980, *Technical Amendments to Proclamation 4744*, 45 Fed. Reg. 25,371, 94 Stat. 3747 (Apr. 15, 1980).
9. Proclamation No. 4751 of April 23, 1980, *Amendment to Proclamation 4744*, 45 Fed. Reg. 27,905, 94 Stat. 3750 (Apr. 25, 1980).

10. Proclamation No. 4762 of June 6, 1980, *Petroleum Import Licensing Requirements*, 45 Fed. Reg. 39,237, 94 Stat. 3760 (June 10, 1980).
11. Proclamation No. 4766 of June 19, 1980, *Imports of Petroleum and Petroleum Products*, 45 Fed. Reg. 41,899, 94 Stat. 3763 (June 23, 1980).
12. Proclamation No. 4907 of March 10, 1982, *Imports of Petroleum*, 47 Fed. Reg. 10,507, 96 Stat. 2709 (Mar. 11, 1982).
13. Proclamation No. 5141 of December 22, 1983, *Imports of Petroleum and Petroleum Products*, 48 Fed. Reg. 56,929, 98 Stat. 3543 (Dec. 27, 1983).

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