Treatment of Section 232 Duties in Commerce Antidumping Proceedings

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In March of 2018, the President of the United States issued a proclamation applying duties of 25 percent to a range of steel products under Section 232 of the Trade Expansion Act of 1962.[2] While the countries covered by the duties and rates of duties have changed from time to time, the Section 232 duties remain in effect for many steel products imported into the United States as of the writing of this paper.[3] Many of these same steel imports are also subject to antidumping duty orders or investigations. As of this writing, the U.S. had well over one hundred antidumping orders in place on flat-rolled steel products, steel long products, and steel pipe and tube.[4]

This paper examines how the U.S. Department of Commerce ("Commerce") has treated Section 232 duties in antidumping proceedings since the duties were imposed in 2018. As of this writing, many, but not all, of Commerce's decisions on the issue are still preliminary. In all of those decisions, however, Commerce has determined that Section 232 duties are import duties that require an adjustment in its antidumping calculations. Because the treatment of Section 232 duties in antidumping calculations is an issue of first impression and one that has the potential to impact dumping margins in a wide array of cases for some time, the issue has been hotly contested before the agency. Respondents have argued that Section 232 duties are "special"

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2 *See Presidential Proclamation No. 9705*, 83 Fed. Reg. 11,625 (Mar. 15, 2018) ("*Proclamation 9705*"). S*ee also* 19 U.S.C. § 1862.

3 While Section 232 duties have been adjusted pursuant to subsequent Presidential proclamations, I focus here on the original proclamation, as it sets out the characteristics of Section 232 duties relevant to this paper.

4 *See* "Antidumping and Countervailing Duty Orders In Place," available on-line at https://www.usitc.gov/sites/default/files/trade_remedy/documents/orders.xls (last accessed on October 1, 2019).

duties and therefore warrant no adjustment in antidumping proceedings, while petitioners have supported Commerce's position. This paper reviews Commerce's practice, reasoning, and further considerations supporting Commerce's approach.

I. BACKGROUND ON COMMERCE'S TREATMENT OF SECTION 232 DUTIES

In antidumping proceedings, the statute requires the Commerce to deduct from export price and constructed export price:

> {T}he amount if included in such price, attributable to any additional costs, charges, or expenses, and United States import duties, which are incident to bringing the subject merchandise from the original place of shipment in the exporting country to the place of delivery in the United States ….[5]

The provision is intended to achieve a proper, apples-to-apples comparison between normal value – which, whether it is based on home market prices, third country prices, or constructed value, does not include United States import duties – and export price or constructed export price when those prices do include such import duties. The imposition of Section 232 duties on steel products subject to antidumping orders presented Commerce with a question of first impression: Are Section 232 duties "United States import duties"? If so, they must be deducted from the export price in antidumping proceedings. If Section 232 duties are not "United States import duties," and if they do not fall in the category of "any additional costs, charges, or expenses" incident to bring the product to the United States, than this provision need not apply.

Commerce first addressed the treatment of Section 232 duties in a proceeding to establish normal values under a suspension agreement on oil country tubular goods ("OCTG") from Ukraine.[6] In that proceeding, Commerce was tasked with calculating normal values for imports

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5 19 U.S.C. § 1677a(c)(2)(A).

6 *See* Memorandum to P. Lee Smith, Deputy Assistant Secretary for Policy and Negotiations, Enforcement and Compliance, "Issues and Decision Memorandum for the Final Normal Value Calculations to be Effective from Release of the Final Normal Values through June 30, 2019, under

of OCTG from Ukraine which would, going forward, establish minimum U.S. selling prices so as to eliminate dumping under the suspension agreement.[7] The suspension agreement defines normal value to include U.S. movement expenses, and it states:

> Movement expenses are additional expenses associated with importation into the United States, which typically include: U.S. inland freight and insurance expenses; U.S. brokerage, handling and port charges; U.S. Customs duties, U.S. warehousing; and international freight and insurance.[8]

Thus, Commerce was required to determine whether Section 232 duties paid on imports of OCTG from Ukraine were "U.S. Customs duties" that should be included in the movement expenses that were added to normal value. Commerce concluded that Section 232 duties were "U.S. Customs duties," and it included them in normal value, raising the minimum import prices for OCTG from Ukraine.[9]

As noted above, in antidumping investigations and reviews, the statute requires a downward adjustment to export price for U.S. import duties, the corollary to the upward adjustment to normal value for U.S. Customs duties required under the OCTG Ukraine suspension agreement.[10] Thus, when administrative reviews and investigations began to cover steel products that had been imported after Section 232 duties were imposed, Commerce faced

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the Agreement Suspending the Antidumping Duty Investigation on Certain Oil Country Tubular Goods from Ukraine" (Feb. 15, 2019) ("*OCTG Ukraine IDM*").

7 *See id*. at 6 – 7.

8 *Suspension of Antidumping Investigation: Certain Oil Country Tubular Goods From Ukraine*, 79 Fed. Reg. 41,959, 41,963 (Dep't Commerce July 18, 2014).

9 *OCTG Ukraine IDM* at Comment 1.

10 Because the suspension agreement is forward-looking, it is focused on establishing normal values that will be the basis for future import prices. For this reason the adjustment is made to normal value. Since antidumping investigations and reviews are retroactive, export prices and actual duties paid have already been established and the adjustment is made to export price. Mathematically, the result of adding the duties to normal value or deducting them from export price should be the same.

the same question as to whether Section 232 duties were "United States import duties" and thus must be deducted from U.S. price. Commerce looked to its determination in the *OCTG Ukraine* case for guidance. As of this writing, Commerce has issued two preliminary determinations in antidumping administrative reviews, and one preliminary determination in an antidumping investigation, concluding that Section 232 duties are "U.S. import duties" and deducting them from U.S. price.[11] In at least one case Commerce referred to these Section 232 adjustments as the agency's "practice." In that case, even though the respondent's U.S. prices were ultimately found to not include Section 232 duties, Commerce stated: "Our practice is to deduct Section 232 duties from U.S. price if they are included in the price in accordance with Section 772(c)(2)(A) of the Act."[12]

Commerce's reasoning in those determinations is reviewed below.

II. COMMERCE'S INTERPRETATION OF "UNITED STATES IMPORT DUTIES"

The term "United States import duties" is not defined in the statutory description of U.S. price.[13] In *Wheatland*, the U.S. Court of Appeals for the Federal Circuit stated that "it is clear that Congress has not defined or explained the meaning or the scope of 'United States import

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[11] *See Circular Welded Carbon Steel Standard Pipe and Tube Products From Turkey: Preliminary Results of Antidumping Duty Administrative Review and Preliminary Determination of No Shipments; 2017-2018*, 84 Fed. Reg. 34,345 (Dep't Commerce July 18, 2019) and accompanying Decision Memorandum ("*CWP Turkey DM*") at 11 – 13; *Certain Corrosion-Resistant Steel Products From Taiwan: Preliminary Results of Antidumping Duty Administrative Review; 2017-2018*, 84 Fed. Reg. 48,120 (Dep't Commerce Sept. 12, 2019) and accompanying Decision Memorandum ("*CORE Taiwan DM*") at 10 – 12. *See also Certain Fabricated Structural Steel From Canada: Preliminary Negative Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 84 Fed. Reg. 47,481 (Dep't Commerce Sept. 10, 2019) and accompanying Decision Memorandum ("*FSS Canada DM*") at 10.

[12] *Certain Cold-Rolled Steel Flat Products From the United Kingdom: Preliminary Results of Antidumping Duty Administrative Review; 2017-2018*, 84 Fed. Reg. 34,868 (Dep't Commerce July 19, 2019) and accompanying Decision Memorandum ("*CRS UK DM*") at 10 – 11.

[13] *See* 19 U.S.C. § 1677a.

duties' as set forth in 19 U.S.C. § 1677a(c)(2)(A)."[14] In that case, the Federal Circuit found that the term was ambiguous and, thus, deferred to Commerce's interpretation of that ambiguous term under the second step of *Chevron* deference.[15] The Federal Circuit noted that, under *Chevron* step two, it must defer to any reasonable Commerce interpretation, even if the court might have preferred another reasonable interpretation and even if the agency's interpretation is not the only reasonable one.[16]

In that case, the Federal Circuit was reviewing Commerce's determination in *Stainless Steel Wire Rod from Korea* ("*SWR Korea*") that safeguard duties under section 201 of the Trade Act of 1974 are not the type of "United States import duties" for which an adjustment to export price is required by 19 U.S.C. § 1677a(c)(2)(A). In the underlying determination, Commerce noted that legislative history distinguished between normal customs duties and "special dumping duties," *i.e.*, antidumping duties.[17] Commerce also noted its long-standing practice, upheld by the courts, of not treating antidumping duties as normal import duties and not deducting them from U.S. price pursuant to 19 U.S.C. § 1677a(c)(2)(A).[18] Commerce thus sought to determine whether safeguard duties were more like normal customs duties or like "special" antidumping duties.

Commerce determined that safeguard duties were "special" duties like antidumping duties based on the following findings:

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[14] *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007).

[15] *Id.* at 1360-63 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984)).

[16] *Id.* at 1360.

[17] *Stainless Steel Wire Rod from the Republic of Korea: Final Results of Antidumping Administrative Review*, 69 Fed. Reg. 19,153, 19,159 (Dep't Commerce Apr. 12, 2004) ("*SWR Korea*").

[18] *See id.*

- Section 201 duties provide "temporary relief for an industry suffering from serious injury," and are thus "special remedial measures," like antidumping duties.[19]

- The Senate Report to the Trade Act of 1974 notes the Commission is required to notify the appropriate agencies if increased imports subject to a safeguard proceeding are attributable to dumping, since action under the Antidumping Act, where appropriate, is preferable to a safeguard action.[20]

- The Statement of Administrative Action accompanying the Uruguay Round Agreements Act directs the President to take into account any existing antidumping relief when determining the amount of safeguard relief to provide, since such antidumping duties "may alter the amount of relief necessary" under the safeguard law.[21]

- Antidumping duties remedy material injury by reason of subject imports, while safeguard duties provide relief to a domestic industry suffering serious injury caused substantially by increased imports, injury standards Commerce characterized as "almost identical."[22] According to Commerce, the fact that the injury cognizable under Section 201 may also be remediable (at least to some extent) under the antidumping law makes the remedies interchangeable.[23]

Based on the complementary nature of safeguard and antidumping duties, and the overlap between them, Commerce determined that deducting safeguard duties from export price would be tantamount to collecting similar duties twice – once as a safeguard duty and again as an increase in the antidumping duty.[24] As noted above, the Federal Circuit affirmed Commerce's interpretation as reasonable given the ambiguity of the term "United States import duties."[25]

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19 *Id*.

20 *Id*. at 19,160. *See also* S. Rep. No. 93-1298 at 123 (1974)); 19 U.S.C. § 2252(c)(5).

21 *SWR Korea* at 19,160. *See also* Uruguay Round Agreements Act Statement of Administrative Action, H.R. REP. NO. 103-316, vol. 1 at 964 (1994).

22 *SWR Korea* at 19,160. *Compare* 19 U.S.C. § 1673 *with id.* §§ 2251(a), 2252(b)(1)(A).

23 *SWR Korea* at 19,160.

24 *Id*.

25 *Wheatland*, 495 F.3d at 1363.

In *OCTG Ukraine*, Commerce acknowledged the Federal Circuit's decision in *Wheatland* upholding Commerce's determination that safeguard duties are not ordinary customs duties.[26] Commerce found, however, that Section 232 duties are not akin to antidumping or safeguard duties. It thus found that they did not overlap with antidumping duties and should be added to normal value.

First, Commerce noted that while antidumping and safeguard duties are both intended to remedy injury to a domestic industry (as evidenced by adverse production and financial trends), Section 232 duties are not.[27] Section 232 is concerned with the effects of imports on national security.[28] While respondents pointed to certain statements by the Secretary and the President regarding unfair trade practices in the context of the Section 232 proceedings, Commerce focused on the nature of the statutory authority itself rather than these statements. Thus, because Section 232 and antidumping duties are aimed at distinct harms, Commerce found that they do not overlap the way that safeguard and antidumping duties overlap.[29]

Second, Commerce noted that the President's Section 232 Proclamation explicitly states: "All anti-dumping, countervailing, or other duties and charges applicable to such goods shall continue to be imposed" in addition to the Section 232 duties.[30] The Proclamation also states that Section 232 duties are "ordinary customs duties."[31] Thus, by their very own terms, Section 232 duties are treated as any other normal customs duty. Commerce found that these statements

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[26] *OCTG Ukraine IDM* at Comment 1.

[27] *See id.*

[28] 19 U.S.C. § 1862(a) & (b)(1)(A).

[29] *OCTG Ukraine IDM* at Comment 1.

[30] *Id.*

[31] *Id.*

supported a determination that there is no overlap between Section 232 duties and antidumping duties.[32]

Third, Commerce found that adjusting for Section 232 duties would not result in a double remedy.[33] Because 232 duties were included in export price in *OCTG Ukraine* as a factual matter, it was necessary to also include them in normal value to achieve an apples-to-apples comparison.[34] And, because Section 232 duties serve a different purpose than antidumping duties, do not overlap with antidumping duties, and are explicitly intended to be collected in addition to antidumping duties, treating Section 232 duties as U.S. Customs duties did not create a double remedy.[35]

As explained in more detail below, additional considerations support Commerce's determination.

III. ADDITIONAL CONSIDERATIONS ON THE TREATMENT OF SECTION 232 DUTIES

A. Section 232 Duties Are Not Time-Limited, "Special" Duties

As noted above, one of the factors Commerce considered in *SWR Korea* regarding safeguard duties is that they "provide temporary relief for an industry suffering serious injury."[36] Commerce further noted that the U.S. International Trade Commission (the "Commission") had referred to Section 201 duties as "special duties."[37] Neither condition applies to Section 232 duties.

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[32] *Id.*

[33] *Id.*

[34] *Id.*

[35] *Id.*

[36] *SWR Korea* at 19,159 (citing S. Rep. No. 93-1298 at 119 (1974)).

[37] *Id.*

First, unlike Section 201 duties, Section 232 duties are of an indefinite rather than limited duration. Section 201 duties may not last longer than four years, or eight years in the aggregate if relief is extended.[38] The statute imposes additional limits on the rates of safeguard duties that may be applied and requires such duties to phase down at regular intervals if they last longer than a year.[39] The statute also prohibits taking new safeguard action on an article that was the subject of action for specified periods of time.[40] Similarly, antidumping orders must be reviewed every five years to determine if their revocation would permit dumping and injury to continue or recur.[41]

By contrast, Section 232 delegates to the President the discretion to decide both the "nature and duration" of any action taken to adjust imports for national security reasons, and it imposes no limits on the rates of Section 232 duties that may be applied or the period of time over which they may stay in effect.[42] To date, the President has not indicated any limitation on the duration of the Section 232 duties currently in effect. This makes Section 232 duties more like regular customs or import duties, and it distinguishes them from Section 201 duties and other "special duties" that are of a specified maximum duration.

B. Section 232 Duties Address Different Harms than Antidumping and Safeguard Duties

As noted above, while antidumping and safeguard duties remedy injury to a domestic industry, Section 232 duties address threats to national security. Under Section 201, for example, the Commission recommends action "that would address . . . serious injury . . . to the domestic

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38 19 U.S.C. § 2253(e)(1).

39 19 U.S.C. § 2253(e)(3), (5).

40 19 U.S.C. § 2253(e)(7).

41 19 U.S.C. § 1675(c).

42 19 U.S.C. § 1862(c)(1)(A)(ii).

industry and be most effective in facilitating efforts of the domestic industry to make a positive adjustment to import competition."[43] The safeguard statute similarly directs the President to take action to facilitate efforts by the domestic industry to make a positive adjustment to import competition.[44] Because safeguard duties and antidumping duties both remedy injury to a domestic industry caused by imports, some of the factors examined by the Commission in antidumping and safeguard actions to determine whether a domestic industry is injured by imports are similar, including: (1) any increase in imports, either actual or relative to domestic production;[45] and (2) negative effects on the domestic industry's production, market share, profits, productivity, capacity utilization, inventories, employment, wages, and ability to raise capital.[46]

In contrast, Section 232 duties are not imposed as a remedial measure to permit an injured domestic industry to adjust to import competition. Under Section 232, the Secretary is not directed to determine whether imports are injuring a domestic industry, but rather whether imports are "entering in such quantities or under such circumstances as to threaten to impair the national security."[47] There is no requirement that the Secretary or the President determine that a domestic industry is injured by imports in order to impose Section 232 duties. The President must determine whether he concurs with the Secretary's findings regarding the threat to national security, not whether such imports have surged into the United States and injured a domestic

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43 19 U.S.C. § 2252(e)(1).

44 19 U.S.C. § 2253(a)(1)(A).

45 *Compare* 19 U.S.C. § 1677(7)(C)(i) *with id.* § 2252(c)(1)(C).

46 *Compare* 19 U.S.C. § 1677(7)(C)(iii) *with id.* § 2252(c)(1)(A), (B).

47 19 U.S.C. § 1862(b)(3)(A).

industry.[48] If the President concurs, Section 232 actions are imposed to "adjust . . . imports . . . so that such imports will not threaten to impair the national security."[49]

While the Secretary and the President take the impact of foreign competition on the welfare of domestic industries into account in making their determinations under Section 232, they are also directed to give consideration to the following factors "in light of the requirements of national security":[50]

- Domestic production needed for projected national defense requirements, and 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; and
- The requirements of growth of such industries and such supplies and services including the investment, exploration, and development necessary to assure such growth.

Further, while Section 201 and the antidumping law focus on the volume of imports, Section 232 directs the Secretary and President to also take into account imports' "availabilities, character, and use" as they affect domestic industries and the capacity of the United States to meet national security requirements.[51]

Thus, Section 232 duties are functionally distinct from antidumping duties and address distinct policy concerns. Antidumping and safeguard duties remedy injury to the domestic industry caused by imports. Section 232 duties adjust imports to preserve national security. Relief may be imposed under Section 232 to protect national security even if a domestic industry

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48 19 U.S.C. § 1862(c)(1)(A)(i).

49 19 U.S.C. § 1862(c)(1)(A)(ii).

50 *See* 19 U.S.C. § 1862(d).

51 19 U.S.C. § 1862(d). Thus, the Secretary may determine that an article is being imported "in such quantities *or under such circumstances* as to threaten to impair the national security." *Id*. § 1862(b)(3)(A) (emphasis added).

has not been injured by imports. While the quantity of imports may be considered under Section 232, the circumstances of importation are also considered, including the availability, character, and use of those imports.

The lack of overlap between Section 232 duties and antidumping duties is also evident in the fact that there are no Congressional instructions that the two be considered in conjunction. As noted above, legislative history requires the Commission to notify the appropriate agencies if increased imports subject to a safeguard proceeding are attributable to dumping, since action under the Antidumping Act, where appropriate, is preferable to a safeguard action. In addition, the SAA directs the President to take into account any existing antidumping relief when determining the amount of safeguard relief to provide, since such antidumping duties "may alter the amount of relief necessary" under the safeguard law.

None of these facts apply to Section 232 duties. Nothing in Section 232 requires the Secretary or the President to determine whether the threat to national security reflects dumping or may be more appropriately remedied by antidumping duties.[52] In addition, nothing in Section 232 directs the President to take into account existing antidumping duties when determining what measures to impose to adjust imports so that national security will no longer be threatened or impaired.[53] These facts further confirm that Section 232 and antidumping duties do not overlap, and are nether complementary nor interchangeable.

C. Simultaneous Imposition of Section 232 and Antidumping Duties Creates No Double Remedy

Antidumping duties and Section 232 duties also differ in their intended effect on import prices. The courts have explained that antidumping duties "serve to provide an incentive to

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[52] *See* 19 U.S.C. § 1862.

[53] *Id.*

ensure fair export prices, rather than to burden importers with additional costs."[54] Put differently: "an antidumping order is designed to raise the price of dumped goods to a fair level in the import market. It is not a normal import duty or an extra 'cost' or 'expense' to the importer – it is an element of a fair and reasonable price."[55] By contrast, Section 232 duties are designed specifically to impose additional costs on importers in order to "adjust" imports to remove the threat to national security.[56]

Due to these distinct aims, simultaneous imposition of antidumping and Section 232 duties does not create a double remedy. To the contrary, if Commerce did not deduct additional Section 232 duties from U.S. price, the agency would effectively be refunding those Section 232 duties to affected importers. Alternatively, by failing to ensure an apples-to-apples comparison of normal value to U.S. price (by including the duties in U.S. price but not normal value), Commerce would be preventing the full amount of dumping from being eliminated or remedied under the antidumping law.

As a hypothetical example, assume an importer had a single entry of merchandise with a normal value (not including Section 232 duties) of $150 and a U.S. price (not including Section 232 duties) of $100. The importer paid $25 in Section 232 duties on the entry, raising the U.S. price to the first unaffiliated customer to $125. If Section 232 duties are treated as normal U.S. import duties, they would be deducted from the U.S. price. Based on a U.S. price of $100 and a normal value of $150, the full amount of dumping ($50) would be revealed and remedied. The payment of Section 232 duties is not intended to remedy dumping or establish a fair price, and

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54 *Ad Hoc Shrimp Trade Action Comm. v. United States*, 925 F. Supp. 2d 1367, 1373 (Ct. Int'l Trade 2013).

55 *Hoogovens Staal BV v. United States*, 4 F. Supp. 2d 1213, 1220 (Ct. Int'l Trade 1998).

56 *See* 19 U.S.C. § 1862(c)(1)(A)(ii).

that dumping should therefore be fully captured and remedied separately under the antidumping law. The importer should thus pay the full $25 in Section 232 duties as well as the antidumping duties required to fully offset the $50 of dumping. As noted in the Presidential Proclamation imposing Section 232 duties, those duties are imposed in addition to any antidumping duties.[57]

By contrast, if Commerce did not deduct the Section 232 duties from U.S. price, in the above example the dumping margin would be based on a comparison of a U.S. price of $125 to a normal value of $150. The amount of dumping would be artificially lowered from $50 to $25. The importer would effectively receive a full refund of the $25 paid in Section 232 duties. Alternatively, the importer's antidumping duty liability would be reduced by the amount of the Section 232 duties paid, leading to less than full offsetting of the dumping that has occurred.

Such a result would undermine the effectiveness of the antidumping laws as well as Section 232. Injurious dumping would be permitted to occur without the full remedy mandated by statute and intended by Congress. In addition, the adjustment of imports that the President determined was necessary to protect national security would be undermined.

IV. CONCLUSION

The imposition of Section 232 duties on steel products has presented a questions of first impression to Commerce – whether those duties are United States import duties that should be the basis of adjustments in Commerce's antidumping proceedings. To date, Commerce has determined that section 232 duties are import duties and has applied the adjustment the statute requires for such duties. Commerce's interpretation is not only reasonable, it also ensures that the relief from unfair pricing required under the antidumping law and the protections for national security contemplated in Section 232 can be simultaneously enforced to their full extent.

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[57] *Proclamation 9705*, 83 Fed. Reg. at 11,627-29.