NONCONFIDENTIAL

UNITED STATES COURT OF INTERNATIONAL TRADE

PRIMESOURCE BUILDING PRODUCTS, INC., Plaintiff, v. THE UNITED STATES, DONALD J. TRUMP, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNITED STATES; WILBUR L. ROSS, JR., IN HIS OFFICIAL CAPACITY AS UNITED STATES SECRETARY OF COMMERCE; UNITED STATES DEPARTMENT OF COMMERCE; MARK A. MORGAN, IN HIS OFFICIAL CAPACITY AS ACTING COMMISSIONER, UNITED STATES CUSTOMS AND BORDER PROTECTION; UNITED STATES CUSTOMS AND BORDER PROTECTION, Defendants.	Ct. No. 20-00032 Confidential Information Removed From pp. 34-35

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER AND A PRELIMINARY INJUNCTION

February 12, 2020

Jeffrey S. Grimson
Kristin H. Mowry
Jill A. Cramer
Sarah M. Wyss
James C. Beaty
Bryan Cenko
Mowry & Grimson, PLLC
5335 Wisconsin Avenue, NW, Suite 810
Washington, D.C. 20015
202-688-3610
Counsel to PrimeSource Building Products, Inc.

NONCONFIDENTIAL

TABLE OF CONTENTS

NONCONFIDENTIAL

TABLE OF AUTHORITIES

Cases

Statutes

NONCONFIDENTIAL

Other Authorities

Regulations

NONCONFIDENTIAL

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

INTRODUCTION AND SUMMARY OF ARGUMENT

President Donald J. Trump violated the law when he issued a January 24, 2020 proclamation imposing 25 percent duties on imports of "derivative" steel products pursuant to Section 232 of the Trade Expansion Act of 1962, 19 U.S.C. § 1862 (2018) [1] ("Section 232"). See Proclamation No. 9980, titled Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles Into the United States, 85 Fed. Reg. 5,281 (Jan 29, 2020) ("Proclamation No. 9980"), attached to PrimeSource Am. Compl. at Ex. 1, Feb. 11, 2020, ECF No. 21 ("PrimeSource Am. Compl."). Proclamation 9980 was unlawful in four ways. First, the process underlying the issuance of Proclamation No. 9980 was inconsistent with the statutory authority on which it was based and regulatory protections of the Administrative Procedures Act ("APA") and constitutes an unlawful rulemaking by the Department of Commerce ("Commerce"). Second, the President lacks the authority to make the contemplated adjustments at this time. Section 232 establishes strict time periods for taking action pursuant to the authority it delegates and the Proclamation No. 9980 was made well outside of allowable time period. Third, the failure of the Secretary of Commerce to establish a notice and comment period in conjunction with the expansion of the initial Section 232 action and his failure to publicize the "assessments" upon which Proclamation No. 9980 is predicated violated PrimeSource's Fifth Amendment due process rights. Fourth, the unlawful actions ordered in Proclamation No. 9980 confirm that Section 232 is an unconstitutional over-delegation of the authority "to lay and collect {t}axes, {d}uties, {i}mposts and {e}xcises"

[1] All subsequent references to the United States Code likewise refer to the 2018 edition unless otherwise noted.

and "to regulate Commerce with foreign nations" vested in the Congress. U.S. Const. art. 1 § 8, cls. 1, 3.

On February 7, 2020 this Court held a telephonic hearing with the parties and encouraged the parties to seek agreement, to the extent possible, on any aspects of injunctive relief. Plaintiff's and Defendant's counsel have engaged in ongoing consultations, including subsequent telephonic hearings with the Court, in an effort to seek common elements in the proposed injunctive relief. Defendant's counsel, while not consenting to any injunctive relief, has provided input as to the form of the proposed relief requested by Plaintiff. Plaintiff's counsel has endeavored to incorporate such input to the extent not contrary to the relief Plaintiff requests.

The memorandum supports a motion which PrimeSource believes will address the concerns identified by this Court and provide such injunctive relief as is appropriate to allow this case to proceed to the merits expeditiously while preserving the rights of the respective parties.

STATEMENT OF FACTS

I. Section 232 of the Trade Expansion Act of 1962 Sets Forth Certain Procedural Measures That Must Be Followed

Section 232, titled "Safeguarding National Security," authorizes the President "to take action to adjust imports of an article and its derivatives" only if certain procedural requirements are met. First, a Section 232 action may only begin upon the request for such an investigation from "the head of any department or agency, upon application of an interested party" or on the Secretary's "own motion." 19 U.S.C. § 1862(b)(1)(A). Following such a request, the statute requires the Secretary immediately to initiate an investigation "to determine the effects on the national security of imports of {an} article." During such investigation, the Secretary must consult with the Secretary of the Department of Defense and other U.S. officials, as appropriate, to determine the effects of the specified imports on the national security. Id. § 1862(b)(2)(A)(i)-(ii).

The Secretary must also, "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." Id. § 1862(b)(2)(A)(iii).

Under the statute, the Secretary then has 270 days from the date the investigation was initiated, to submit a report to the President. The report must contain "the findings of such investigation with respect to the effect of the importation of such article in such quantities or under such circumstances upon the national security and, based on such findings, the recommendations of the Secretary for action or inaction under th{e} section." Id. § 1862(b)(3)(A).

While Section 232 does not explicitly define "national security," it does provide a non-exhaustive list of factors that the Secretary and President must consider, including:

> domestic production needed for projected national defense requirements, the capacity of domestic industries to meet such requirements, existing and anticipated availabilities of the human resources, products, raw materials, and other supplies and services essential to the national defense, the requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth, and the importation of goods in terms of their quantities, availabilities, character, and use.

Id. § 1862(d).

Upon receipt of Commerce's report, the President has 90 days – and no more – to both "determine whether the President concurs with the finding of the Secretary" and if the President concurs, "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." Id. § 1862(c)(1)(A)(ii). After reaching a determination, the President has 15 days – and no more – to implement the chosen action. See id. § 1862(c)(1)(B). Alternatively, under the statute, the President may "negotiat{e} … an agreement which limits or restricts the importation into, or the exportation to, the United States of the article that threatens to

impair national security…" Id. § 1862(c)(3)(A)(i). If the President chooses to negotiate an article-specific agreement, but either "no such agreement is entered into" within 180 days or the resulting agreement "is not being carried out or is ineffective," the President must "take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security." Id. § 1862(c)(3)(A)(ii) (emphasis added).

II. Commerce's 2017 Investigation Under Section 232 Did Not Cover Steel Nails

On April 19, 2017, the Secretary initiated an investigation into the effects of aluminum and steel imports on the national security of the United States. On April 26, 2017, the Secretary published a notice of the investigation in the Federal Register and invited public comment on "imports of steel." Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel, 82 Fed. Reg. 19,205 (Dep't Commerce Apr. 26, 2017) ("Request For Public Comment"), attached to PrimeSource Am. Compl. at Ex. 3. The notice did not mention steel nails specifically, or any derivative articles generally. Id. Nor did any of the public comments that were submitted in during the period advocate for the tariff to be applied to imported steel nails or suggest that they should be exempted from the tariffs. See U.S. DEP'T OF COMMERCE, BUREAU OF INDUS. & SEC. OFFICE OF TECH. EVALUATION, The Effect of Imports of Steel on the National Security at app. G, (Jan. 11, 2018) ("Steel Report"), https://www.commerce.gov/sites/default/files/the_effect_of_imports_of_steel_on_the_national_security_-_with_redactions_-_20180111.pdf (app. G directs to the Steel 232 Investigation Public Comments Library), attached to PrimeSource Am. Compl. at Ex. 4; see also U.S. DEP'T OF COMMERCE, BUREAU OF INDUS. & SEC. OFFICE OF TECH. EVALUATION, The Effect of Imports of Aluminum on the National Security (Jan. 17, 2018), https://bis.doc.gov/index.php/documents/aluminum/2223-the-effect-of-imports-of-aluminum-on-

the-national-security-with-redactions-20180117/file. The word "nails" does not appear anywhere in the transcript of the public hearing held on May 24, 2017. See U.S. DEP'T OF COMMERCE, BUREAU OF INDUS. & SEC. OFFICE OF TECH. EVALUATION, Steel 232 Investigation Public Hearing Transcript (May 24, 2017), https://www.bis.doc.gov/index.php/documents/section-232-investigations/232-steel-public-comments/1927-steel-232-investigation-public-hearing-transcript/file ("Steel Hr'g Tr."), attached to PrimeSource Am. Compl. at Ex. 5.

On January 11, 2018 and January 17, 2018, the Secretary transmitted these reports to the President detailing the findings and recommendations with regards to steel and aluminum imports respectively. In its reports, Commerce relied on an expansive definition of "national security," which incorporated the "general security and welfare of certain industries, beyond those necessary to satisfy national defense requirements, which are critical to minimum operations of the economy and government." See, e.g., Steel Report at 1, 13-15.

The Steel Report specifically identified the scope of its investigation as covering "steel mill products" falling into five categories: flat products, long products, pipe and tube products, semi-finished products (such as billets, slabs and ingots) and stainless products. Id. at 21-22 (steel nails were not included). Notably, "nails" appears only once in the 262-page report, in a list of civilian articles made from cold finished steel bar. Id., app. F at 134. Part V of the report, the "Findings", refers to antidumping and countervailing duty actions on "unfairly traded steel products." Id. at 28. Appendix K to the Report lists the antidumping and countervailing duty cases on "steel" but does not include any of the numerous antidumping/countervailing duty cases on nails. Id., app. K at 1-4.

Following its analysis, Commerce recommended that the President take immediate action to adjust the level of steel imports through quotas or tariffs. Id. at 58-61. Such recommendations

are required by both the statute and regulation. See 19 U.S.C. § 1862(b)(3)(A); 15 C.F.R. § 705.10(b). Commerce specifically proposed three actions, which would enable the U.S. steel industry to operate at an average capacity utilization rate of 80 percent or better. Id. One of the recommendations was a global tariff of 24 percent on "all imported steel products, in addition to any antidumping or countervailing duty collections applicable to any imported steel product." Steel Report at 59.

On February 18, 2018, roughly one month after Commerce issued its Steel Report, the Secretary of Defense provided views on the impact of steel and aluminum on national security, stating "U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production." Mem. from the Sec'y of Defense to Sec'y of Commerce re: Response to Steel and Aluminum Policy Recommendation at 1 (Feb. 18, 2018), attached to Compl. at Ex. 6. On this basis, the Secretary of Defense concluded that the "DoD does not believe that the findings in the reports {by Commerce} impact the ability of DoD programs to acquire the steel or aluminum necessary to meet national defense requirements." Id.

III. The 2018 Proclamations Implementing the Remedies Recommended by the Secretary of Commerce Did Not Cover Steel Nails

On March 8, 2018, the President issued Proclamations 9704 and 9705, which concurred with the Secretary's findings, referred to the recommended global tariff of 24 percent, and determined to adjust the imports of steel and aluminum by subjecting such articles to 25 percent and 10 percent ad valorem tariffs, respectively, "to address the threat that imports of steel articles pose to the national security . . . so that such imports will not threaten to impair the national security as defined in section 232 of the Trade Expansion Act of 1962." Proclamation No. 9704, Adjusting Imports of Aluminum Into the United States, 83 Fed. Reg. 11,619, 11,621 (Mar. 15, 2018), attached to PrimeSource Am. Compl. at Ex. 7; see also Proclamation No. 9705, Adjusting Imports

of Steel Into the United States, 83 Fed. Reg. 11,625, 11,626 (Mar. 15, 2018) ("Proclamation No. 9705"), attached to PrimeSource Am. Compl. at Ex. 8.

The President later exempted certain countries from the imposition of measures. See Proclamation No. 9740, Adjusting Imports of Steel Into the United States, 83 Fed. Reg. 20,683, 20,685 (May 7, 2018) (exempting South Korea from steel tariffs announced in Proclamation No. 9705), attached to PrimeSource Am. Compl. at Ex. 9; see also Proclamation No. 9894, Adjusting Imports of Steel Into the United States, 84 Fed. Reg. 23,987, 23,988 (May 23, 2019) (exempting Canada and Mexico from steel tariffs announced in Proclamation No. 9705), attached to PrimeSource Am. Compl. at Ex. 10.

The President's Proclamations, by law, took action against all threats identified in the 2017 Section 232 investigations. 19 U.S.C. § 1862(c)(1)(A)(ii). (authorizing the President to "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security."). Neither nails nor any other derivative steel or aluminum article was listed in the annexes of steel articles covered by that action. See Proclamation No. 9705, 83 Fed. Reg. at 11,629.

IV. Proclamation 9980 is an Unlawful Expansion of the Tariffs Imposed Pursuant to the 2017 232 Investigation of Steel Mill Articles

On January 24, 2020, nearly two years after the initial proclamations imposing tariffs on steel and aluminum, without notice, the President issued Proclamation 9980, imposing additional tariffs of 25 and 10 percent respectively on certain steel- and aluminum-derivative products. See Proclamation No. 9980. The President claimed that "domestic steel producers' utilization ha{d} not stabilized for an extended period of time at or above the 80 percent capacity utilization level" as the reason for imposing additional tariffs on imports of certain derivatives of steel and aluminum

articles. Id. Proclamation No. 9980 did not cover imports from countries previously exempted from the 2018 Section 232 measures.

Paragraph 1 of Proclamation No. 9980 states that its legal authority is based on the investigation conducted by Commerce in 2017, leading to the January 11, 2018 Steel Report by the Secretary of Commerce. See id. As noted above, however, that investigation and report did not include nails or any derivative steel product. The Secretary of Commerce did not conduct a new investigation under the statute. Neither the President nor the Secretary of Commerce solicited public comment from interested parties regarding whether derivative steel products impact national security, as was done with respect to steel products during the initial 2017 Section 232 investigation.

Instead, the President's basis for the expansion of the initial 232 tariffs was that the Secretary of Commerce informed him that "certain derivatives of steel articles have significantly increased since the imposition of the tariffs and quotas" and the "net effect of the increase of imports of these derivatives has been to erode the customer base for U.S. producers of aluminum and steel and undermine the purpose of the proclamations adjusting imports of aluminum and steel articles to remove the threatened impairment of the national security." Proclamation No. 9980, 85 Fed. Reg. at 5,282. Further, Proclamation No. 9980 refers to an "assessment" by the Secretary of Commerce that an increase in imports of derivative items is the result of purposeful circumvention of the existing Section 232 tariffs. Not one of the legal or procedural requirements of Section 232 was met by the Secretary of Commerce in investigating new articles not covered by the 2017 Section 232 investigation or by the President in issuing Proclamation No. 9980. To date, the Secretary of Commerce's communication "informing" the President that derivative articles impair the national security, and the "assessments" contained therein, has not been released to the public.

PrimeSource, based on the references to "derivative" articles of steel in Proclamation 9980, began its internal process to decide whether to take action to protect its interests. Affidavit of PrimeSource Official, ¶ 7, attached to PrimeSource Am. Compl. at Ex. 11. As Proclamation 9980 constituted final action, however, PrimeSource was unable to participate at the agency level. Id. at ¶ 11.

On January 29, 2020, the Executive Office of the President published Annexes in the Federal Register listing the products covered by Proclamation 9980. See id. at 5,286, 5,290. The covered products included steel nails, tacks (other than thumb tacks), drawing pins, corrugated nails, staples (other than those of heading 8305) and similar derivative steel articles as well as aluminum stranded wire, cables, plaited bands and vehicular bumper and body stampings.

ARGUMENT

I. PrimeSource's Claims Warrant a Preliminary Injunction

To prevail in an application for a preliminary injunction, a plaintiff must establish the following four factors: (1) the likelihood that the plaintiff will succeed on the merits of its claim; (2) the plaintiff will suffer or be threatened with irreparable harm without the requested injunctive relief; (3) the balance of equities and hardships weigh in plaintiff's favor and (4) granting such relief would be in the public interest. See Winter v. NRDC, Inc., 555 U.S. 7, 20 (2008); Am. Signature, Inc. v. United States, 598 F.3d 816, 823 (Fed. Cir. 2010); Zenith Radio Corp. v. United States, 710 F.2d 806, 809 (Fed. Cir. 1983).

A. PrimeSource Has a High Likelihood of Succeeding on the Merits

A party seeking a preliminary injunction, must establish "that it has at least a fair chance of success on the merits for a preliminary injunction to be appropriate." Silfab Solar, Inc. v. United States, 892 F.3d 1340, 1345 (Fed. Cir. 2018) (internal quotation and citation omitted). "A request

for a preliminary injunction is evaluated in accordance with a 'sliding scale' approach: the more the balance of irreparable harm inclines in the plaintiff's favor, the smaller the likelihood of prevailing on the merits he need show in order to get the injunction." Qingdao Taifa Group Co. v. United States, 581 F.3d 1375, 1378–79 (Fed. Cir. 2009) (citing Kowalski v. Chi. Tribune Co., 854 F.2d 168, 170 (7th Cir. 1988)). "No one factor, taken individually is necessarily dispositive." FMC Corp. v. United States, 3 F.3d 424, 427 (Fed. Cir. 1993). PrimeSource stands to suffer both procedural and economic harm and has a high likelihood of succeeding on the merits of its claims given the clear procedural, statutory and constitutional violations committed by the President and Secretary of Commerce in connection with Proclamation No. 9980. Specifically, PrimeSource is highly likely to succeed on its claims that (1) the Secretary of Commerce violated the substantive and procedural protections of the APA; (2) the President exceeded the authority delegated to him by Section 232 in issuing Proclamation No. 9980; (3) as a result of the procedural deficiencies surrounding Proclamation No. 9980, PrimeSource was deprived of constitutional due process protections; and (4) Proclamation No. 9980 demonstrates that Section 232 is an over-delegation of Congress' enumerated authority over international trade.

i. The Secretary of Commerce Violated the Substantive and Procedural Protections Afforded by the APA

The Secretary of Commerce, acting on behalf of Commerce, is a federal agency within the meaning of the APA. See 5 U.S.C. § 701. The APA provides parties with certain substantive and procedural protections. In terms of substantive protections, the APA set forth that a reviewing court will "hold unlawful and set aside agency action, findings, and conclusions found to be—arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Id. § 706(2)(A). Under this standard, an agency "must examine the relevant data and articulate a satisfactory explanation for its action including a "'rational connection between the facts found

and the choice made.'" Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)). In terms of procedural protections, the APA provides that when an agency engages in rulemaking it shall give public notice in the Federal Register and "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation." 5 U.S.C. § 553(b)-(c). Further, each "agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." Id. § 553(e). By failing to follow it's the procedures delineated in its regulations, pertaining to certain required investigative and consultative steps before issuing its assessments that the President relied on in Proclamation No. 9980, the Secretary of Commerce violated the substantive and procedural protections guaranteed to interested persons such as PrimeSource under the APA.

1. *The Secretary of Commerce's Assessments Made in Connection with Proclamation No. 9980 Were Arbitrary and Capricious Because the Secretary Failed to Follow the Procedures in Regulation*

Congress has the exclusive "power to lay and collect {t}axes, {d}uties, {i}mposts and {e}xcises" and "to regulate Commerce with foreign nations." U.S. Const. art. 1 § 8, cls. 1, 3. Section 232 delineates the circumstances where the President may take action to address imports that threaten to impair the national security of the United States and what actions the President may take in service of that purpose. The statute requires an investigation by the Secretary of Commerce, including notification to the Secretary of Defense, and sets forth the factors the Secretary of Commerce shall consider, culminating in a mandated "report" due to the President within 270 days after the commencement of an investigation. 19 U.S.C. § 1862(a)-(b). The Secretary of Commerce promulgated regulations establishing the procedures governing such an investigation. See 15 C.F.R. pt. 705.

The President based his action in Proclamation No. 9980 on "assessments" provided by the Secretary of Commerce regarding an alleged threat to national security by reason of imports of derivative steel and aluminum products. See Proclamation No. 9980 at para. 9 ("Based on the Secretary's assessments, I have concluded that it is necessary an appropriate in light of our national security interests to adjust the tariffs imposed by previous proclamations to apply to the derivatives of aluminum articles and steel articles described in Annex I and Annex II to this proclamation").

In providing such "assessments", undisclosed as of this time, Commerce violated its regulations because it, inter alia:

- failed to initiate an investigation pursuant to 15 C.F.R. § 705.3(a);
- failed to notify the Secretary of Defense of the initiation of an investigation pursuant to 15 C.F.R. § 705.3(b);
- failed to provide proper notification to parties interested in derivative steel and aluminum products of a public comment period and opportunity to appear at a hearing after the Secretary determined that such information and advice was appropriate with respect to the steel and aluminum articles resulting in the report upon which the President relies in Proclamation 9980 pursuant to 15 C.F.R. § 705.7(a);
- failed to comply with 15 C.F.R. § 705.8(a)(1) in notifying parties interested in derivative steel and aluminum products that the date, time, place and subject matter of hearings held in 2017 on steel and aluminum products was the public notice of hearings on derivative products subject to Proclamation 9980, more than two years later; and
- failed to prepare a report and publish an Executive Summary in the Federal Register pursuant to 15 C.F.R. § 705.10(c).

By bypassing the investigative and consultative steps required in the regulations as set forth above, the Secretary of Commerce failed to provide any sort of reasoned explanation for his determinations relied upon by the President in Proclamation No. 9980. Specifically, the President relied upon the following determinations by the Secretary of Commerce:

- "Although imports of aluminum articles and steel articles have declined since the imposition of the tariffs and quotas, the Secretary has informed me that imports of certain derivatives of aluminum articles and imports of certain derivatives of steel articles have significantly increased since the imposition of the tariffs and quotas;"
- "The derivative articles the Secretary identified are described in Annex I (aluminum) and Annex II (steel) to this proclamation. For purposes of this proclamation, the Secretary determined that an article is "derivative" of an aluminum article or steel article if all of the

following conditions are present: (a) the aluminum article or steel article represents, on average, two-thirds or more of the total cost of materials of the derivative article; (b) import volumes of such derivative article increased year-to-year since June 1, 2018, following the imposition of the tariffs in Proclamation 9704 and Proclamation 9705, as amended by Proclamation 9739 and Proclamation 9740, respectively, in comparison to import volumes of such derivative article during the 2 preceding years; and (c) import volumes of such derivative article following the imposition of the tariffs exceeded the 4 percent average increase in the total volume of goods imported into the United States during the same period since June 1, 2018;"

- "It is the Secretary's assessment that foreign producers of these derivative articles have increased shipments of such articles to the United States to circumvent the duties on aluminum articles and steel articles imposed in Proclamation 9704 and Proclamation 9705, and that imports of these derivative articles threaten to undermine the actions taken to address the risk to the national security of the United States found in Proclamation 9704 and Proclamation 9705;"
- The Secretary has assessed that reducing imports of the derivative articles described in Annex I and Annex II to this proclamation would reduce circumvention and facilitate the adjustment of imports that Proclamation 9704 and Proclamation 9705, as amended, made to increase domestic capacity utilization to address the threatened impairment of the national security of the United States.

Proclamation No. 9980 at paras. 5-8.

The Court's recent opinion granting a motion for injunction in Invenergy Renewable LLC v. United States, No. 19-00192, 2019 Ct. Intl. Trade LEXIS 154 (Ct. Int'l Trade Dec. 5, 2019) ("Invenergy") is particularly instructive. In that case, the Court concluded that withdrawal of an exemption for bifacial solar modules subject to Section 201 tariffs by the U.S. Trade Representative ("USTR") was likely arbitrary and capricious. Id. at *48. The Court reasoned that "the facts on which USTR relied to implement the Withdrawal remain unknown to all but USTR; they are neither publicly available nor available to this court." Id. at *67. Further, "USTR has not explained the facts on which it relied or the reasoning behind its decision" nor did "USTR display awareness that it is changing position and show that there are good reasons for the new policy." Id. (internal quotation and citation omitted). Similarly, here, the Secretary of Commerce provided no explanation for his "assessments." By including derivative products not subject to the initial 232 investigation, the Secretary of Commerce effectively altered his findings in the original steel

report that set forth specific Harmonized Tariff Schedule of the United States ("HTSUS") codes that were threatening national security and subject to the Secretary's recommendations on actions the President should take to adjust the level of steel imports without any of the procedural protections that are required by the regulation and were observed in the 232 investigation. Steel Report at 21-22 (setting forth the HTSUS codes subject to the initial steel investigation). This ex post alteration circumvented a lengthy investigation that was conducted within the bounds of the statute and with the procedural steps required by Commerce's regulations.

In sum, the Secretary of Commerce's "assessments" regarding the alleged national security threat from derivative steel and aluminum articles, referred to throughout Proclamation No. 9980 as the legal basis for that Proclamation, are arbitrary and capricious because the Secretary of Commerce failed to observe the procedural controls in 15 C.F.R. pt. 705 or to provide any details or explanations for his conclusions.

2. The Secretary of Commerce's Assessments Constitute Rulemaking and Required a Public Notice and Comment Period Consistent with the APA

The Secretary of Commerce engaged in rulemaking when making the "assessments" regarding steel and aluminum derivatives. The Secretary of Commerce violated the APA by not providing PrimeSource, and other interested parties, with an APA-consistent notice and comment period.

The APA defines a rule as follows:

> "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

5 U.S.C. § 551(4). Further, rulemaking consists of the "agency process for formulating, amending, or appealing a rule." Id. § 551(5). Rulemaking is distinguishable from adjudication, which is not subject to the APA, based on the following characteristics:

> {t}wo principle characteristics distinguish rulemaking from adjudication. First, adjudications resolve disputes among specific individuals in specific cases . . . . Second, because adjudications involve concrete disputes, they have an immediate effect on specific individuals . . . Rulemaking, in contrast, is prospective, and has a definitive effect on individuals only after the rule subsequently is applied.

Int'l Custom Prods. v. United States, 32 CIT 302, 313, 549 F. Supp. 2d 1384, 1395-96 (2008) (quoting Yesler Terrace Community Council v. Cisneros, 37 F.3d 442, 448 (9th Cir. 1994)).

The "assessments" made by the Secretary of Commerce constitute rulemaking. Proclamation No. 9980 states, "{t}he modifications to subchapter III of chapter 99 of the Harmonized Tariff Schedule of the United States described in Annex I (aluminum) and Annex II (steel) to this proclamation implement the Secretary's determinations in this regard." Proclamation No. 9980 at para. 6. Although the President ultimately ordered that the tariffs be imposed, Proclamation No. 9980 relies on the Secretary of Commerce's determination of what products constitute an aluminum or steel derivative. See id. The Secretary of Commerce's determination on what articles to include in the annexes, therefore, does not have an immediate effect on specific individuals because it is broadly applicable to many derivative products. See Int'l Custom Prods. v. United States, 32 CIT at 313, 549 F. Supp. 2d at 1395. Instead, this determination is a "prospective" determination that will have a "definitive effect on individuals only after the rule subsequently is applied" by the President through Proclamation 9980. Id.

Once again, the Court's analysis in Invenergy is equally applicable to the present action. In Invenergy, the Court held that "an accompanying modification to the HTSUS is indicative of the determination that these actions are rulemakings." Invenergy, No. 19-00192, 2019 Ct. Intl.

Trade LEXIS 154, at *59 (internal citation omitted). The Court explained that "{t}he modification of HTSUS underlies the prospective nature of these decisions and has the force of law." Id. (citing 5 U.S.C. § 551(4)). Here, the Secretary of Commerce's recommendation for what products to include in the annexes led to steel and aluminum products being included under the new HTSUS subheading 9903.85.03. See Proclamation No. 9980 at Annexes I-II. The modification to the HTSUS thus indicates that the "assessments" made by the Secretary of Commerce constitute rulemaking.

When an agency engages in rulemaking, it is required to provide parties with an opportunity to comment. See 5 U.S.C. § 553(b), (c); see also Envtl. Integrity Project v. EPA, 425 F.3d 992, 996 (D.C. Cir. 2005) ("The APA's notice requirements are designed (1) to ensure that agency regulations are tested via exposure to diverse public comment, (2) to ensure fairness to affected parties, and (3) to give affected parties an opportunity to develop evidence in the record to support their objections to the rule and thereby enhance the quality of judicial review" (internal quotation and citation omitted)). As detailed above, the Secretary of Commerce failed to engage in any form of notice or provide any opportunity to comment on his assessments regarding steel and aluminum derivatives. Procedures existed in the statute and regulations to reach a legal "assessment" but those were not followed. By failing to follow these required procedures, the Secretary of Commerce violated the APA.

ii. The President's Proclamation No. 9980 Exceed the Authority Granted by Section 232

An action by the President may be set aside if it involves "a clear misconstruction of the governing statute, a significant procedural violation, or action outside delegated authority." Corus Grp. PLC v. Int'l Trade Comm'n, 352 F.3d 1351, 1356 (Fed. Cir. 2003) (internal citation and quotation omitted). The President may not use the authority delegated to him by a statute in a

manner contrary to the terms of the statute. "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637-38 (1952); see also Am. Inst. for Int'l Steel, Inc. v. United States, __ CIT __, __, 376 F. Supp. 3d 1335, 1352 (2019) (Katzmann J., dubitante) (citing Youngstown, 343 U.S. at 587 and noting that Presidential "power is also not unbounded, even in times of crisis"). Indeed, an action by the President that is inconsistent with an act of Congress, implicates the Constitution's separation of powers, namely "the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty." Mistretta v. United Sates, 488 U.S. 361, 380 (1989); see also Buckley v. Valeo, 424 U.S. 1, 122 (1976) (per curiam) ("The Framers regarded the checks and balances that they had built into the tripartite Federal Government as a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other").

It is unequivocal that "legislation by the national Congress be a step-by-step, deliberate and deliberative process." INS v. Chadha, 462 U.S. 919, 959 (1983). Thus, "there is no provision in the Constitution that authorizes the President to enact, to amend, or to repeal statutes." Clinton v. City of New York, 524 U.S. 417, 438 (1998). The procedures set forth in a statute matter, especially where, as here, they govern the delegation of an enumerated power of the Congress. U.S. Const. art. 1 § 8, cls. 1, 3. Otherwise, by ignoring any procedures set forth in a statute, the President is effectively amending the statute and engaging in a law-making function reserved to Congress. Here, the President clearly misappropriated Section 232 in Proclamation No. 9980 by failing to follow any of the mandated procedures as set forth in the statute.

A Section 232 investigation may only begin upon the request of "the head of any department or agency, upon application of an interested party" or on the Secretary's "own motion." 19 U.S.C. § 1862(b)(1)(A). Following such a request, the statute requires the Secretary immediately to initiate an investigation "to determine the effects on the national security of imports of {an} article." Id. Under the statute, the Secretary has 270 days from the date the investigation was initiated, to submit a report to the President. Id. § 1862(b)(3)(A). Upon receipt of Commerce's report, the President has 90 days – and no more – to both "determine whether the President concurs with the finding of the Secretary" and if the President concurs, "determine the nature and duration of the action that, in the judgment of the President, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security." Id. § 1862(c)(1)(A)(ii) (emphasis added). After reaching a determination, the President has 15 days – and no more – to implement the chosen action. Id. § 1862(c)(1)(B).

In an analogous factual scenario, the President increased Section 232 tariffs on steel imports from Turkey from 25 to 50 percent beyond the 105-day window. Proclamation No. 9772, Adjusting Imports of Steel Into the United States, 83 Fed. Reg. 40,429 (Aug. 10, 2018). In the ensuing litigation, the Court found that the "statute's clear and unambiguous steps—of investigation, consultation, report, consideration, and action—require timely action from the Secretary of Commerce and the President." TransPacific Steel LLC v. United States, No. 19-00009, 2019 Ct. Intl. Trade 142, at *9 (Ct Int'l Trade Nov. 15, 2019). In TransPacific, the Court detailed the following timeline:

> The Secretary of Commerce submitted his report to the President on January 11, 2018, which launched a 90-day period for the President to act. The President acted on March 8, 2018 by imposing a 25 percent tariff on steel articles through Proclamation 9705. See 19 U.S.C. § 1862(c)(1)(B). However, the President issued Proclamation 9772 on August 13, 2018, far beyond the 90 days permitted to decide

> to act and the further 15 days allowed for implementation, to impose a 50 percent tariff on steel articles from Turkey.

Id. (internal citation omitted). The Court denied Defendant's motion to dismiss, accepting Plaintiff's argument that "after the time periods set by Congress" have passed, the "the Present lack{s} power to take new action . . . without the procedures as required by Congress." Id. at *15; see also id. at *18 (Katzmann, J. concurring) (finding that "the statute's investigative and consultative steps, within prescribed time limits, are not advisory and . . . cannot be ignored without consequence").

In its analysis in TransPacific, the Court explained that Section 232 instructs the President to take action "so that such imports will not threaten to impair national security." Id. at *11 (citing 19 U.S.C. § 1862(c)(1)(A), (c)(3)(A)). First, the Court explained that by specifying that the President must act to remove the threat to national security, Congress made clear its intent that, if the President concurs with the Secretary's finding, he "shall" act to eliminate the threat. See id. In other words, the President cannot delay acting for an indefinite time after a threat to national security has been identified. If enough time has passed between the President's actions and his receipt of the report from the Secretary of Commerce, there may no longer be a nexus between the President's actions and the threat to national security. Finally, Congress specifically recognized the possibility of the need for ongoing action and provided set procedures for the President to follow. See id. at *15, n.15 (citing 19 U.S.C § 1862(c)(3)). Those procedures were not followed here, as explained below.

Second, Section 232 provides that one action the President may take is to enter negotiations to reach an agreement that limits imports of the article that threatens to impair national security. 19 U.S.C. § 1862(c)(3). If no agreement is reached 180 days after the President "makes the determination under paragraph (1)(A) to take such action" or an agreement is in place but is

ineffective, the President "shall take such other actions as the President deems necessary to adjust imports of such article." Id. The statute, therefore, provides an avenue for additional action by the President, but here the President made no reference in Proclamation No. 9980 to ongoing negotiations that would justify additional action beyond the time limits set forth in the statute. If the President could act beyond the time constraints set forth in 19 U.S.C § 1862(c)(1)(A) then there would be no purpose for including the earlier limiting language. See Carcieri v. Salazar, 555 U.S. 379, 391 (2009), 511 U.S. 244, 259 (1994) (explaining that "a court is obliged to give effect, if possible, to every word Congress used").

Based on these methods of statutory interpretation, the Court reasoned that "{t}he time limits, in particular, compel the President to do all that he can do immediately, and tie presidential action to the investigative and consultative safeguards. If the President could act beyond the prescribed time limits, the investigative and consultative provisions would become mere formalities detached from Presidential action." TransPacific, 2019 Ct. Int'l Trade LEXIS 142, at *13; see also Independent Gasoline Marketers Council, Inc. v. Duncan, 492 F. Supp. 614, 619-20 (D.D.C 1980) (striking down the implementation of a conservation fee under Section 232 by President Carter as contrary to the statute, reasoning the "clear expressions of statutory purposes cannot be ignored, laudable purposes notwithstanding. Existing statutes cannot be used for purposes never contemplated by Congress and in ways contrary to congressional intent").

In addition to the plain language of the statute clearly setting forth mandatory time-constraints for the President to act, the legislative history of Section 232 supports this plain language interpretation. TransPacific, No. 19-00009, 2019 Ct. Intl. Trade 142, at *11-12 (finding that "{t}he legislative history {of Section 232} clarifies that Congress wanted the President to do all that he thought necessary as soon as possible"). Section 232 was amended in 1988 to include

the specific time constraints set forth above. See id. at *11 (citing Omnibus Trade and Competitiveness Act of 1998, Pub. L. No. 100-418, Title I, §§ 1501(a), (b)(1), 102 Stat. 1107, 1257-60 (1988) (codified as amended at 19 U.S.C. §1862)). Specifically, in TransPacific the Court set forth the following references in the legislative history of the amendments to Section 232 in 1998 to illustrate the importance that Congress placed on the President taking action "as soon as possible:"

> See Trade Reform Legislation: Hearings Before the Subcomm. on Trade of the H. Comm. on Ways & Means, 99th Cong., 2d Sess. 1282 (1986) (statement of Hon. Barbara B. Kennelly, former Member, H. Comm. On Ways & Means) (discussing the need to set a deadline by which the President should act); Comprehensive Trade Legislation: Hearings Before the Subcomm. on Trade of the H. Comm. on Ways & Means, 100th Cong., 1st Sess. 466–67 (1987) (statement of Phillip A. O'Reilly, Chairman and CEO of Houdaille Industries, Inc., accompanied by James H. Mack, Public Affairs Director) (discussing delays in section 232 implementation); H.R. REP. NO. 99-581, pt. 1, at 135 (1986) ("The Committee believes that if the national security is being affected or threatened, this should be determined and acted upon as quickly as possible."); H.R. REP. NO. 100-40, pt. 1, at 175 (1987) ("The Committee believes that if the national security is being affected or threatened, this should be determined and acted upon as quickly as possible.").

Id. at *12. The legislative history of the amendments to Section 232, therefore, confirm that Congress intended for the President to act as soon as possible subject to specific time limitations that must be tied to the original "investigative and consultative safeguards." Id. at *13.

The President issued Proclamation No. 9980 on January 24, 2020, a full 637 days beyond the 90-day period to act, and fifteen-day period to implement, any actions. Proclamation No. 9980 places tariffs on aluminum and steel derivative products that enter the United States on or after February 8, 2020. Proclamation No. 9980 at 84 Fed. Reg. 5,284. This belated action is inconsistent with Section 232's mandate that the President act within 90 days of the Commerce report, and implement any action within 15 days – and no later. See 19 U.S.C. § 1862(c)(1)(A)-(B). Otherwise, "{i}f the President has the power to continue to act, to modify his actions, beyond these

deadlines, then these deadlines are meaningless." TransPacific, No. 19-00009, 2019 Ct. Intl. Trade 142, at *11, n. 13. Proclamation No. 9980, therefore, is unequivocally incompatible with the will of Congress as expressed by the plain language of Section 232 and confirmed in its legislative history.

Further, Proclamation No. 9980 references the Secretary of Commerce's Steel Report and Proclamations 9704 and 9705 where the President "directed the Secretary to monitor imports of aluminum articles and steel articles . . . and inform {the President} of any circumstances that in the Secretary's opinion might indicate the need for further action under Section 232." Proclamation No. 9980 at paras. 1 and 4. The Court clarified in TransPacific that the President cannot rely on either the initial report as a foundation for additional action or language in earlier proclamations stating that the President would continue to monitor the situation. See TransPacific, No. 19-00009, 2019 Ct. Intl. Trade 142, at *10-11 (finding that "{t}he President's expansive view of his power" referencing language instructing the Secretary to monitor imports of steel to inform him "of any circumstances that . . . might indicate the need for further action" is "at odds with the language of the statute, its legislative history, and its purpose"). Proclamation 9980, like the increase on steel tariffs on steel products from Turkey, cannot be tied back to earlier actions by the President as its legal justification for violating the procedures set forth in Section 232. The instant case goes one step further than TransPacific in that here, the untimely additional duties are being extended to types of products that were not previously investigated.

For the reasons set forth, the President's authority under Section 232 is subject to temporal constraints that the President failed to follow in issuing Proclamation No. 9980 making the actions contained therein inconsistent with the President's delegated authority.

iii. Proclamation No. 9980 Was Issued in a Manner that Abrogated PrimeSource's Right to Due Process Under the Fifth Amendment of the Constitution

The Fifth Amendment "imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests." Mathews v. Eldridge, 424 U.S. 319, 332 (1976); see also Young v. Dep't of Housing and Urban Dev., 706 F.3d 1372, 1376 (Fed Circ. 2013). At issue in the present action is the "fundamental requirement of due process" which requires "the opportunity to be heard at a meaningful time and in a meaningful manner." Mathews, 424 U.S. at 333 (internal quotation and citation omitted); see also Young, 706 F.3d at 1376 (explaining "that certain substantive rights . . . cannot be deprived unless constitutionally adequate procedures are followed"). Due process claims necessitate a two-step analysis: (1) whether there was a deprivation of a protected interest, and (2) what process is due before this property interest can be taken. See Logan v. Zimmerman Brush Co., 455 U.S. 422, 428 (1982). Here, PrimeSource has a protected interest in its imports of steel derivatives and this interest was economically harmed without due process when the President announced the future implementation of tariffs on these items without providing PrimeSource with notice and adequate time to comment on these measures.

1. PrimeSource Has an Inherent Right in Its Imports of Merchandise Subject to Proclamation No. 9980

To have a property interest, an individual must have a "legitimate claim of entitlement" to that right. See Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972). PrimeSource has a legitimate claim of entitlement to import steel derivatives without imposition of Section 232 tariffs under the statutory language itself and more generally has a right to a fair and honest process.

Property rights "are created and their dimensions defined by . . . rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." Id. (emphasis

added). In other words, a statute can confer a property right. Section 232 states that before the President can take action, the Secretary of Commerce must "initiate an appropriate investigation to determine the effects on the national security of imports of the article" and "shall submit to the President a report on the findings of such investigation." 19 U.S.C. § 1862(b)(3)(A). As part of this investigation, the Secretary of Commerce "shall . . . if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." Id. at § 1862(b)(2)(A)(iii) (emphasis added). The plain language of the statute mandates that the Secretary "shall" hold such a hearing if deemed appropriate. Commerce's regulations mirror the statutory requirements.

Here, prior to the issuance of the Steel Report upon which the President based the initial Section 232 actions, the Secretary of Commerce determined that such hearings were appropriate by soliciting public comment and holding a public hearing. Request for Public Comment, 82 Fed. Reg. at 19,205. Section 232, by its very terms, acknowledges an inherent property right of importers, by implicating importers' due process rights to public comment before the Secretary of Commerce issues a report of his findings.

Such a right may not arise where the statute does not contemplate public comment. For example, in Gilda Industries v. United States, 446 F.3d 1271 (Fed. Circ. 2006), involving retaliation by the USTR under Section 301[2] against the European Community after it prohibited imports of hormone-treated meat, the Federal Circuit determined that "the retention of Gilda's imports on the retaliation list did not deprive Gilda of a property interest." Id. at 1284. Section 301, and the holding in Gilda Industries, are distinguishable from the instant case because Section

[2] 19 U.S.C. § 2413 provides that "{t}he Trade Representative shall seek information and advice from the petitioner (if any) and the appropriate committees established pursuant to section 2155 of this title in preparing United States presentations for consultations and dispute settlement proceedings."

232 includes affirmative language discussing public comment. 19 U.S.C. § 1862(b)(2)(A)(iii). In Gilda, the Federal Circuit specifically noted that the "{t}he statute does not require the Trade Representative to provide notice or an opportunity for comment to all interested parties at that point." Gilda Indus., 446 F.3d at 1283. In contrast, Section 232 calls for the Secretary of Commerce to provide notice to the public, hold a public hearing and solicit comments. 19 U.S.C. § 1862(b)(2)(A)(iii). Though this provision is elective, Commerce determined that such a procedure was appropriate. Request for Public Comment, 82 Fed. Reg. at 19,205. As such, PrimeSource had a reasonable expectation that future impositions of duties to new products pursuant to Section 232 would afford the public an opportunity to participate.

More generally, the Federal Circuit has recognized the existence of a property interest for Fifth Amendment due process purposes for importers facing a deprivation of their property by the federal government. See NEC Corp. v. United States, 151 F.3d 1361, 1370-71 (Fed. Cir. 1998) (explaining in the context of a deprivation of an importer's property that "there inheres in a statutory scheme such as this an expectation that those charged with its administration will act fairly and honestly"). PrimeSource, therefore, has a property interest in its imports of steel derivative products that is protected by the due process clause of the Constitution.

Regardless of whether there is a constitutionally protected liberty or property interest "of an importer who accepts the Government's invitation to engage in Commerce within the United States," the Federal Circuit has concluded that "there can be no doubt that arbitrary administration of law is subject to judicial intervention" and that parties are "due a fair and honest process." Id. at 1371 (concluding that it "need not decide . . . {whether there} resides in a constitutionally-protected liberty or property interest of an importer who accepts the Government's invitation to engage in commerce within the United States" as it is "enough for us to here conclude that

{respondent} is due a fair and honest process"); see also Schaeffler Grp. USA, Inc. v. United States, 786 F.3d 1354, 1361 (Fed. Cir. 2015) (recognizing "the outcome of the due process analysis {does not} depend{} upon a determination that a vested right exists, and that, although the vested right analysis . . . may be relevant to the due process analysis, it is not a threshold test." (internal quotations and citations omitted)). As the Supreme Court set forth:

> due process, unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Due process is flexible and calls for such procedural protections as the particular situation demands.

Mathews, 424 U.S. at 334 (citing Morrisey v. Brewer, 408 U.S. 471, 481 (1972)). Here, the procedures underlying the issuance of Proclamation No. 9980 were deficient and abrogated PrimeSource's due process rights. Specifically, Commerce declined to give importers of the merchandise covered by Proclamation No. 9980 the same opportunity to comment as those subject to the initial 232 investigation or the benefit of the statutorily required report. These procedural defects, as set forth above, call for the type of flexibility envisioned by the Supreme Court and Federal Circuit when finding a property right that is protected under the due process clause.

2. Proclamation No. 9980 Violates the Due Process Protections Afforded to PrimeSource Under the Fifth Amendment

Determining whether the administrative procedures implemented by an agency are constitutionally sufficient "requires analysis of the governmental and private interests that are affected." Id. at 334 (internal citation omitted). While the Government has an administrative interest, here the balancing of these interests clearly favors PrimeSource as the United States had provided no meaningful opportunity for PrimeSource to comment on the inclusion of aluminum and steel derivatives in the list of articles subject to 232 tariffs. See Logan, 455 U.S. at 428 (concluding that "can be no doubt that at a minimum they require that deprivation of life, liberty

or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case").

Again, Section 232 mandates that the Secretary of Commerce shall "if it is appropriate and after reasonable notice, hold public hearings or otherwise afford interested parties an opportunity to present information and advice relevant to such investigation." 19 U.S.C. § 1862(b)(2)(iii). Here, although the Secretary of Commerce did initially hold a hearing a solicit comments on imports of steel, as explained below, there was no indication that the steel derivative articles imported by PrimeSource fell within the scope of the investigation. See Request for Public Comment, 82 Fed. Reg. at 19,205.

The request for comment stated: "{t}he Secretary of Commerce initiated an investigation to determine the effects on the national security of imports of steel . . . Interested parties are invited to submit written comments, data, analyses, or other information pertinent to the investigation to the Department of Commerce's Bureau of Industry and Security." Id. The notice did not mention nails specifically, or any derivative articles generally. Id. at 19,206. None of the public comments advocated for duties to be applied to steel nails or that steel nails be exempted. See Steel Report at app. G (directing 232 Investigation Public Comments Library). The word "nails" does not appear anywhere in the transcript of the public hearing held on May 24, 2017. See Steel Hr'g Tr., attached to PrimeSource Am. Compl. at Ex. 5. No representatives from the domestic producers involved in the many nails antidumping and countervailing duty cases attended the hearing or filed comments, in contrast to numerous representatives of domestic steel producers who attended and testified of their history filing unfair trade cases on steel products. See, generally U.S. DEPARTMENT OF COMMERCE, Section 232 Investigation on the Effect of Imports of Steel on U.S.

National Security, https://www.commerce.gov/section-232-investigation-effect-imports-steel-us-national-security (last visited Feb. 4, 2020).

Instead, the public comments show that "steel" was widely understood to be the flat, long, pipe and tube products that were ultimately identified in the public release of the Section 232 Report and were later subjected to duties as part of the President's actions pursuant to that report. See Proclamation 9705, 83 Fed. Reg. at 11,625 (identifying certain HTSUS codes designated as "steel articles"). This public understanding was confirmed by the Steel Report itself, which specifically identified the scope of its investigation as covering "steel mill products" falling into five categories: flat products, long products, pipe and tube products, semi-finished products (such as billets, slabs and ingots) and stainless products. Steel Report at 21-22. That steel nails and other derivative products were not considered in the 2017 Section 232 investigation leading to the Steel Report is no surprise. "Frequently Asked Question" Number 1 on Commerce's website for its 2017/2018 Section 232 Steel investigation states:

> **What is the purpose of a Section 232 Investigation?**
> Section 232 investigations are initiated to determine the effects of imports of any articles on national security. In this case, the Commerce Department is determining the effect of steel imports on the national security. Generally, steel products fall into one of the following five categories (including but not limited to): Flat products, long products, pipe and tube products, semi-finished products, and stainless products.

Id. (last visited Feb. 3, 2020) (emphasis added). Steel nails and other "derivative" products do not fall into any of those categories, a fact confirmed by the President and Secretary of Commerce's challenged action to add Section 232 duties now because those products definitively were not included in the original investigation.

There was nothing in the notice that would alert PrimeSource, or any importer of "derivative steel articles" that are the subject of this latest action, that their interests and rights were implicated by the initial Section 232 steel investigation. PrimeSource has regularly

commented on trade issues, including submitting comments that successfully prevented nails from being initially included in retaliation actions related to the Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute. See Affidavit of PrimeSource Official, ¶ 7, attached to PrimeSource Am. Compl. at Ex. 11; see also PrimeSource Am. Comp. at Exs. 12-20 (providing examples of PrimeSource's active engagement with federal government entities in response to proper public notification requesting comment). Based on the reasonable conclusion that original 232 steel investigation did not cover PrimeSource's products, as explained above, PrimeSource did not file any comments or request to appear at that hearing in 2017. See id. at ¶ 8. By contrast, as Proclamation 9980 clearly applied "derivative" articles of steel, PrimeSource immediately "confer{ed} with its sourcing department and top management to decide whether {it} needed to take action to protect its interests." Id. at ¶ 9-10. The absence of an opportunity for public comment in relation to steel derivatives in connection with Proclamation No. 9980, thus, has deprived PrimeSource of an important procedural protection under the due process clause of the Constitution. See Techsnabexport, Ltd. v. United States, 16 CIT 420, 427, 795 F. Supp. 428, 436 (1992) ("the essential elements of due process are notice and the opportunity to be heard.").

iv. Proclamation No. 9980 is Unlawful Because Section 232 is an Unconstitutional Over-delegation of the Congress' Enumerated Powers

The Constitution specifies 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. Although Congress must have some flexibility to delegate some of its authority to function, there are nonetheless firm limits on this flexibility to maintain the boundaries of our constitutional system. See Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935) (explaining that Congress "is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested").

In analyzing constitutional nondelegation claims, courts look to the statute to see if Congress "has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others." A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 530 (1935). The Constitution only allows for delegations where Congress has set forth "an intelligible principle to which the person or body authorized to {act} is directed to conform." J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (emphasis added). Whether a statute sets forth an intelligible principle depends on the facts of the case, but generally Congress must set forth some set of guidelines to be followed by the executive. See Panama, 293 U.S. at 416 (finding fault with Section 9(c) of the National Industrial Recovery Act because "it establish{ed} no criterion to govern the President's course"); Schechter, 295 U.S. at 537-38 (explaining that Congress cannot give the President "unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry"). The intelligible principle standard ensures that the public and, more relevant to the case at bar, the judiciary can "ascertain whether the will of Congress has been obeyed." Yakus v. United States, 321 U.S. 414, 425-26 (1944).

Section 232 represents an unconstitutional delegation of authority because Congress failed to set forth an intelligible principle by not establishing sufficient guidelines for the President to follow or prescribing a coherent policy objective that could alleviate the lack of guidance within the statute. See Am. Inst. for Int'l Steel, __ CIT at __, 376 F. Supp. 3d at 1352 (Katzmann, J., dubitante) ("If the delegation permitted by section 232, as now revealed, does not constitute

excessive delegation in violation of the Constitution, what would?").[3] Section 232 does not require the President to act in any way once he concurs in the finding of his own Secretary of Commerce that steel "is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security . . ." 19 U.S.C. § 1862 (c)(1)(A). Instead it grants him the near unbridled authority to determine the nature and duration of the remedy. See id. (granting the President the authority to "determine the nature and duration of the action that, in {his} judgment . . . must be taken to adjust imports of {that} article and its derivatives so that such imports will not threaten to impair the national security"); see also Am. Inst. for Int'l Steel, __ CIT at __, 376 F. Supp. 3d at 1344 ("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 for Congress, leaving very few tools beyond his reach.").

Nor does Section 232 prescribe a policy goal that could limit the President's authority. See Panama, 293 U.S. at 416 (explaining that the court "examine{s} the context to ascertain if it furnishes a declaration of policy or a standard of action, which can be deemed to relate to the subject of {the statute} and thus to imply what is not there expressed"). Although Section 232(d) dictates that President should adjust imports "in light of the requirements of national security," it then expands that definition beyond any traditional notions of self-defense to cover any element of the economy touched by the "displacement of any domestic products by excessive imports." 19 U.S.C. § 1862(d).

[3] PrimeSource acknowledges that this same issue was on appeal in Am. Inst. for Int'l Steel, Inc. v. United States, where the Court found itself bound by Fed. Energy Admin. v. Algonquin SNG, Inc., 426 U.S. 548, 553 (1976). See Am. Inst. for Int'l Steel, __ CIT at __, 376 F. Supp. 3d at 1345. This opinion, however, is currently on appeal before the Federal Circuit. See Am. Inst. for Int'l Steel v. United States, Ct. No. 19-1727. The Federal Circuit held oral argument on January 10, 2020.

For the reasons set forth above, Section 232 is an unconstitutional over-delegation of legislative authority to the President. As Section 232 is unconstitutional in its entirety, any action by the President using this statute as its legal framework, including Proclamation 9980, is similarly unconstitutional.

B. In the Absence of a TRO or Preliminary Injunction PrimeSource Will Suffer Irreparable Harm

To show irreparable harm a party must prove that "'it faces an 'immediate and viable' threat of irreparable harm." Otter Prods., LLC v. United States, __ CIT __, __, 37 F. Supp. 3d 1306, 1315 (2014) (citing Kwo Lee, Inc. v. United States, __ CIT __, __, 24 F. Supp. 3d 1322, 1326 (2014)). Further, "'plaintiff{s} must prove that unless the injunction is awarded, some harm will result to {them} that cannot be reasonably redressed in a court of law.'" Nat'l Fisheries Inst. Inv. v. U.S. Bureau of Customs and Border Protection, 30 CIT 1838, 1848, 465 F. Supp. 2d 1300, 1310 (2006). In other words, harm cannot be reasonably redressed in a court of law when "no damages payment, however great, can address it." Otter Prods., __ CIT at __, 37 F. Supp. 3d at 1315 (internal quotation and citation omitted); Celsis In Vitro, Inc. v. CellzDirect, Inc., 664 F.3d 922, 930 (Fed. Cir. 2012).

In Invenergy, the Court concluded in granting Plaintiff's preliminary injunction that "a procedural injury can itself constitute irreparable injury." Invenergy, No. 19-00192, 2019 Ct. Intl. Trade LEXIS 154, at *72. As the Court explained:

> A procedural violation can give rise to irreparable harm justifying injunctive relief because lack of process cannot be remedied with monetary damages or post-hoc relief by a court. Permitting "the submission of views after the effective date of a regulation is no substitute for the right of interested persons to make their views known to the agency in time to influence the rule making process in a meaningful way." Am. Fed'n of Gov't Emp v. Block, 655 F.2d 1153, 1158 (D.C. Cir. 1981) (internal citation omitted); see also New Jersey Dept. of Envtl. Protection, 626 F.2d at 1049 ("Section 553 is designed to ensure that affected parties have an opportunity to participate in and influence agency decision making at an early stage, when the

> agency is more likely to give real consideration to alternative ideas."). Once the regulatory change "has begun operation as scheduled . . . {the Agency} is far less likely to be receptive to comments." N. Mariana Islands v. United States, 686 F. Supp. 2d 7, 18 (D.D.C. 2009).

Id.; see also Wash. Toxics Coal. v. EPA, 413 F.3d 1024, 1034 (9th Cir. 2005) (setting forth that the "the remedy for a substantial procedural violation of {a statute} . . . must therefore be an injunction of the project pending compliance with {the statute}"); Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv., 230 F. Supp. 3d 1106, 1134 (N.D. Cal., 2017) (detailing that "if the agencies' failure to reinitiate formal consultation is a 'substantive procedural violation' then injunctive relief, while consultation is ongoing, is the appropriate remedy").

As the Court succinctly summarized in Invenergy, damages cannot remedy either an APA or constitutional procedural harm because "if the {action} is not enjoined prior to its effective date, {Plaintiff} will never have an equivalent opportunity to influence {the} decision as to its imposition." Invenergy, No. 19-00192, 2019 Ct. Intl. Trade LEXIS 154, at *73-74 (internal citation and quotation omitted). As detailed above, PrimeSource did not comment on the initial 232 steel investigation because the scope of the investigation did not cover PrimeSource's products. Proclamation 9980 constituted final action, effectively denying PrimeSource any opportunity to comment or participate in a public hearing on the original investigation. See Affidavit of PrimeSource Official, ¶ 11, attached to PrimeSource Am. Compl. at Ex. 11. Even if the Court were to order the Secretary of Commerce to provide a notice and comment period without granting any injunctive relief, the duties will go into effect and it is likely that the Secretary of Commerce would be less willing to fully consider PrimeSource's arguments. Invenergy, No. 19-00192, 2019 Ct. Intl. Trade LEXIS 154, at *51. The damage done to PrimeSource, thus, cannot be remedied by mere recovery of duties wrongfully demanded by the United States. PrimeSource suffers from ongoing harm every day after duties are implemented because the ability to comment

may have prevented these tariffs from being initiated by the President under Proclamation 9980 in the first place.

This argument is supported by the record related to the initial comment period, and associated hearing, where parties were successful in preventing certain steel products from being listed in Proclamation 9705. For example, the United States Tire Manufacturers Association submitted comments and appeared at the hearing requesting, in part, that certain steel tire cord under HTS code 7312.10 not be included in any ultimate list of affected products and these products were indeed ultimately spared from duties. See PrimeSource Am. Compl. at Ex. 4 (including prepared oral testimony from Tracy J. Norberg, Senior Vice President & General Counsel for the U.S. Tire Manufacturers Association in Attachment F). These facts demonstrate that the comment period was a meaningful opportunity to shape the scope of the action taken by the President and the lack of notice implicates PrimeSource's due process rights. By failing to initiate a separate investigation, provide notice or an opportunity to comment, the Secretary of Commerce and the President prevented PrimeSource from having a similar opportunity prior to issuing Proclamation 9980.

Further, PrimeSource will also suffer from substantive forms of irreparable harm. As detailed in the confidential affidavit included in the index to the complaint, according to PrimeSource, "{t}he duties set forth in Proclamation 9980 will add a cost burden on PrimeSource of over [ ] million." Affidavit of PrimeSource Official, ¶ 8, attached to PrimeSource Am. Compl. at Ex. 2. This Court has recognized that when a contested action results in a "competitive disadvantage" to a third party is a factor that weighs in favor of finding irreparable harm. GPX Int'l Tire Corp. v. United States, 32 CIT 1183, 1196, 587 F. Supp. 2d 1278, 1292 (2008) (finding that there would be "hardships" to a party "due to the competitive disadvantage they would suffer

if they did not receive the full remedies the agency granted them"). In deciding whether to issue a preliminary injunction, courts have broadly defined what constitutes a competitive disadvantage, including changes to business activities and damages to customer relationships. See, e.g., Nat'l Fisheries, 30 CIT at 1857, 465 F. Supp. 2d at 1314 (finding that "harm that will occur absent a status quo preliminary injunction includes severe disruption of the plaintiffs' business activities, damage to the plaintiffs' long-standing relationships with their customers and suppliers, lost sales, diminished profits, and foregoing of business opportunities"). The unanticipated significant duty cost will force PrimeSource to make an "unexpected revision of our business plans with respect to our sourcing of products covered by Proclamation 9980." Affidavit of PrimeSource Official, ¶ 9, attached to PrimeSource Am. Compl. at Ex. 2. PrimeSource will not be able to [ ]. Id. PrimeSource expects [ ]. Id. at ¶ 10. These facts represent the types of irreparable harm from which PrimeSource cannot recover with the award of refunds if it succeeds on the merits.

These substantive examples of the irreparable harm suffered by PrimeSource only strengthen the argument that it has suffered irreparable harm because of the procedural violations committed by the Secretary of Commerce and the President. The Supreme Court has established that "{w}here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and opportunity to be heard are essential." Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971). When combined, these procedural and substantive harms meet the threshold to demonstrate that PrimeSource will suffer immediate and irreparable harm, harm that will be ongoing for every day that the contested duties may be in effect.

C. The Balance of Hardships Favors Granting a TRO and Preliminary Injunction

The implementation of Proclamation No. 9980 will result in a requirement by CBP from PrimeSource of additional cash deposits. This requirement will in turn cause other economic harms to PrimeSource in the form of alteration to its business model and diminished order. Where, as here, such an imposition has occurred without legally required procedural due process protections, the balance of hardships favors PrimeSource. See Severstal Exp. GMBH v. United States, No. 18-00057, 2018 Ct. Intl. Trade LEXIS 38, at *29 (Ct. Int'l Trade Apr. 5, 2018) (noting that in situations where Plaintiffs "will suffer at least some degree of irreparable harm" if the Court denies a request for preliminary injunction, the "balance of hardships likely favors plaintiffs").

The request relief in this action is narrowly tailored to solely enjoin the collection of cash deposits covering additional duties and the return of any duties paid prior to the issuance of a TRO or preliminary injunction related to PrimeSource's entries of merchandise covered by Proclamation No. 9980. A TRO, and ultimately a preliminary injunction, therefore, would merely postpone the final settlement of any payment of duties to the United States by PrimeSource. Postponement is "at most" an "inconvenience" to the United States. See SKF USA Inc. v. United States, 28 CIT 170, 175, 316 F. Supp. 2d 1322, 1328 (2004); see also Timken Co. v. United States, 6 CIT 76, 81, 569 F. Supp. 65, 71 (1983).

The postponement of the final settlement of any duties that PrimeSource may ultimately owe is "at most" an inconvenience, the Government nonetheless still has a valid interest in ensuring that it can ultimately collect duty payments from PrimeSource if it were to succeed on the merits. 19 U.S.C § 1623 provides the method through which the Government's interests can be protected in this action, namely through the provision of a bond by PrimeSource. The statute states:

> In any case in which bond or other security is not specifically required by law, the Secretary of the Treasury may by regulation or specific instruction require, or

> authorize customs officers to require, such bonds or other security as he, or they, may deem necessary for the protection of the revenue or to assure compliance with any provision of law, regulation, or instruction which the Secretary of the Treasury or the Customs Service may be authorized to enforce.

19 U.S.C. § 1623(a). Regarding the deposit of estimated duties and fees relevant to the present action, 19 U.S.C. § 1505 dictates that "the importer of record shall deposit with the Customs Service at the time of entry, or at such later time as the Secretary may prescribe by regulation . . . the amount of duties and fees estimated to be payable on such merchandise." Id. at § 1505(a); see also 19 C.F.R. § 113.62 (requiring the "{d}eposit, within the time prescribed by law or regulation, any duties, taxes, and charges imposed, or estimated to be due, at the time of release or withdrawal" of merchandise "imported and released from {Customs and Border Protection ("CBP")} custody or withdrawn from a CBP warehouse").

PrimeSource already has a continuous importation bond. To sufficiently protect the government's interests, under the terms of the proposed injunctive relief, PrimeSource will significantly increase the face value of the continuous bond in order to provide enhanced security to Defendant in the event PrimeSource does not prevail in its lawsuit. We note that there is no basis to expect any default by PrimeSource considering its track record of timely payment of its obligations to U.S. Customs and Border Protection. The increased continuous bond nevertheless provides additional security and also satisfies the requirement of Rule 65(c) of the Court of International Trade.

By increasing PrimeSource's bond and agreeing to the suspension of its entries of steel and derivative products, the rights of the United States are sufficiently preserved because it will simply collect, with interest, if succeeds on the merits, any amount owed by PrimeSource. See SKF, 28 CIT at 175, 316 F. Supp. 2d at 1328; see also Sunpreme Inc. v. United States, __ CIT __, __,145 F. Supp. 3d 1271, 1297 (2016) (concluding that the "the balance of equities favors Plaintiff because

any possible harm to the Government and the domestic industry can be mitigated through requiring Plaintiff to post a bond as security"). The Court has held that the permanent deprivation of rights of one party outweighs inconvenience to the government in the delay of collecting duties. SKF, 28 CIT at 175, 316 F. Supp.2d at 1328-29. The requested relief is, therefore, appropriate. The irreparable harm posed by the collection of cash deposits in connection with PrimeSource's entries of merchandise covered by Proclamation No. 9980 far outweighs any inconvenience Defendants would suffer as a result of the postponement of the collection of these deposits. PrimeSource's bond increase will ensure the Government can collect any duties to which it is lawfully entitled.

D. The Public Interest is Served by Maintaining the Status Quo Ante as This Litigation Moves to the Merits

Public interest favors that "governmental bodies comply with the law and interpret and apply trade statutes uniformly and fairly." Am. Signature, Inc., 598 F.3d at 830; see also Ceramica Regiomontana, S.A. v. United States, 7 CIT 390, 397, 590 F. Supp. 1260, 1265 (1984) ("As for the public interest, there can be no doubt that it is best served by ensuring that the ITA complies with the law, and interprets and applies our international trade statutes uniformly and fairly"). Admittedly, the public interest includes legitimate national security concerns. See Severstal, No. 18-00057, 2018 Ct. Intl. Trade LEXIS 38, at *30 (concluding that "both the rule of law and our nation's security are foundational to the public good"). But here, any alleged national security concerns are called into question by the Secretary of Defense's memorandum to the Secretary of Commerce detailing that "{the Department of Defense} remains concerned about the negative impact on our key allies regarded the recommended options within the reports" and "the U.S. military requirements for steel and aluminum each only represent about three percent of U.S. production." Mem. from Sec'y of Def. to Sec'y of Commerce, re: Response to Steel and Aluminum Policy Recommendations (Feb. 18, 2018), attached to PrimeSource Am. Compl. at Ex. 6. Further,

the Court has emphasized the importance of "process and fidelity to the law" in cases, such as the present action where there are significant process concerns. Invenergy, No. 19-00192, 2019 Ct. Intl. Trade LEXIS 154, at *82. Here, the public interest is best served by a TRO and preliminary injunction so that the status quo can be maintained pending the resolution of PrimeSource's claims.

CONCLUSION

For the foregoing reasons, PrimeSource respectfully requests that this Court grant its motion for temporary restraining order and preliminary injunction. In the alternative, PrimeSource respectfully requests that this Court grant the motion for temporary restraining order pending further proceedings and the Court's consideration of PrimeSource's request for a preliminary injunction protecting the parties' interests during the remainder of this appeal.

Dated: February 12, 2020

/s/ Jeffrey S. Grimson
Jeffrey S. Grimson
Kristin H. Mowry
Jill A. Cramer
Sarah M. Wyss
James C. Beaty
Bryan P. Cenko
Mowry & Grimson, PLLC
5335 Wisconsin Avenue, NW, Suite 810
Washington, D.C. 20015
202-688-3610
Counsel to PrimeSource Building Products, Inc