U.S. Court of International Trade

Slip Op. 19–37

AMERICAN INSTITUTE for INTERNATIONAL STEEL, INC., SIM-TEX, LP, and KURT ORBAN PARTNERS, LLC, Plaintiffs, v. UNITED STATES and KEVIN K. MCALEENAN, Commissioner, UNITED STATES CUSTOMS and BORDER PROTECTION, Defendants.

Before: Claire R. Kelly, Jennifer Choe-Groves & Gary S. Katzmann, Judges
Court No. 18–00152

[Denying Plaintiffs' motion for summary judgment seeking a declaration that section 232 of the Trade Expansion Act of 1962 contains an impermissible delegation of legislative authority and granting Defendants' motion for judgment on the pleadings. Judge Katzmann files a separate *dubitante* opinion.]

Dated: March 25, 2019

Alan B. Morrison, George Washington University Law School, *Donald Bertrand Cameron* and *Rudi Will Planert*, Morris, Manning & Martin, LLP, of Washington, DC, and *Gary N. Horlick*, Law Offices of Gary N. Horlick, of Washington, DC argued for plaintiffs, American Institute for International Steel, Inc. a/k/a AIIS, Sim-Tex, LP, and Kurt Orban Partners, LLC. With them on the brief were *Steve Charnovitz*, George Washington University Law School, *Julie Clark Mendoza* and *Brady Warfield Mills*, Morris, Manning & Martin, LLP, of Washington, DC, and *Timothy Lanier Meyer*, Vanderbilt University Law School.

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

OPINION

Kelly, Judge:

Before the court are American Institute for International Steel, Inc., Sim-Tex LP, and Kurt Orban Partners, LLC's ("Plaintiffs") motion for summary judgment and Defendants' motion for judgment on the pleadings, and their respective supporting memoranda. *See* [Plaintiffs'] Mot. Summary J. & Mem. Supp., July 19, 2018, ECF No. 20 ("Pls.' Br."); Defs.' Mot. J. Pleadings & Opp'n Pls.' Mot. Summary J., Sept. 14, 2018, ECF No. 26 ("Defs.' Opp'n Br."). Plaintiffs seek declaratory and injunctive relief against enforcement of section 232 of the Trade Expansion Act of 1962, as amended 19 U.S.C. § 1862

(2012)[1] ("section 232"), on the grounds that, on its face, it constitutes an improper delegation of legislative authority in violation of Article I, Section 1 of the U.S. Constitution and the doctrine of separation of powers.[2] *See* Pls.' Br. at 16–42; *see also* U.S. Const. art. I, § 1. Defendants argue that Plaintiffs' claim is foreclosed by *Fed. Energy Admin. v. Algonquin SNG Inc.*, where the Supreme Court stated that section 232's standards are "clearly sufficient to meet any delegation doctrine attack." Defs.' Opp'n Br. at 13 (quoting *Fed. Energy Admin. v. Algonquin SNG Inc.*, 426 U.S. 548, 559 (1976)).[3] Alternatively, Defendants argue that the statutory scheme "amply satisfies the nondelegation doctrine." *Id.* at 14.

BACKGROUND

Section 232 authorizes the Secretary of Commerce to commence an investigation "to determine the effects on the national security of imports" of any article. 19 U.S.C. § 1862(b)(1)(A). The Secretary of Commerce must "provide notice to the Secretary of Defense" of the investigation's commencement and, in the course of the investigation, "consult with the Secretary of Defense regarding the methodological and policy questions raised[.]" 19 U.S.C. § 1862(b)(1)(B); 19 U.S.C. § 1862(b)(2)(A)(i). The Secretary of Commerce must also "(ii) seek information and advice from, and consult with, appropriate officers of the United States, and (iii) if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." 19 U.S.C. § 1862(b)(2)(A)(ii)–(iii). The Secretary of Defense shall also, if requested by the Secretary of Commerce, provide to the Secretary of Commerce "an assessment of the defense requirements of any article that is the subject of an investigation conducted under this section." 19 U.S.C. § 1862(b)(2)(B).

Upon the investigation's completion or within the timeline provided, the Secretary of Commerce must provide the President with a report of the investigation's findings, advise on a course of action, and if the Secretary determines that the article under investigation "is being imported into the United States in such quantities or under

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

[2] Basrai Farms appears as amicus curiae in this action and filed a brief in support of Plaintiffs' position and in opposition to Defendants' position. *See generally* Br. Basrai Farms Opp'n Defs.' Mot. J. Pleadings & Supp. Pls.' Mot. Summary J., Oct. 5, 2018, ECF No. 39.

[3] American Iron and Steel Institute ("AISI") and Steel Manufacturers Association ("SMA") appear as amici curiae in this action and filed a brief in opposition to Plaintiffs' position. *See generally* Br. Amici Curiae [AISI] & [SMA] Opp'n Pls.' Mot. Summary J., Sept. 14, 2018, ECF No. 30.

such circumstances as to threaten to impair the national security," advise the President of the threat. 19 U.S.C. § 1862(b)(3)(A).

After receiving the Secretary of Commerce's report, if the President concurs with the finding that a threat exists, he 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." 19 U.S.C. § 1862(c)(1)(A)(ii).

Additionally,

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

19 U.S.C. § 1862(c)(2).

Finally, section (d) lists the following factors that the Secretary and the President should consider when acting pursuant to the statute:

> (d) Domestic production for national defense; impact of foreign competition on economic welfare of domestic industries
>
> For the purposes of this section, the Secretary and the President shall, in the light of the requirements of national security and without excluding other relevant factors, give consideration to domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use as those affect such industries and the capacity of the United States to meet national security requirements. In the administration of this section, the Secretary and the President shall further recognize the close relation of the economic welfare of the Nation to our national security, and shall take into consideration the impact of foreign competition on the economic welfare of individual domestic industries; and any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports shall be considered, without

> excluding other factors, in determining whether such weakening of our internal economy may impair the national security.

19 U.S.C. § 1862(d).

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction under 28 U.S.C. § 1581(i)(2),(4) (2012). Summary judgment is appropriate "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). "Judgment on the pleadings is appropriate where there are no material facts in dispute and the party is entitled to judgment as a matter of law." *Forest Labs, Inc. v. United States*, 476 F.3d 877, 881 (Fed. Cir. 2007) (citation omitted). Plaintiffs challenge the constitutionality of section 232. Compl. ¶ 11, June 27, 2018, ECF No. 10; Pls.' Br. at 3, 16–42. The issue of a statute's constitutionality is a question of law appropriate for summary disposition, which the court reviews "completely and independently." *See, e.g.*, *Demko v. United States*, 216 F.3d 1049, 1052 (Fed. Cir. 2000).

DISCUSSION

Article I, Section I of the U.S. Constitution provides that "all legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const. art. I, § 1. The Supreme Court established the standard by which delegations are to be judged in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928), explaining that "[i]f Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power."

Since 1935 no act has been struck down as lacking an intelligible principle. *See Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). The Supreme Court has upheld delegations of authority as sufficient to guide the executive branch where they contained standards such as: regulating broadcast licensing as "public interest, convenience, or necessity" require, *National Broadcasting Co. v. United States*, 319 U.S. 190, 225–26 (1943); ensuring that a company's existence in a holding company does not "unduly or unnecessarily complicate the structure" or "unfairly or inequitably distribute voting power among security holders[,]" *American Power & Light Co. v. SEC*, 329 U.S. 90, 104–05 (1946); and setting nationwide air-quality standards limiting pollution to the level required "to protect the public health." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001). Most

importantly for the challenge here, in *Algonquin*, the Supreme Court found that section 232 "easily" met the intelligible principle standard because

> [i]t establishes clear preconditions to Presidential action[,] —[i]nter alia, a finding by the Secretary of the Treasury 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." Moreover, the leeway that the statute gives the President in deciding what action to take in the event the preconditions are fulfilled is far from unbounded. The President can act only to the extent "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." And §232(c),[4] [a]rticulates a series of specific factors to be considered by the President in exercising his authority under § 232(b). In light of these factors and our recognition that "(n)ecessity . . . fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules . . . ," we see no looming problem of improper delegation.

Algonquin, 426 U.S. at 559–60 (citation and footnote omitted). This court is bound by *Algonquin*.

Plaintiffs argue unpersuasively that *Algonquin* does not control because the plaintiffs in *Algonquin* "did not bring a facial challenge to the constitutionality of section 232," but rather challenged the President's statutory authority to impose a specific kind of remedy and argued for a narrow statutory construction to avoid a nondelegation problem. *See* Pls.' Br. at 31–33; Resp. Mem. Supp. Pls.' Opp'n Defs.' Mot. J. Pleadings & Reply Mem. Supp. Pls.' Mot. Summary J. at 4–7, Oct. 5, 2018, ECF No. 33 (Pls.' Reply Br."). This argument fails to carry the day, given that the parties in *Algonquin* argued the nondelegation issue, and the District Court for the District of Columbia and Supreme Court squarely addressed it. The district court ruled that section 232 is "a valid delegation of authority by Congress to the President and confers upon him the power to impose import license fees on oil imports once he determines the fact of threatened impairment of the national security." *Algonquin SNG, Inc. v. Fed. Energy Admin.*, 518 F.2d 1051, 1063 (D.C. Cir. 1975) (Robb, J., dissenting) (attaching, in the Appendix, the U.S. District Court for the District of Columbia's opinion and order in this action stating that one thrust of

[4] Section 232 has been amended since the Supreme Court issued *Algonquin*. Under the current law, section 232(d) mirrors what was previously section 232(c) and section 232(c) enumerates the President's authority, as was previously codified in section 232(b). Section 232, substantively, remains the same in relevant part.

the challenge is whether the proclamation at issue "is an unconstitutional delegation by Congress of legislative power"). Reversing the District Court, the U.S. Court of Appeals for the District of Columbia found that the President's license fee program was not authorized by the statute, *see id.* at 1055, 1062. Thereafter, the Supreme Court squarely confronted the nondelegation challenge in response to the arguments put forth by parties in their briefs. *Algonquin*, 426 U.S. at 559–60.

Plaintiffs also argue that *Algonquin* does not control because, since its issuance, "the legal landscape of judicial review of presidential decisions involving implementation of federal statutes has changed markedly[.]" *See* Pls.' Br. at 29–30. Specifically, Plaintiffs argue that the Supreme Court's decisions explaining that the President is not an agency and therefore not subject to review under the Administrative Procedure Act ("APA") undercut *Algonquin*'s relevance. *See id.* at 29–31 (citing *Franklin v. Massachusetts*, 505 U.S. 788 (1992); *Dalton v. Specter*, 511 U.S. 462 (1994)). Thus, Plaintiffs premise their quest to overcome *Algonquin* on their view that the Supreme Court and all parties in *Algonquin* assumed a more searching standard of judicial review, *see id.* at 29–30, and that without the availability of such review, the standards articulated in section 232 must be considered anew to ascertain whether they meet the intelligible principle standard. *See id.* at 30–33, 42.

Plaintiffs' premise cannot withstand scrutiny. *Dalton* and *Franklin* did not change "the legal landscape of judicial review" with respect to section 232. *See* Pls.' Br. at 29–30. Indeed, no court before or after *Algonquin* held that the President was subject to the APA. *See* 1 Kenneth Culp Davis, Administrative Law Treatise § 1.2 at 8 (2d ed. 1978); 1 Kristin E. Hickman & Richard J. Pierce, Jr., Administrative Law Treatise § 1.2.4 at 15 (6th ed. 2019); *see also Franklin*, 505 U.S. at 796, 800–01 (holding, definitively, that the President is not subject to review under the APA).[5] More importantly for purposes of this case, the APA did not expand judicial review to include review of matters committed to presidential discretion. The Attorney General's Manual on the Administrative Procedure Act, considered an authoritative interpretation of the APA and entitled to deference, *see Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 546

[5] Courts had suggested, without deciding the question, that the APA applied to the President. *See Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. Connally*, 337 F. Supp. 737, 761 (D.D.C. 1971) (Leventhal, J., for three-judge panel) (noting scholars who believed the President was an agency under the APA); *DeRieux v. Five Smiths, Inc.*, 499 F.2d 1321, 1332 & n.13 (Temp. Emer. Ct. App. 1974) (relying on *Amalgamated Meat Cutters* to review an executive order and stating that the court's analysis assumed, for the sake of argument, "that the President is an agency within the meaning of the APA.").

(1978), makes clear that presidential determinations committed to the President's discretion by an enabling statute are not subject to review for rationality, findings of fact, or abuse of discretion. *See* U.S. Dep't of Justice, Att'y Gen.'s Manual on the APA at 94–95 (1947) ("Manual") (noting, for example, that *United States v. George S. Bush & Co.*, 310 U.S. 371 (1940), held that the President's actions under section 336(c) of the Tariff Act of 1930 were unreviewable because the statute left the determination to the President "if in his judgment" action was necessary); *see also Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO v. Connally*, 337 F. Supp. 737, 760 (D.D.C. 1971) (Leventhal, J., for three-judge panel) (noting the rare occasions when Congress commits matters to executive discretion to avoid judicial review for errors of law and abuse of discretion). In fact, *Dalton* acknowledged that prior decisions similarly found that matters committed to presidential discretion could not be reviewed for abuse of that discretion. *Dalton*, 511 U.S. at 474 (quoting *Dakota Cent. Tel. Co. v. S.D. ex rel. Payne*, 250 U.S. 163, 184 (1919), for the proposition that "where a claim 'concerns not a want of [presidential] power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power'"). Thus, prior to *Dalton*, and at the time of *Algonquin*, there was no judicial review of matters that Congress had committed to presidential discretion—such as those the President makes under section 232—for rationality, findings of fact, or abuse of discretion. *See George S. Bush & Co.*, 310 U.S. at 379–80; 19 U.S.C. § 1862(c)(1)(A)(ii).[6] Instead, both before and after *Algonquin*, courts assessed presidential determinations committed to presidential discretion pursuant to nonstatutory review for being unconstitutional or in excess of statutorily granted authority.[7]

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[6] Plaintiffs, perhaps unintentionally, touch upon this idea in their reply brief, stating that "even if there w[as] an express provision for judicial review, the courts would be assigned an impossible task." Pls.' Reply Br. at 20. Indeed, the task would be impossible not because *Dalton* and *Franklin* changed the legal landscape for judicial review of presidential action, but because section 232 commits requisite determinations to the President's discretion. *See* 19 U.S.C. § 1862(c). Judicial review was as much of an "impossible task" in *Algonquin* as it is here; neither *Dalton* nor *Franklin* made it any more or less practicable. The delegation of decision-making authority in section 232 existed at the time of *Algonquin* and the Supreme Court nonetheless found that it "easily fulfills" the nondelegation test. *Algonquin*, 426 U.S. at 559. This court is thus bound by *Algonquin*.

[7] In addition to establishing judicial power to review the constitutionality of statutes, *Marbury v. Madison*, 5 U.S. 137 (1803), demonstrated that courts can review the President's power under a statute and determine whether the President acted in excess of such statutory powers. This latter form of review has been described as nonstatutory review and is to be contrasted with the type of judicial review provided for by a specific statute, such as the APA. *See* Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 Colum. L. Rev. 1612, 1613–14 (1997) (discussing nonstatutory review). For example, in *United States v. Yoshida International, Inc.*, 526 F.2d 560 (C.C.P.A. 1975), the Court of Customs and Patent Appeals ("CCPA") addressed whether Presidential Proclamation 4074

Here, determinations pursuant to section 232 are committed to presidential discretion. *See* 19 U.S.C. § 1862(c). Section 232 empowers the President to either concur or not in the Secretary's finding as to whether an article under investigation constitutes a threat to national security and to "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." 19 U.S.C. § 1862(c)(1)(A)(i)–(ii). The President's determination of whether to concur is not qualified by any language or standard, establishing that it is left to his discretion. Accordingly, the President's determination as to the form of remedial action is a matter "in the judgment of the President[.]" 19 U.S.C. § 1862(c)(1)(A)(ii). By committing the determinations of whether to concur with the Secretary and what remedial action to take, if any, to the judgment of the President, Congress precluded an inquiry for rationality, fact finding, or abuse of discretion. *See* Manual at 94–96; *George S. Bush & Co.*, 310 U.S. at 379–80. Notwithstanding *Dalton* and *Franklin*, because the statutory language here commits determinations to the President's discretion, the review available for presidential action has always been limited to constitutionality and action beyond statutory authority. Thus, there has been no change in the legal landscape since *Algonquin* as far as section 232 is concerned.

Nonetheless, Plaintiffs ask the court to consider the broad authority given to the President that triggers executive action, i.e., the "essen-

was within the President's delegated authority. Proclamation 4074 declared, inter alia, a national emergency related to the country's economic position, and assessed a supplemental duty of 10% on all dutiable products. *Yoshida International*, 526 F.2d at 567–68. Further, the proclamation authorized the President to, at any time, modify or terminate, in whole or in part, any proclamation made under his authority. *Id.* at 568. The CCPA held that although neither the Tariff Act of 1930 nor the Trade Expansion Act of 1962 authorized the proclamation, its adoption fell within the powers granted to the President under the Trading with the Enemy Act, i.e., to regulate or prohibit importation of goods during periods of war or national emergency. *Id.* at 576. The court reviewed the action not under the APA or any statute conferring judicial review but sought to answer the question of whether Proclamation 4074 was an ultra vires presidential act. *Id.* at 583.

Likewise, *U.S. Cane Sugar Refiners' Ass'n v. Block*, 683 F.2d 399 (C.C.P.A. 1982), addressed whether the President acted within his delegated authority in issuing Proclamation 4941, which limited entry of sugar to a specific quantity between May 11, 1982, and June 30, 1982, and then to an amount as set by the Secretary of Agriculture. Under section 201(a) of the Trade Expansion Act of 1962, the President could proclaim additional import restrictions as deemed appropriate to carry out a trade agreement entered pursuant to section 201 between June 30, 1962, and July 1,1967. *Id.* at 401. The CCPA upheld the President's action, holding that the Geneva Protocol of the General Agreement on Tariffs and Trade, which the President invoked in the proclamation, is a trade agreement for purposes of section 201, and thus the President's act was authorized by statute. *Id.* at 402, 404. Such reviews of presidential action demonstrate the availability of nonstatutory review separate and distinct from review under the APA.

tially unlimited definition of national security," as well as the "limitless grant of discretionary remedial powers," as indicative that the statute does not have an intelligible principle. *See* Pls.' Br. at 5–6, 19–20; *see also* 19 U.S.C. § 1862(c)–(d). Plaintiffs emphasize the expansive options available to the President to confront what he deems a national security issue. *See* Pls.' Br. at 6, 19–20. Plaintiffs argue the President is only limited by his imagination, *see id.* at 20, and that the President could take any number of actions under the statute, including

> imposing tariffs on goods that are currently duty-free and increasing tariffs above those currently existing under the law for the subject article—with no limit on the level of the tariff. Thus, section 232 permits the President to impose tariffs—taxes—in unlimited amounts and of unlimited duration on any imported articles—or, as in the case with the steel tariff, on an entire class of imported articles. The President may also impose quotas—whether or not there are existing quotas—and with no limit on how much a reduction from an existing quota (or present or historical level of imports) there can be for the subject article. In addition, the President could choose to impose licensing fees for the subject article, either in lieu of or in addition to any tariff or quota already in place. Conversely, the President may also reduce an existing tariff or increase a quota, whenever he concludes that such a reduction or increase is in the interest of national security, as elastically defined. And for all these changes in the law, the President may select the duration of each such change without any limits on his choice, and he may make any changes with no advance notice or delay in implementation.

Pls.' Br. at 6.[8] Admittedly, the broad guideposts of subsections (c) and (d) of section 232 bestow flexibility on the President and seem to invite the President to regulate commerce by way of means reserved

[8] Plaintiffs emphasize the range of actions available to the President under section 232 and reference specific acts that he has taken. *See* Pls.' Br. at 12, 19–20; Pls.' Reply Br. at 5–6, 12–13. For example, on March 8, 2018, the President issued Proclamation 9705 imposing a 25% tariff on all imported steel articles, other than those imported from Canada and Mexico. *See Proclamation 9705 of March 8, 2018*, 83 Fed. Reg. 11,625 (Mar. 15, 2018). The President also enacted Proclamation 9704 under section 232, which imposed a tariff of 10% on aluminum articles, other than those imported from Canada and Mexico. *See Proclamation 9704 of March 8, 2018*, 83 Fed. Reg. 11,619 (Mar. 15, 2018). Subsequently, the President issued several amendments to Proclamation 9705 under section 232, providing for various country-based exemptions from the steel tariff. *See Proclamation 9711 of March 22, 2018*, 83 Fed. Reg. 13,361 (Mar. 28, 2018) (exempting, in addition to Canada and Mexico, the following countries from the steel tariff: the Commonwealth of Australia ("Australia"), the Argentine Republic ("Argentina"), the Republic of South Korea ("Korea"), the Federative Republic of Brazil ("Brazil"), and the European Union ("EU") on behalf of its member countries); *Proclamation 9740 of April 30, 2018*, 83 Fed. Reg. 20,683 (May 7, 2018) (announcing an agreement with Korea to impose a quota on Korean imports of steel articles

for Congress, leaving very few tools beyond his reach. *See* 19 U.S.C. § 1862(c) (providing the President 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."), and 19 U.S.C. § 1862(d) (providing that the President shall take into consideration "the close relation of the economic welfare of the Nation to our national security, . . . any substantial unemployment, decrease in revenues of government, loss of skills or investment, or other serious effects resulting from the displacement of any domestic products by excessive imports . . . , without excluding other factors, in determining whether such weakening of our internal economy may impair the national security.").

To be sure, section 232 regulation plainly unrelated to national security would be, in theory, reviewable as action in excess of the President's section 232 authority. *See, e.g.*, *Indep. Gasoline Marketers Council, Inc. v. Duncan*, 492 F. Supp. 614, 620 (D.D.C. 1980) (holding that the President's imposition of a gasoline "conservation fee" pursuant to section 232(b) of the Trade Expansion Act was not authorized by the statute). However, identifying the line between regulation of trade in furtherance of national security and an impermissible encroachment into the role of Congress could be elusive in some cases because judicial review would allow neither an inquiry into the President's motives nor a review of his fact-finding. *See George S. Bush & Co.*, 310 U.S. at 379–80; *Florsheim Shoe Co. v. U.S.*, 744 F.2d 787, 796–97 (Fed. Cir. 1984). One might argue that the statute allows for a gray area where the President could invoke the statute to act in a manner constitutionally reserved for Congress but not objectively outside the President's statutory authority, and the scope of review would preclude the uncovering of such a truth. Nevertheless, such concerns are beyond this court's power to address, given the Supreme Court's decision in *Algonquin*, 426 U.S. at 558–60.

into the United States, extending the temporary exemption from the steel tariff for Argentina, Australia, and Brazil, and extending the temporary exemption for Canada, Mexico, and the EU); *Proclamation 9759 of May 31, 2018*, 83 Fed. Reg. 25,857 (June 5, 2018) (announcing agreements to exempt on a long-term basis Argentina, Australia, and Brazil from the steel tariff announced in Proclamation 9705). Plaintiffs also note the President is not required to apply his chosen remedy to imports from all countries but can pick and choose a remedy. *See* Pls.' Br. at 7, 19–20. Such discretion was recently demonstrated, Plaintiffs note, when the President doubled the tariff on steel imports from Turkey with no national security justification beyond that which is applicable to steel imports from other countries. *See Proclamation 9772 of August 10, 2018*, 83 Fed. Reg. 40,429 (Aug. 15, 2018) (raising the steel tariff to 50% for Turkey); *see also* Pls.' Reply Br. at 12 (reproducing the proclamation as Exhibit 15 to Supp. Mem. Supp. Pls.' Mot. Summary J., Aug. 16, 2018, ECF No. 24).

CONCLUSION

For the foregoing reasons, the Plaintiffs' motion for summary judgment is denied, and the Defendants' motion for judgment on the pleadings is granted. Judgment will enter accordingly.

Dated: March 25, 2019
New York, New York

/s/ Claire R. Kelly
CLAIRE R. KELLY, JUDGE

/s/ Jennifer Choe-Groves
JENNIFER CHOE-GROVES, JUDGE

Katzmann, Judge, *dubitante*.[9] Section 232 of the Trade Expansion Act of 1962, *as amended in* 19 U.S.C. § 1862 (2012) ("section 232"), provides that if 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,"

[9] "[E]xpressing the epitome of the common law spirit, there is the opinion entered *dubitante* – the judge is unhappy about some aspect of the decision rendered, but cannot quite bring himself to record an open dissent." Lon Fuller, *Anatomy of the Law* 147 (1968). *See generally* Jason Czarnezki, *The Dubitante Opinion*, 39 Akron L. Rev. 1 (2006).

The *dubitante* opinion has a well-established place in American jurisprudence. *See, e.g.*, *Radio Corp. of America v. United States*, 341 U.S. 412, 421 (1951) (Frankfurter, J., *dubitante*) ("Since I am not alone in entertaining doubts about this case they had better be stated."); *O'Keefe v. Smith, Hinchman & Grylls Associates*, 380 U.S. 359, 371–72 (1965) (Douglas, J., *dubitante*) ("I would not be inclined to reverse a Court of Appeals that disagreed with . . . findings as exotic as we have here."); *Kartell v. Blue Shield of Mass., Inc.*, 592 F.2d 1191, 1195–96 (1st Cir. 1979) (Coffin, C.J., *dubitante*) ("While I share the court's desire to defer to Massachusetts courts for all the help we can get . . . I confess to some uneasiness about our privilege as an appellate court simply to abstain when the district court has not seen fit to do so . . . I hope the court is correct."); *Feldman v. Allegheny Airlines, Inc.*, 524 F.2d 384, 393 (2d Cir. 1975) (Friendly, J., concurring *dubitante*) ("Although intuition tells me that the Supreme Court of Connecticut would not sustain the award made here, I cannot prove it. I therefore go along with the majority, although with the gravest doubts."); *Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP*, 684 F.3d 1364, 1374 (Fed. Cir. 2012) (Reyna, J., *dubitante*) ("As I cannot prove or disprove our result, I go along with the majority – but with doubt.").

The *dubitante* opinion has also been issued where — as I do in the case before us now — a judge considers himself or herself to be constrained or bound by precedent, but wishes to suggest an alternative view. *See., e.g.*, *Weaver v. Marine Bank*, 683 F.2d 744, 749 (3rd Cir. 1982) (Sloviter, J., *dubitante*) ("With great deference to my colleagues on the court when the [precedential] decision was rendered, it appears to rest on a misapprehension and misapplication of the Supreme Court's decision."); *United States v. Jeffries*, 692 F.3d 473, 483 (6th Cir. 2012) (Sutton, J., *dubitante*) ("Sixth Circuit precedent compels this interpretation of § 875(c) . . . I write separately because I wonder whether our initial decisions in this area (and those of other courts) have read the statute the right way from the outset."); *PETA v. U.S. Dept. of Agriculture*, 797 F.3d 1087, 1099 (D.C. Cir. 2015) (Millett, J., *dubitante*) ("If the slate were clean, I would feel obligated to dissent from the majority's standing decision. But I am afraid that the slate has been written upon, and this court's . . . precedent will not let me extricate this case from its grasp."); *Brenndoerfer v. U.S. Postal Service*, 693 Fed.Appx. 904, 906–07 (Fed. Cir. 2017) (Wallach, J., concurring *dubitante*) ("Because I am bound by our precedent, I agree with the majority that [Petitioner's] petition must be dismissed for lack of subject matter jurisdiction. However, I reiterate that '[i]t may be time' [to revisit the issue] in 'light of recent Supreme Court precedent.'" (citations omitted)).

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

Section 232 was enacted pursuant to the power granted exclusively to Congress by Article I, Section 8 of the Constitution, which provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises," as well as "To regulate Commerce with foreign Nations." There is no provision in the Constitution that vests in the President the same "Power To Lay and collect . . . Duties." In short, the power to impose duties is a core legislative function.

On March 18, 2018, after receiving the report of the Secretary of Commerce, the President, invoking section 232, issued two proclamations imposing tariffs of 25% on steel and 10% on aluminum imports effective March 23, 2018,[10] while providing for flexibility with regard to country and product applicability of the tariffs. The new tariffs were to be imposed in addition to duties already in place, including antidumping and countervailing duties under domestic laws designed to preserve fair trade for the American economy.[11] It appears that the March 18, 2018 proclamations were the first presidential actions based on section 232 in more than thirty years.[12]

The question before us may be framed as follows: Does section 232, in violation of the separation of powers, transfer to the President, in his virtually unbridled discretion, the power to impose taxes and duties that is fundamentally reserved to Congress by the Constitution? My colleagues, relying largely on a 1976 Supreme Court deci-

[10] *Proclamation 9704 of March 8, 2018*, 83 Fed. Reg. 11,619 (Mar. 15, 2018) *amended in Proclamation 9776 of August 29, 2018*, 83 Fed. Reg. 45,019 (Sept. 4, 2018) and *Proclamation 9705 of March 8, 2018*, 83 Fed. Reg. 11,625 (Mar. 15, 2018) *amended in Proclamation 9777 of August 29, 2018*, 83 Fed. Reg. 45,025 (Sept. 4, 2018).

[11] "Dumping occurs when a foreign company sells a product in the United States at a lower price than what it sells that same product for in its home market. Such a product can be described as being sold below 'fair value.'" *Sioux Honey Ass'n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046 (Fed. Cir. 2012). "[A] countervailable subsidy exists where a foreign government provides a financial contribution which confers a benefit to the recipient." *ATC Tires Private Ltd. v. United States*, 42 CIT __, __, 322 F. Supp. 3d 1365, 1366–67 (2018). To empower the Department of Commerce ("Commerce") to offset harmful economic distortions caused by countervailable subsidies and dumping, Congress enacted the Tariff Act of 1930. *Sioux Honey*, 672 F.3d at 1046. Under the Tariff Act's framework, Commerce may investigate potential countervailable subsidies or dumping and, if appropriate, issue orders imposing duties on the merchandise under investigation. 19 U.S.C. §§ 1671, 1673; *see also Sioux Honey*, 672 F.3d at 1046; *ATC Tires*, 322 F. Supp. 3d at 1366–67.

[12] The Congressional Research Service has reported in a study that "[p]rior to the [current] Administration, a President arguably last acted under Section 232 in 1986. In that case, Commerce determined that imports of metal-cutting and metal-forming machine tools threatened to impair national security. . . . [T]he President sought voluntary export restraint agreements with leading foreign exporters, and developed domestic programs to revitalize the U.S. industry." Cong. Research Serv., R45249, Section 232 Investigations: Overview and Issues for Congress 4 (2018).

sion, conclude that the statute passes constitutional muster. While acknowledging the binding force of that decision, with the benefit of the fullness of time and the clarifying understanding borne of recent actions, I have grave doubts. I write, respectfully, to set forth my concerns.

It was the genius of the Framers of the Constitution of this Nation, forged from the struggle against tyranny, that they declared the essential importance of the separation of the powers.[13] In *The Federalist No. 47*, James Madison wrote that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than" the separation of powers. *The Federalist No. 47*, at 301 (James Madison) (Clinton Rossiter ed., 1961). "The accumulation of all powers, legislative, executive and judiciary in the same hands . . . must justly be pronounced the very definition of tyranny." *Id.* Although the Constitution does not have an explicit provision recognizing the separation of powers, the Constitution does identify three distinct types of governmental power — legislative, executive and judicial — and, in the Vesting Clauses, commits them to three distinct branches of Government. Those clauses provide that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives," U.S. Const. art. I, § 1; "[t]he executive Power shall be vested in a President of the United States," U.S. Const. art. II, § 1, cl. 1; and "[t]he judicial Power of the United States[] shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," U.S. Const. art. III, § 1. Insofar as the Constitution departs from a pure separation of powers model and allows some sharing of powers across the branches of government, those exceptions are set out in text. The President is given a share of the legislative power through the prerogative of the presidential veto. U.S. Const. art. I, § 7. The Senate is given a share of the executive power through the right to advise and consent to the appointment of government officers. U.S. Const. art. II, § 2.

A review of Supreme Court jurisprudence, from the early days of the Republic, evinces affirmation of the principle that the separation of powers must be respected and that the legislative power over trade cannot be abdicated or transferred to the Executive. Indeed, the first case raising the question of unconstitutional delegation of legislative

[13] *See generally* M.J.C. Vile, *Constitutionalism and the Separation of Powers*, 156–175 (1967) (*reprinted in* 1969); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379 (2017).

power was a trade case, *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 382–85 (1813). That case involved the condemnation and seizure of cargo of the brig Aurora in the Port of New Orleans, imported from Great Britain in violation of the Non-Intercourse Act of 1809 ("1809 Act"). Ch. 242, 2 Stat. 528 (1809). The 1809 Act, which sought to keep the United States from entanglement in the war between Britain and France by forbidding the importation of goods from either of those nations, had authorized the President to lift the embargo upon his declaration that either of those nations had ceased to violate the neutral commerce of the United States. *Id.* When the 1809 Act expired, the Non-Intercourse Act of 1810 extended its terms but temporarily suspended its implementation to permit each of the two warring nations an opportunity to renounce her policies against American shipping and to announce respect for American neutrality. The President was again authorized to lift the embargo upon declaration by proclamation that the nation had "cease[d] to violate the neutral commerce of the United States." *Cargo of the Brig Aurora*, 11 U.S. at 384. The President issued a proclamation declaring that France had revoked her edicts such that she was now respectful of America's neutral commerce, thus lifting the embargo against France. *Id.* The President, however, determined that Britain had not modified its offending edicts, and thus the embargo against her remained in place. *Id.* Counsel for the owner of the cargo contended that Congress had impermissibly "transfer[red] the legislative power to the President" and that Congress could not enact legislation which predicated the revival of an expired law upon a proclamation by the President attesting to facts as articulated by Congress. *Id.* at 386. In rejecting this argument and upholding the act, the Court ruled that it could "see no sufficient reason[] why the legislature should not exercise it discretion in reviving the act, . . . either expressly or conditionally, as their judgment should direct . . . upon the occurrence of any subsequent combination of events." *Id.* at 388. In other words, the law was constitutional because the President was acting as a fact-finder, not a lawmaker.

By the time the Supreme Court addressed its next nondelegation challenge in a trade case, *Field v. Clark*, 143 U.S. 649 (1892), it had previously observed that "[t]he line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details." *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 20 (1825). In the 1892 case, *Field*, *supra*,

importers brought a suit claiming that duties imposed pursuant to the Tariff Act of 1890 should be refunded because that act was an unconstitutional delegation of legislative power. The Tariff Act of 1890 provided:

> That with a view to secure reciprocal trade with countries producing [specified] articles . . . whenever, and so often as the [P]resident shall be satisfied that the [G]overnment of any country producing . . . such articles, imposes duties or other exactions upon the agricultural or other products of the United States, which in view of the free introduction of ...[such articles] into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of [such articles] . . . for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid upon [such articles] . . . .

Field, 143 U.S. at 697–98. In rejecting the claim that the Tariff Act of 1890 unconstitutionally delegated legislative power to the President, the Court stated:

> That Congress cannot delegate legislative power to the [P]resident is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution. The [A]ct of October 1, 1890, in the particular under consideration, is not inconsistent with that principle. It does not, in any real sense, invest the [P]resident with the power of legislation. . . . Congress itself prescribed, in advance, the duties to be levied, collected and paid . . .while the suspension lasted. Nothing involving the expediency or the just operation of such legislation was left to the determination of the [P]resident. . . . But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which [C]ongress had determined should occur. He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by [C]ongress. As the suspension was absolutely required when the [P]resident ascertained the existence of a particular fact, it can-

> not be said that in ascertaining that fact, and in issuing his proclamation, in obedience to the legislative will, he exercised the function of making laws.

Id. at 692–93.

The next case adjudicating a challenge to a trade statute on the grounds of unconstitutional delegation of legislative power to the President was *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928). An importer of barium dioxide challenged the tariff assessed on a shipment by virtue of the "flexible tariff provision" of the Tariff Act of 1922, enacted:

> to secure by law the imposition of customs duties on articles of imported merchandise which should equal the difference between the cost of producing in a foreign country the articles in question and laying them down for sale in the United States, and the cost of producing and selling like or similar articles in the United States, so that the duties not only secure revenue, but at the same time enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States.

Id. at 404. In that provision, Congress authorized the President to adjust the duties set by the statute if the President determined after investigation that the duty did not "equalize . . . differences in costs of production in the United States and the principal competing country . . . . Provided, [t]hat the total increase or decrease of such rates of duty shall not exceed 50 per centum of the rates specified" by statute. *Id.* at 401. Noting that the "difference which is sought in the statute is perfectly clear and perfectly intelligible," the Court also observed that it was difficult for Congress to fix the rates in the statute. *Id.* at 404. Accordingly, the Tariff Commission was assigned to "assist in . . . obtaining needed data and ascertaining the facts justifying readjustments," to "make an investigation and in doing so must give notice to all parties interested and an opportunity to adduce evidence and to be heard." *Id.* The President would then "proceed to pursue his duties under the [A]ct and reach such conclusion as he might find justified by the investigation[,] and to proclaim the same, if necessary." *Id.* at 405.

Noting that the Federal Constitution "divide[s] the governmental power into three branches," the *Hampton* Court stated that "it is a breach of the national fundamental law if Congress gives up its legislative powers and transfers it to the President . . . ." *Id.* at 406. However, Congress could "invoke the action" of the Executive "in so far as the action invoked shall not be an assumption of the constitu-

tional field of action of [the Legislative] branch." *Id.* "[I]n determining what it may do in seeking assistance from [the Executive], the extent and character of that assistance must be fixed according to common sense and the inherent necessities of the governmental co-ordination." *Id.* Then the *Hampton* court announced what has come to be known as the "intelligible principle" formulation: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.* at 409. Citing to *Field, supra*, the Court pointed to the limited and circumscribed nature of the Executive action, concluding the President was:

> not in any real sense invest[ed] . . . with the power of legislation, because nothing involving the expediency or just operation of such legislation was left to the determination of the President; that the legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency.

Id. at 410. The President "was the mere agent of the law-making department." *Id.* at 411. "What the President was required to do was merely in execution of the act of Congress." *Id.* at 410–11.

The "intelligible principle" standard is the standard which has since been applied to determine whether there has been an impermissible delegation of legislative power. As my colleagues note, in the years since the "intelligible principle" was announced, and in cases involving numerous statutes, only twice has the Court invalidated a statute because it impermissibly delegated the power vested in the Congress to the Executive. "In the history of the Court we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'" *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 474 (2001) (citing *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). Since 1935, the Court has never invalidated a statute because of impermissible delegation of legislative power to the Executive. This deference "is a reflection of the necessities of modern legislation dealing with complex economic and social problems. . . . Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules." *American Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

In the one trade case before the Court since *Hampton* where it was contended that the statute at issue constituted an unconstitutional delegation of legislative power to the Executive, the statute in question was the one before us now — section 232. *See Fed. Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976). In that case — after a determination that foreign petroleum was being imported into the United States in such quantities and at such low costs as to threaten to impair national security by inhibiting the development of domestic production and refinery capacity — the President imposed license fees upon the exporters in an effort to control imports pursuant to section 232. The Attorney General of the Commonwealth of Massachusetts and others brought suit, primarily making the narrow statutory claim that while section 232 authorized the President to adjust the imports of petroleum and petroleum products by imposing quotas, the remedy that the President sought, import licensing fees, was not authorized by the statute. *Id.* at 556. They also argued that unless this construction was adopted, the Court would have to reach the constitutional question of whether section 232 was an impermissible delegation of legislative power to the President. *Id.* at 558–59. The Supreme Court opinion, as my colleagues note, not only decided (in favor the Federal Energy Administration) the statutory question as to whether licenses were permissible, but also reached the constitutional question. Referencing the "intelligible principle," the Court ruled that "[e]ven if § 232(b) is read to authorize the imposition of a license fee system, the standards that it provides the President in its implementation are clearly sufficient to meet any delegation doctrine attack." *Id.* at 559.

Of course, as a lower court, it behooves us to follow the decision of the highest court. It can also be observed that new developments and the record of history may supplement and inform our understanding of law. Indeed, the *Algonquin* court concluded with the following:

> Our holding today is a limited one. As respondents themselves acknowledge, a license fee as much as a quota has its initial and direct impact on imports, albeit on their price as opposed to their quantity. As a consequence, our conclusion here, fully supported by the relevant legislative history, that the imposition of a license fee is authorized by § 232(b) in no way compels the further conclusion that *any* action the President might take, as long as it has even a remote impact on imports, is also so authorized.

Id. at 571 (emphasis in original).

Analyzing the delegation question from the face of the statute, the *Algonquin* court took note of "clear conditions to Presidential action" that established an intelligible principle restricting presidential

action: The Secretary is required to make a finding that "an article is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security." *Id.* at 559. "The President can act only to the extent 'he deems necessary to adjust the imports of such article and its derivative so that such imports will not threaten to impair the national security.' And § 232(c) articulates a series of specific factors to be considered by the President in exercising his authority under § 232(b)." *Id.* at 559. While section 232 states as the Court recited, there is no statutory requirement that the President's actions match the Secretary's report or recommendations. The President is not bound in any way by any recommendations made by the Secretary, and he is not required to base his remedy on the report or the information provided to the Secretary through any public hearing or submission of public comments. There is no rationale provided for how a tariff of 25% was derived in some situations, and 10% in others. There is no guidance provided on the remedies to be undertaken in relation to the expansive definition of "national security" in the statute – a definition so broad that it not only includes national defense but also encompasses the entire national economy. The record reveals, for example, that the Secretary of Defense stated that "the U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production."[14]

As the preceding review of the trilogy of *Aurora, Field*, and *Hampton* evinces, the trade statutes in those cases did not impermissibly transfer the legislative function to the Executive because they provided ascertainable standards to guide the President – standards such that the congressional will had been articulated and was thus capable of effectuation. What we have come to learn is that section 232, however, provides virtually unbridled discretion to the President with respect to the power over trade that is reserved by the Constitution to Congress. Nor does the statute require congressional approval of any presidential actions that fall within its scope.[15] In short, it is difficult to escape the conclusion that the statute has permitted the transfer of power to the President in violation of the separation of powers.

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[14] Letter from James N. Mattis, Secretary of Defense, to Wilbur L. Ross Jr., Secretary of Commerce (2018), Pl.'s Mot. for Summary J. (July 19, 2018) at Exh. 8, ECF No. 20–7.

[15] Compare the Crude Oil Windfall Profit Tax Act of 1980, creating a joint disapproval resolution provision under which Congress can override presidential actions in the case of adjustments to petroleum or petroleum product imports). The Crude Oil Windfall Profit Tax Act of 1980, § 402, Pub. L. 96–223, 19 U.S.C. § 1962, 94 Stat. 229, *repealed by* Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, 102 Stat. 1107, 1322.

To note these concerns is not to diminish in any way the reality, sanctioned under established constitutional principles, that in the workings of an increasingly complex world, Congress may assign responsibilities to the Executive to carry out and implement its policy. Nor is it to ignore the flexibility that can be allowed the President in the conduct of foreign affairs. *See United States v. Curtiss-Wright Export Corp*, 299 U.S. 304 (1936). However, that power is also not unbounded, even in times of crisis. *See Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952)).[16]

In the end, I conclude that, as my colleagues hold, we are bound by *Algonquin*, and thus I am constrained to join the judgment entered today denying the Plaintiffs' motion and granting the Defendants' motion. I respectfully suggest, however, that the fullness of time can inform understanding that may not have been available more than forty years ago. We deal now with real recent actions, not hypothetical ones. Certainly, those actions might provide an empirical basis to revisit assumptions. If the delegation permitted by section 232, as now revealed, does not constitute excessive delegation in violation of the Constitution, what would?

/s/ Gary S. Katzmann
GARY S. KATZMANN, JUDGE

Slip Op. 19–38

UNITED STATES, Plaintiff, v. UNIVAR USA INC., Defendant.

Before: Mark A. Barnett, Judge
Court No. 15–00215

MEMORANDUM AND ORDER

On August 6, 2015, Plaintiff, United States ("Plaintiff" or "the Government"), initiated this action seeking to recover unpaid antidumping duties and a monetary penalty pursuant to 19 U.S.C. § 1592

[16] Regarding the interplay between the Constitution and statute, one commentator has observed:

> The Constitution grants Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises" and "To regulate Commerce with foreign Nations." The president has no similar grant of substantive authority over economic policy, international or domestic. Consequently, international trade policy differs substantially from other foreign affairs issues, such as war powers, where the president shares constitutional authority with Congress. Where international trade policy is concerned, the president's authority is almost entirely statutory.

Timothy Meyer, *Trade, Redistribution, and the Imperial Presidency*, 44 Yale J. Int'l L. Online 16 (2018) (footnotes omitted) *available at* http://www.yjil.yale.edu/features-symposium-international-trade-in-the-trump-era/.

stemming from 36 entries of saccharin allegedly transshipped from the People's Republic of China ("China") through the Republic of China ("Taiwan") that Defendant, Univar USA, Inc. ("Defendant" or "Univar"), entered into the commerce of the United States between 2007 and 2012. Compl., ECF No. 2. On October 6, 2015, Defendant filed an answer and "demand[ed] a jury trial on all issues so triable, pursuant to Rule 38 of this Court and U.S. Const. amend. VII." Answer at 10, ECF No. 8. The parties have completed discovery, the court has ruled on two motions for partial summary judgment and a motion for summary judgment, and this matter is scheduled for a jury trial to begin on April 1, 2019. *See* Docket Entry (Dec. 13, 2018), ECF No. 210.

At the pretrial conference on March 5, 2019, Defendant asserted that any determination of civil penalties pursuant to 19 U.S.C. § 1592 would not be an issue triable by jury. The Government disagreed. The court invited the parties to brief the issue, and the parties did so. *See* United States' Mem. Relating to the Jury's Consideration of Quantum ("Pl.'s Mem."), ECF No. 232; Univar's Mem. Demonstrating the Determination of any Discretionary Penalty is for the Judge, ECF No. 233. At issue before the court, therefore, is whether any determination of the amount of civil penalties pursuant to 19 U.S.C. § 1592 is an issue triable by the jury pursuant to federal statute or the Seventh Amendment to the U.S. Constitution. Having considered the parties' memoranda and arguments, and after due deliberation, the court finds that the determination of civil penalties pursuant to 19 U.S.C. § 1592 is not triable by jury.

DISCUSSION

U.S. Court of International Trade ("USCIT") Rule 38(a) preserves a right to a jury trial provided by a federal statute or arising out of the Seventh Amendment to the U.S. Constitution.[1] The court first addresses whether section 1592 provides a right to have a jury determine any civil penalties and then turns to the Seventh Amendment analysis.

A. Section 1592 Does Not Provide a Right to Have Civil Penalties Determined by a Jury

The statute provides that in an action seeking recovery of any monetary penalty pursuant to 19 U.S.C. § 1592, "all issues, including

[1] While USCIT Rule 38(d) permits a party to withdraw a demand for jury trial, such withdrawal must be with the consent of all parties. Univar does not suggest that it is partially withdrawing a jury demand on the civil penalty issue and, in any case, the Government has opposed Univar's assertion that any determination of civil penalties is for the court.

the amount of the penalty, shall be tried de novo." 19 U.S.C. § 1592(e)(1). Section 1592 provides the statutory framework for determining civil penalties depending on the degree of culpability of the violator. When a grossly negligent section 1592(a) violation[2] affects the assessment of duties, the statute provides for a civil penalty of no more than "the lesser of [ ] the domestic value of the merchandise, or [ ] four times the lawful duties, taxes, and fees of which the United States is or may be deprived." 19 U.S.C. § 1592(c)(2)(A). When a negligent section 1592(a) violation affects the assessment of duties, the civil penalty may not exceed "the lesser of [ ] the domestic value of the merchandise, or [ ] two times the lawful duties, taxes, and fees of which the United States is or may be deprived." *Id.* § 1592(c)(3)(A).[3] The statue is silent, however, as to whether the judge or jury must determine the amount of the penalty; in fact, it makes no mention of juries.

Congress adopted section 1592(c) in essentially its current form in 1978. The prior version of the law — section 592 of the Tariff Act of 1930 — required a fixed penalty regardless of the degree of culpability of the alleged violator and did not permit effective judicial review. S. Rep. No. 95–778, at 2, 17–18 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 2211, 2213, 2228–29; *see also* Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95–410, § 592, 92 Stat. 888, 895. The penalty imposed for a violation of section 592 was forfeiture of the merchandise or payment of a fine equal to its domestic value. S. Rep. 95–778, at 2, 17, *as reprinted in* 1978 U.S.C.C.A.N. at 2213, 2228–29. While Customs had authority to mitigate a penalty, upon judicial review, "the court [could] only decide whether or not a violation occurred. It [could not] change the amount of the statutory penalty, domestic value." S. Rep. No. 95–778 at 2, *as reprinted in* 1978 U.S.C.C.A.N. at 2213. The court had no ability to tailor the penalty to the degree of culpability.

With the passage of the Customs Procedural Reform and Simplification Act of 1978, Congress changed the civil penalty from a fixed amount "to an amount varying according to the culpability of the importer." S. Rep. No. 95–778, at 19, *as reprinted in* 1978

[2] A violation of section 1592(a) occurs when a person—by fraud, gross negligence, or negligence—enters, introduces, or attempts to enter or introduce merchandise into the United States by means of a material and false act, statement, or omission. 19 U.S.C. § 1592(a)(1).

[3] Regardless of whether a monetary penalty is assessed, the United States shall require the payment of any "lawful duties, taxes, or fees" of which it has been deprived as a result of the violation of section 1592(a). 19 U.S.C. § 1592(d).

U.S.C.C.A.N. at 2230; H.R. Rep. No. 95–1517, at 10 (1978) (Conf. Rep.), *as reprinted in* 1978 U.S.C.A.N. 2249, 2252; 19 U.S.C. 1592(c). For the first time, "the appropriateness of the amount of the penalty" became "a proper subject for judicial review." S. Rep. No. 95–778, at 21, *as reprinted in* 1978 U.S.C.A.N. at 2232. While the legislative history is clear that the court is permitted "to make its own judgment about the appropriate remedy for a section [1]592 violation," H.R. Rep. No. 95–1517, at 10, *as reprinted in* 1978 U.S.C.C.A.N. at 2253; *see also* S. Rep. No. 95–778, at 20, *as reprinted in* 1978 U.S.C.C.A.N. 2231, that history, when read in isolation, does not shed light on whether "court" means judge or jury. *Cf. Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 346 (1998) (considering whether the word "court" in the context of the statutory damages provision of the Copyright Act of 1976 meant "judge, not jury").[4] Thus, the court is unable to discern any congressional intent to grant a statutory right to a jury trial on the determination of the amount of civil penalties pursuant to 19 U.S.C. § 1592(c).

B. The Seventh Amendment Does Not Provide a Right to Have Civil Penalties Determined by a Jury

The Seventh Amendment provides that "[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." U.S. Const., amend. VII. The Seventh Amendment preserves the right to a jury trial that "existed under the English common law when the amendment was adopted."

[4] A survey of section 1592 cases in the Court of International Trade does not aid in this respect. In several cases in which the court determined the civil penalty following a bench trial, the court has stated that it has the discretion to determine the penalty amount within the parameters set by the statute. *See United States v. Optrex Am., Inc.,* 32 CIT 620, 621, 639, 560 F. Supp. 2d 1326, 1328, 1342 (2008)*; United States v. Inn Foods, Inc.*, 31 CIT 1474, 1475, 1488–90, 515 F. Supp. 2d 1347, 1350, 1361–62 (2007), *aff'd*, 560 F.3d 1338 (Fed. Cir. 2009); *United States v. Nat'l Semiconductor Corp.*, 30 CIT 769, 771–72, *modified on reconsideration*, 30 CIT 1428 (2006), *vacated and remanded*, 496 F.3d 1354 (Fed. Cir. 2007); *United States v. Complex Mach. Works Co.*, 23 CIT 942, 942, 947, 83 F. Supp. 2d 1307, 1308, 1312 (1999); *United States v. Menard, Inc.*, 17 CIT 1229, 1229, 838 F. Supp. 615, 616 (1993), *aff'd in part, vacated in part*, 64 F.3d 678 (table) (Fed. Cir. 1995); *United States v. Modes, Inc.*, 17 CIT 627, 628, 635–36, 826 F. Supp. 504, 506, 512 (1993). In the absence of a jury demand, the court was not required to determine whether the penalty amount was to be determined by the jury in these cases. There is one case in which the jury determined the amount of civil penalty. *See United States v. Priority Prods., Inc.*, 793 F.2d 296, 298 (Fed. Cir. 1986) ("The case proceeded to a trial before a jury[;] . . . The jury found all three defendants . . . jointly and severally liable for a penalty of $30,000."). However, there is no indication that *Priority Products* addressed whether the defendant had a right to a jury's determination of the quantum of the civil penalty and the case predates *Tull v. United States*, 481 U.S. 412 (1987) by two years. *See id.*; *United States v. Priority Products, Inc.*, 9 CIT 383, 615 F. Supp. 591 (1985); *infra* pp. 5–7 (discussing *Tull*). The court has located only one case in which the court was confronted with the same issue and decided, without explanation, that the defendant had a right to a jury trial to determine liability, but not to any other aspect of the case. *See* Order, *United States v. Tri-State Hosp. Supply Corp.*, Court No. 97–04–00678 (CIT May 10, 1999), Docket Entry 55.

Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935). It also applies to "actions brought to enforce statutory rights that are analogous to common-law causes of action ordinarily decided in English law courts in the late 18th century, as opposed to those customarily heard by courts of equity or admiralty." *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 41 (1989) (citing *Curtis v. Loether,* 415 U.S. 189, 193 (1974)). A two-step inquiry determines whether a modern statutory cause of action is analogous to a common-law action that was tried in a court of law. *Tull*, 481 U.S. at 417–18. First, the court must "compare the statutory action to 18th-century actions brought in the courts of England prior to the merger of the courts of law and equity." *Id.* at 417. "Second, [the court must] examine the remedy sought and determine whether it is legal or equitable in nature." *Id*. at 417–18.

The parties do not dispute that Defendant has a right to have a jury determine liability pursuant to 19 U.S.C. § 1592(a)(1) and the court agrees. In *Tull*, the U.S. Supreme Court analogized actions by the Government seeking civil penalties under statutory provisions to a common law "action in debt," for which the Seventh Amendment guarantees a defendant's right to a jury trial on liability. *Id.* at 420, 424. Thus, Univar has a right to have a jury determine its liability for civil penalties pursuant to 19 U.S.C. § 1592(a)(1) and, by timely demanding a jury in its answer, has properly invoked that right.

Nevertheless, "[t]he Seventh Amendment is silent on the question of whether a jury must determine the remedy in a trial in which it must determine liability." *Id.* at 425–26. Although a defendant may have a right to a jury trial to determine liability pursuant to section 1592(a), whether a defendant has a right to have a jury determine the civil penalty quantum is a separate inquiry. *Id.* The answer to that inquiry "depend[s] on whether the jury must shoulder this responsibility as necessary to preserve the 'substance of the common-law right of trial by jury.'" *Id.* at 426 (quoting *Colgrove v. Battin*, 413 U.S. 149, 157 (1973)).

In *Tull*, the U.S. Supreme Court held that, although the Seventh Amendment guarantees a defendant a right to a jury trial to determine liability in a civil penalty action brought by the United States under the Clean Water Act, the defendant had no such right with respect to the determination of civil penalties. *Id.* at 427. The Court reasoned that, in an action to recover civil penalties, the United States usually seeks the penalty amount fixed by Congress. *See id.* at 426 (citing *United States v. Regan*, 232 U.S. 37, 40 (1914); *Hepner v. United States*, 213 U.S. 103, 109 (1909)). Accordingly, the Court concluded that the determination of civil penalties does not involve the

"substance of a common-law right to a trial by jury." *Id.* The Court also reasoned that, since Congress had the authority to determine the statutory penalty, Congress could delegate that function to trial judges. *Id.* at 427. The Court noted that the determination of penalties under the Clean Water Act involved "highly discretionary calculations that take into account multiple factors," and that such calculations were "traditionally performed by judges." *Id.* (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 442–43 (1975) (Rehnquist, J., concurring)).

Applying the Court's decision and reasoning in *Tull* to the instant action, the court concludes that the Seventh Amendment does not guarantee a right to a trial by jury to determine civil penalties pursuant to section 1592(c). As in *Tull*, "Congress' authority to fix the penalty by statute has not been questioned." *Tull*, 481 U.S. at 426. Similar to the Clean Water Act, which provides for a maximum civil penalty of "'$10,000 per day' during the period of the violation," *id*. at 414, section 1592(c) now sets varying maximum penalties depending on the degree of culpability, *see* 19 U.S.C. § 1592(c). Congress's ability to delegate the civil penalty determination to trial judges at the Court of International Trade is not in question. Congress has done so here because, while it chose to set statutory maximums, it clearly intended for the court "to make its own judgment about the appropriate remedy for a section [1]592 violation." H.R. Rep. No. 95–1517, at 10, *as reprinted in* 1978 U.S.C.C.A.N. at 2253. In contrast, the court retains no discretion as to whether or not to award duties, taxes, or fees, of which the United States has been deprived as a result of a section 1592(a) violation. 19 U.S.C. § 1592(d) (separate and regardless of any civil penalty determination, payment of any lost duties, taxes, or fees, "shall be required"; such determination lies with the jury and Univar has not suggested otherwise). Correspondingly, similar to the Clean Water Act, which required "highly discretionary calculations . . . traditionally performed by judges," *Tull*, 481 U.S. at 427, section 1592(c) requires a similar discretionary determination.[5] Therefore, a determination of a civil penalty pursuant to section 1592(c) is not "an

[5] In *Tull,* the Court noted that the Clean Water Act required consideration of "multiple factors" in calculating the amount of civil penalties. 481 U.S. at 427. Although section 1592(c) does not specify the factors the court must consider when determining civil penalties, the absence of articulated factors does not detract from Congress' commitment of the penalty determination to the court's discretion. While not binding here, the court has identified and considered up to 14 factors when determining the appropriate penalty. *See Complex Mach. Works Co.*, 23 CIT at 949–50, 83 F. Supp. 2d at 1315 (outlining 14 factors); *United States v. Nat'l Semiconductor Corp.*, 496 F.3d 1354, 1356 (Fed. Cir. 2007) (stating that the 14 factors identified in *Complex Machine Works* "are factors the Court of International Trade may consider when determining the appropriateness of a civil penalty for a violation of customs laws"). In *Complex Machine Works Co.*, the court looked to numerous Acts imposing civil penalties, including the Clean Water Act, that articulated factors to

essential function of a jury trial," and the Seventh Amendment does not provide a right to have a jury determine civil penalties pursuant to section 1592(c). *See id.*; *cf. Albemarle*, 422 U.S. at 443 (Rehnquist, J., concurring) (rejecting the notion that a party may demand a jury in a Title VII case as to the award of backpay "notwithstanding a finding of unlawful discrimination" because discretionary determinations implicating a court's jurisdiction over equitable matters are not susceptible to jury demands).

The Government's arguments to the contrary are not persuasive.[6] The Government correctly asserts that the Seventh Amendment guarantees a right to a jury trial on the assessment of damages if such a right existed in a comparable action that pre-dated the Amendment. *See* Pl.'s Mem. at 3–4 (citations omitted). The U.S. Supreme Court has recognized that the assessment of damages in certain civil suits is a matter within the province of the jury. *See, e.g.*, *Day v. Woodworth*, 54 U.S. 363, 371 (1851) ("It is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant . . . ."); *Dimick v. Schiedt*, 293 U.S. 474, 480 (1935) (stating that "the common-law rule as it existed at the time of the adoption of the Constitution" was that "in cases where the amount of damages was uncertain[,] their assessment was a matter so peculiarly within the province of the jury that the Court should not alter it."); *Pernell v. Southall Realty*, 416 U.S. 363, 370

guide the determination of the proper penalty amount. *See Complex Mach. Works Co.*, 23 CIT at 947–49 & n.10, 83 F. Supp. 2d at 1313–14. The factors are:

> (1) the defendant's good faith effort to comply with the statute; (2) the defendant's degree of culpability; (3) the defendant's history of previous violations; (4) the nature of the public interest in ensuring compliance with the regulations involved; (5) the nature and circumstances of the violation at issue; (6) the gravity of the violation; (7) the defendant's ability to pay; (8) the appropriateness of the size of the penalty to the defendant's business and the effect of a penalty on the defendant's ability to continue doing business; (9) that the penalty not otherwise be shocking to the conscience of the [c]ourt; (10) the economic benefit gained by the defendant through the violation; (11) the degree of harm to the public; (12) the value of vindicating the agency authority; (13) whether the party sought to be protected by the statute had been adequately compensated for the harm; and (14) such other matters as justice may require.

Id. at 949–50, 83 F. Supp. 2d at 1315. The Government has not suggested departure from those 14 factors.

[6] The court takes note that the Government's position here is at odds with its position in *Tri-State.* In *Tri-State,* the defendant sought a jury trial on all issues. The Government agreed that defendant had a right to a jury trial on liability but, citing *Tull,* argued that the defendant was not entitled to demand that a jury determine the civil penalty to be imposed. Pl.'s Resp. to Def.'s Demand for Jury Trial, *United States v. Tri-State Hosp. Supply Corp.*, Court No. 97–04–00678 (CIT May 10, 1999), Docket Entry No. 13. The *Tri-State* court agreed with the Government but did not explain its reasoning. *See supra* note 4. In arguing for a jury to determine the civil penalty here, the Government does not point to any intervening case law or statutory changes that might explain its change in position.

(1974) ("Th[e] Court has long assumed that actions to recover land, like actions for damages to a person or property, are actions at law triable to a jury."); *Feltner*, 523 U.S. at 353 ("[T]here is overwhelming evidence that the consistent practice at common law was for juries to award damages.") (citations omitted). In none of the cases on which the Government relies, however, was the Government the plaintiff seeking a civil penalty. In contrast to civil suits between private litigants, the U.S. Supreme Court has analogized "the awarding of civil penalties to the Government . . . to sentencing in a criminal proceeding." *Feltner*, 523 U.S. at 355 (citing *Tull*, 481 U.S. at 428 (Scalia, J., concurring in part and dissenting in part)).[7]

There is also no historical evidence that juries determined discretionary civil penalties to be paid to the Government in customs cases at the time the Seventh Amendment was adopted. The Government cites five cases, each of which is inapposite. Pl.'s Mem. at 6–7 (citing *Wight v. Curtis*, 29 F. Cas. 1170, 1171 (C.C.S.D.N.Y. 1845); *Lawrence v. Caswell*, 54 U.S. 488, 490 (1851); *Maxwell v. Griswold*, 51 U.S. 242, 247 (1850); *Greely v. Thompson*, 51 U.S. 225, 230 (1850); *In re One Hundred & Twenty-Three Packages of Glass*, 18 F. Cas. 709, 711 (C.C.S.D.N.Y. 1841)). Four of the five cases involved suits by private parties against the Collector of Customs[8] to recover allegedly overpaid duties, rather than suits brought by the Government. *See Wright*, 29 F. Cas. at 1170; *Lawrence*, 54 U.S. at 488; *Maxwell*, 51 U.S. at 242; *Greely,* 51 U.S. at 226. The remaining case involved an information filed to seek forfeiture of goods allegedly undervalued with the "intent, by a false valuation, to defraud the revenue of the United States." *In re One Hundred & Twenty-Three Packages of Glass*, 18 F. Cas. at 710. There, the issues concerned the real or market value of the goods on the date of the invoice and whether the invoice value was made up to defraud the revenue, questions presented to the jury. *Id.* at 710–11. Those are the type of factual determinations that are traditionally within the province of the jury. Once that liability was determined, the penalty provided by statute was forfeiture of the goods. *See id. (citing* An Act for the More Effectual Collection of the Impost Duties, ch. 147, § 4, 4 Stat. 409, 410 (1830)). There were no factors to weigh and no discretionary civil penalty amount to be

[7] The Government further avers that this court "has long recognized that in a section 1592 action such as this one, it 'may order a trial by a jury of any or all issues.'" Pl.'s Mem. at 5 (quoting *Priority Prods.* 615 F. Supp. at 597). As noted earlier, *Priority Products* predates *Tull* and there is no indication that the court considered whether the Seventh Amendment gave the Defendant a right to have the civil penalty determined by the jury.

[8] In early customs cases, the named defendant was usually the Collector of Customs.

determined. Thus, the *in rem* remedy sought in that case is not analogous to the discretionary civil penalty that the Government now seeks pursuant to section 1592(c).

CONCLUSION

Univar filed a demand for a "jury trial on all issues so triable." Neither section 1592 nor the Seventh Amendment to the U.S. Constitution guarantees a right to have the jury determine civil penalties to be paid to the Government. The court finds that the determination of the quantum of civil penalties pursuant to section 1592(c) is not an issue triable to the jury.

SO ORDERED.

Dated: March 26, 2019
New York, New York

/*s*/ *Mark A. Barnett*
JUDGE

Slip Op. 19–39

SEVERSTAL EXPORT GMBH and PAO SEVERSTAL, Plaintiffs, v. UNITED STATES, Defendant,

Before: Leo M. Gordon, Judge
Court No. 17–00209

[Commerce's *Final Results* sustained.]

Dated: March 27, 2019

Daniel J. Cannistra, of Crowell & Moring, LLP of Washington, DC argued for Plaintiff Severstal Export GmbH and PAO Severstal.

Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for Defendant United States. With her on the brief were *Joseph H. Hunt*, Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Renee A. Burbank*, Senior Trial Counsel. Of counsel was *Christopher P. Hyner*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Tessa V. Capeloto, of Wiley Rein of Washington, DC, argued for Defendant-Intervenor Nucor Corp. With her on the brief was *Alan H. Price*, *Timothy C. Brightbill*, and *Maureen E. Thorson*.

OPINION

Plaintiffs Severstal Export GmbH and PAO Severstal (together, "Severstal") requested that the U.S. Department of Commerce ("Commerce") conduct an administrative review of its entries of subject merchandise covered by the antidumping duty order on hot-rolled steel from the Russian Federation. In the review Commerce assigned Severstal as total adverse facts available ("AFA") the highest petition

margin from the original investigation, 184.56 percent. *Certain Hot-Rolled Flat-Rolled Carbon-Quality Steel Products from the Russian Federation*, 82 Fed. Reg. 31,559 (Dep't of Commerce July 7, 2017) (final admin. review) ("*Final Results*"), and accompanying Issues and Decision Memorandum ("*Decision Memorandum*"). Severstal challenges Commerce's assignment of the total AFA rate, arguing that Commerce wrongfully (1) denied an extension request and (2) rejected its revised databases, applied facts otherwise available, and used total AFA with an adverse inference.[1] *See* Rule 56.2 Mem. Supp. Mot. J. Agency R. of Pls. Severstal Export GmbH and Pao Severstal, ECF No. 24–1 ("Severstal Br."); *see also* Def.'s Resp. to Pls.' Rule 56.2 Mot. J. Agency R., ECF No. 29 ("Def.'s Br."); Def.-Int. Nucor Corp.'s Resp. Br., ECF No. 30; Severstal's Reply Br., ECF No. 32 ("Severstal Reply").

The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2012),[2] and 28 U.S.C. § 1581(c) (2012).

I. Standard of Review

The court sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *DuPont Teijin Films USA v. United States*, 407 F.3d 1211, 1215 (Fed. Cir. 2005) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 9.24[1] (3d ed. 2019). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the

[1] Severstal withdrew another argument about the total AFA rate at oral argument.

[2] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2012 edition.

challenged agency action "was reasonable given the circumstances presented by the whole record." 8A West's Fed. Forms, *National Courts* § 3.6 (5th ed. 2018).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984) governs judicial review of Commerce's interpretation of the antidumping statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

II. Discussion

Severstal first argues that Commerce mishandled its April 14 extension request. A party typically leads with its strongest argument. One would logically anticipate that Severstal would then build upon that argument, contending that Commerce arbitrarily failed to provide sufficient time for Severstal to respond to the sections B and D questionnaires, which in turn unreasonably disadvantaged Severstal for the balance of the proceeding, leading Commerce to apply facts available and an adverse inference. Severstal, however, does not make that argument. Severstal instead argues that despite being aggrieved by Commerce's handling of its April 14 extension request, it "timely, completely, and accurately provided all information requested, ..." Severstal Br. at 17. That argument creates an irreconcilable conflict with its first argument about its extension request, which is either irrelevant and unnecessary, or renders suspect Severstal's later claim of timeliness, completeness, and accuracy.

A. Severstal's April 14 Extension Request

Commerce addressed in detail Severstal's argument that the partial grant of its April 14 extension request was arbitrary:

> Severstal argues that the Department acted unlawfully and contrary to its longstanding practice by initially rejecting Severstal's third extension request, and then subsequently granting an additional extension of only two days. Severstal also states that it had only two days to complete its responses to sections B and D of the Department's antidumping duty questionnaire, as it did not have time prior to the final two-day extension to respond to the Department's questionnaire due to the need to prepare for verification on other antidumping duty cases. We disagree. The Department's antidumping duty questionnaire was issued February 19, 2016. The questionnaire provided Severstal a deadline of March 30, 2016, to respond to sections B and

> D. Severstal requested two extensions, which the Department granted in part, which moved the deadline to April 18, 2016. Thus, Severstal initially received a total of 54 days to submit complete section B-D responses. After initially rejecting Severstal's April 14, 2016, third extension request for an additional 14 days, the Department ultimately granted Severstal an additional two-day extension, until April 20, 2016. Therefore, Severstal was, in total, given 56 days to respond to sections B and D of the Department's antidumping duty questionnaire. Severstal stated that it "tr[ied] to prepare and file complete section B and D questionnaires in less than two days," which suggests that Severstal did not use the prior 54 days of time to prepare these sections of the questionnaire. As Severstal itself has stated, it has been involved in other antidumping and countervailing duty proceedings before the Department. The Department notes that Severstal, an experienced respondent familiar with the Department's procedures, self-requested this administrative review on December 30, 2015, less two months prior to the initial questionnaire being issued. Thus, in self-requesting the administrative review, Severstal understood the time and resource commitment it was making with overlapping proceedings.

Decision Memorandum at 11–12.

Severstal argues that Commerce's "rejection of Severstal's extension request and granting only a partial two-day extension was unsupported by substantial evidence, arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law." Severstal's Br. at 8. The court does not agree. Commerce highlighted Severstal's admission that it left itself only two days to prepare a section B and D response. The questionnaire instructions state that the original deadlines apply unless extended in writing by Commerce. Severstal assumed otherwise. That assumption and accompanying laxity in preparing its questionnaire responses place Severstal in a difficult position, further compounded by Severstal attempting to mislead the court about the facts on the record. Severstal misrepresents that the "initial due date" for the questionnaire was "April 18, 2016." Severstal Br. at 4–5. The initial due date was March 30, 2016. Severstal ultimately had *56* days to complete the questionnaires, *not 2*. Rather than address that *56-day* time period, Severstal argues that Commerce's handling of Severstal's extension request was contrary to long standing practice. Severstal, though, only cites two extension requests from non-market economy proceedings for a different product. Severstal does not explain how these non-market economy cases are

identical factually and procedurally to its market economy proceeding thereby mandating similar treatment across the proceedings. Severstal also never comes to terms with the 56 days it had to complete sections B and D. The court therefore sustains Commerce's partial grant of Severstal's April 14 extension request.

B. Revised Database, Facts Available, Adverse Inference

Pursuant to 19 U.S.C. § 1677e, Commerce follows a two-step process to apply facts available with an adverse inference. First, Commerce must use facts otherwise available to fill gaps in the record if, among other things, an interested party withholds information requested by Commerce, fails to provide such information in the form and manner requested, significantly impedes the proceeding, or provides information that cannot be verified. 19 U.S.C. § 1677e(a). Second, Commerce may apply an adverse inference in selecting among the facts available if an interested party fails to cooperate to the best of its ability. 19 U.S.C. § 1677e(b). An interested party fails to cooperate to "the best of its ability" when it "fails to put forth its maximum effort to provide Commerce with full and complete answers to all inquiries." *See Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). "While the standard does not require perfection and recognizes that mistakes sometimes occur, it does not condone inattentiveness, carelessness, or inadequate record keeping." *Id.*

Severstal requested the administrative review, and one would anticipate that Severstal would have been prepared for the review. Commerce issued its Initial Antidumping ("AD") Questionnaire that requested that Severstal report all of its U.S. and home market sales made during the period of review in corresponding sales databases. Initial AD Questionnaire, PD[3] 8, at B-1, C-1. Severstal submitted its response to section B of the Initial AD Questionnaire on April 21, 2016. Severstal's Section B Questionnaire Response (Apr. 21, 2016) (Section B Response) PD 37, CD 28–44. In its section B response, Severstal did not include a substantial number and volume of sales in its home market sales database, *Decision Memorandum* at 8, despite Severstal's section B narrative response that it had reported downstream sales between its affiliate, Severstal Distribution, and unaffiliated customers. *Decision Memorandum* at 8; Section B Response, PD 37, CD 28, at B-6. The home market sales database accompanying the section B response did not contain the downstream

[3] "PD" refers to a document contained in the public administrative record, which is found in ECF No. 19–2, unless otherwise noted. Likewise, "CD" refers to a document contained in the confidential administrative record, which is found in ECF No. 19–3, unless otherwise noted.

sales. *Decision Memorandum* at 8; Section B Response at Exhibit B-1, CD 32. Commerce explained that it discovered the discrepancies when comparing Severstal's reported home market sales in its section B response with the reported quantity of home market sales in Severstal's quantity and value chart in its response to section A of the Initial AD Questionnaire. *Decision Memorandum* at 8, n.24; Section B Response at Exhibit B-1, CD 32; Severstal's Section A Questionnaire Response (Mar. 14, 2016) at Exhibit A-1, PD 14, CD 2.

To address the discrepancies, Commerce issued a supplemental questionnaire on August 3, 2016. Second Supplemental Questionnaire for the Section A-C Questionnaire Responses of Severstal (Aug. 3, 2016) (Second Supplemental Questionnaire) PD 61, CD 95. Specifically, Commerce requested that Severstal "[r]econcile the quantity and value of sales to affiliated parties reported in Exhibit A-1 of the [section A questionnaire response] to the home market sales database of the [section B questionnaire response]." Second Supplemental Questionnaire, PD 61, CD 95, at 7. Furthermore, Commerce informed Severstal that its home market sales database did not include individual columns for the product characteristics that make up the CONNUM[4] and instructed it to "add a column for each product characteristic" and "report each sale's respective product characteristic coded in the home market sales database of the [section B questionnaire response]." *Id.* at 8. As Commerce explained in the *Decision Memorandum*, "[i]t is standard practice for respondents to include these columns in the sales databases," and Severstal did report these individual columns for the U.S. sales database, but not for the home market sales database. *Decision Memorandum* at 9; *compare* Section B Response at Exhibit B-1, CD 32, *with* Severstal's Section C Questionnaire Response (Apr. 18, 2016) at Exhibit C-2, CD 21. To address this deficiency, Commerce issued a supplemental questionnaire to provide Severstal an opportunity to revise its home market sales database "to report these standard columns." *Decision Memorandum* at 9.

Severstal responded to section B of the Second Supplemental Questionnaire on September 6, 2016. *See* Severstal's Section B Supplemental Questionnaire Response (Sept. 6, 2016) ("Second Supplemental Section B Response") PD 74, CD 107. Severstal provided updated exhibits to reconcile its quantity and value chart in its original section A questionnaire response and its original home market sales database and claimed that the "apparent discrepancies

[4] CONNUM refers to control numbers that identify unique product characteristics, which establish the model matching criteria for making a proper comparison between U.S. and home market sales.

ha[d] been removed." Second Supplemental Section B Response at 6, Exhibit 2S-16, Exhibit 2S-17, CD 107, 114, 117 & 119. Severstal also stated that the home market sales database had been updated to include the individual columns that make up the CONNUM. *Id.* at 7, Exhibit 2S-17, CD 107, 117 & 119. Severstal failed to inform Commerce that it had made additional, unrequested changes by changing all CONNUMs in the home market sales databases. *Decision Memorandum* at 9. Severstal also made similar unrequested changes to the U.S. sales database. *Id.* As a result, Commerce concluded that Severstal's revised home market and U.S. sales databases contained unsolicited factual information that Commerce rejected pursuant to 19 C.F.R. § 351.302(d)(1)(ii) and (2). *Id.*

Severstal argues as a factual matter that the information Commerce rejected was not unsolicited, but merely corrected previously solicited and submitted information. Severstal Br. at 9–13. Problematically for Severstal, it chose a curious path to correct inaccuracies within its prior factual submissions. The record is clear that Severstal did more than was asked in Commerce's supplemental questionnaire, seeking to cram those corrections into its response, all without a detailed explanation identifying exactly what it was correcting from its prior submissions, and why the corrections were necessary. A more transparent approach would have been to file the responsive supplemental questionnaire without the unrequested corrections *and* separately file a transparent correction of its prior factual submission containing "a written explanation identifying the information which is already on the record that the factual information seeks to . . . correct, including the name of the interested party that submitted the information and the date on which the information was submitted." 19 C.F.R. § 351.301(b)(2).

Without that straightforward, transparent approach to correcting Severstal's information, Commerce reasonably addressed the opacity Severstal created. Defendant explains that Severstal "attempted to make broad, unsolicited changes to its home and U.S. sales databases in the guise of responding to Commerce's supplemental questionnaire seeking information about home market downstream sales and information on home market sales product characteristics." Def's Br. at 9. Defendant persuasively notes that when Commerce requested that Severstal, in its home market database, "add a column for each product characteristic" and "report each sale's respective product characteristic coded in the home market sales database of the [section B questionnaire response]," Commerce intended for Severstal to conform its home market database to its U.S. database. Commerce did

not request that Severstal change the product characteristics and CONNUMs. Def's Br. at 13 (citing Second Supplemental Questionnaire, PD 61, CD 95, at 8).

Severstal also challenges Commerce's application of facts available and an adverse inference. Severstal Br. at 13–20. Commerce noted its authority under § 1677e(a)(2)(B) to use facts available when an interested party fails to provide information "in the form and manner requested," *Decision Memorandum* at 6–7, and explained that Commerce "appropriately applied AFA, because Severstal failed to provide necessary information in the manner and form requested by the Department . . . ." *Id.* at 7. In its argument, Severstal omits any reference to Commerce's authority to use facts available when a party like Severstal fails to provide information in the form and manner requested. *See* Severstal Br. at 13–14, 15 (referencing section 1677e(a)(2) but omitting the requirement that parties submit information in the form and manner requested); *see also* Severstal Reply Br. at 4. This is unfortunate because it means Severstal's argument is unresponsive to Commerce's determination. Commerce reasonably explained its application of facts otherwise available and an adverse inference against Severstal. *Decision Memorandum* at 6–10. The court simply adds that it is difficult for Severstal to claim in good faith that it acted to the best of its ability when it acknowledged before Commerce that despite having 56 days to file its responses, Severstal "tried to prepare and file complete section B and D questionnaires in less than two days," *Id.* at 12 (quoting Severstal's administrative case brief).

Severstal also argues that, pursuant to 19 U.S.C. § 1677m(d), Commerce had to first issue a supplemental questionnaire for section D (relating to costs) before resorting to facts available. Severstal Br. at 20–23. Defendant persuasively counters that Commerce identified a problem with the sales databases, not the cost databases. Commerce relied on Severstal's admission that the original sales databases were incorrect to determine that they were incomplete and unreliable. *Decision Memorandum* at 10. Once Commerce made that determination, it did not have to embark on a fool's errand regarding the cost databases. *Id.* ("Had Severstal provided accurate and reliable sales databases, . . . the section D cost database would have been compatible with the sales databases and would have allowed us to run a margin program."). Commerce therefore properly determined it was not required to further modify its section D cost database prior to applying facts otherwise available. *Id.* at 8.

Conclusion

For the foregoing reasons, the court sustains the *Final Results*. The court will enter judgment accordingly.

Dated: March 27, 2019
New York, New York

/*s*/ *Leo M. Gordon*
JUDGE LEO M. GORDON