

U.S. Customs and Border Protection



19 CFR CHAPTER I

NOTIFICATION OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND MEXICO

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

ACTION: Notification of continuation of temporary travel restrictions.

SUMMARY: This document announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border. Such travel will be limited to “essential travel,” as further defined in this document.

DATES: These restrictions go into effect at 12 a.m. Eastern Daylight Time (EDT) on June 22, 2021 and will remain in effect until 11:59 p.m. EDT on July 21, 2021, unless amended or rescinded prior to that time.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202-325-0840.

SUPPLEMENTARY INFORMATION:

Background

On March 24, 2020, DHS published notice of its decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel,” as further defined in that document.¹ The document described the developing circumstances regarding the COVID-19 pandemic and stated that, given the outbreak and con-

¹ 85 FR 16547 (Mar. 24, 2020). That same day, DHS also published notice of its decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel,” as further defined in that document. 85 FR 16548 (Mar. 24, 2020).

tinued transmission and spread of the virus associated with COVID-19 within the United States and globally, DHS had determined that the risk of continued transmission and spread of the virus associated with COVID-19 between the United States and Mexico posed a “specific threat to human life or national interests.” DHS later published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on June 21, 2021.²

DHS continues to monitor and respond to the COVID-19 pandemic. As of the week of June 14, 2021, there have been over 172 million confirmed cases globally, with over 3.7 million confirmed deaths.³ There have been over 33 million confirmed and probable cases within the United States,⁴ over 1.3 million confirmed cases in Canada,⁵ and over 2.4 million confirmed cases in Mexico.⁶

DHS also notes positive developments in recent weeks. CDC reports that, as of June 14, over 310 million vaccine doses have been administered in the United States and almost 55% of adults in the United States are fully vaccinated.⁷ On June 7, 2021, CDC moved Canada and Mexico from COVID-19 Level 4 (Very High) to Level 3 (High) in recognition of conditions that, while still requiring significant safeguards, are improving.⁸

² See 86 FR 27800 (May 24, 2021); 86 FR 21189 (Apr. 22, 2021); 86 FR 14813 (Mar. 19, 2021); 86 FR 10816 (Feb. 23, 2021); 86 FR 4967 (Jan. 19, 2021); 85 FR 83433 (Dec. 22, 2020); 85 FR 74604 (Nov. 23, 2020); 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020). DHS also published parallel notifications of its decisions to continue temporarily limiting the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel.” See 86 FR 27802 (May 24, 2021); 86 FR 21188 (Apr. 22, 2021); 86 FR 14812 (Mar. 19, 2021); 86 FR 10815 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83432 (Dec. 22, 2020); 85 FR 74603 (Nov. 23, 2020); 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020).

³ WHO, Coronavirus disease 2019 (COVID-19) Weekly Epidemiological Update (June 8, 2021), available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports> (accessed June 14, 2021).

⁴ CDC, COVID Data Tracker: United States COVID-19 Cases, Deaths, and Laboratory Testing (NAATs) by State, Territory, and Jurisdiction (June 13, 2021), https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days (accessed June 14, 2021).

⁵ WHO, COVID-19 Weekly Epidemiological Update (June 8, 2021).

⁶ *Id.*

⁷ See CDC, COVID Data Tracker: COVID-19 Vaccinations in the United States (June 14, 2021), <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (accessed June 15, 2021).

⁸ See CDC, Travel Notice; COVID-19 in Canada (June 7, 2021), <https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-canada> (accessed June 10, 2021); CDC, Travel Notice: COVID-19 in Mexico (June 7, 2021), <https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-mexico> (accessed June 10, 2021). In addition, on June 8, 2021, the Department of State moved Canada and Mexico from Level 4 (Do Not Travel) to Level 3 (Reconsider

Notice of Action

Given the outbreak and continued transmission and spread of COVID–19 within the United States and globally, the Secretary has determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Mexico poses an ongoing “specific threat to human life or national interests.”

U.S. and Mexican officials have mutually determined that non-essential travel between the United States and Mexico currently poses additional risk of transmission and spread of the virus associated with COVID–19 and places the populace of both nations at increased risk of contracting the virus associated with COVID–19. Moreover, given the sustained human-to-human transmission of the virus, coupled with risks posed by new variants, returning to previous levels of travel between the two nations places the personnel staffing land ports of entry between the United States and Mexico, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID–19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),⁹ I have determined that land ports of entry along the U.S.-Mexico border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade

Travel). See Department of State, Canada Travel Advisory (June 8, 2021), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/canada-travel-advisory.html> (accessed June 10, 2021); Department of State, Mexico Travel Advisory (June 8, 2021), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html> (accessed June 10, 2021).

⁹ 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. See 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. See Treas. Dep’t Order No. 100–16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S. Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Mexico border shall be limited to “essential travel,” which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
- Individuals traveling for medical purposes (*e.g.*, to receive medical treatment in the United States);
- Individuals traveling to attend educational institutions;
- Individuals traveling to work in the United States (*e.g.*, individuals working in the farming or agriculture industry who must travel between the United States and Mexico in furtherance of such work);
- Individuals traveling for emergency response and public health purposes (*e.g.*, government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID–19 or other emergencies);
- Individuals engaged in lawful cross-border trade (*e.g.*, truck drivers supporting the movement of cargo between the United States and Mexico);
- Individuals engaged in official government travel or diplomatic travel;
- Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
- Individuals engaged in military-related travel or operations.

The following travel does not fall within the definition of “essential travel” for purposes of this Notification—

- Individuals traveling for tourism purposes (*e.g.*, sightseeing, recreation, gambling, or attending cultural events).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Mexico, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Mexico. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EDT on July 21, 2021. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat. Meanwhile, as part of an integrated U.S. government effort and guided by the objective analysis and recommendations of public health and medical experts, DHS is working closely with counter-

parts in Mexico and Canada to identify conditions under which restrictions may be eased safely and sustainably.

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

ALEJANDRO N. MAYORKAS,
Secretary,
U.S. Department of Homeland Security.

[Published in the Federal Register, June 23, 2021 (85 FR 32766)]

19 CFR CHAPTER I

NOTIFICATION OF TEMPORARY TRAVEL RESTRICTIONS APPLICABLE TO LAND PORTS OF ENTRY AND FERRIES SERVICE BETWEEN THE UNITED STATES AND CANADA

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

ACTION: Notification of continuation of temporary travel restrictions.

SUMMARY: This document announces the decision of the Secretary of Homeland Security (Secretary) to continue to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border. Such travel will be limited to “essential travel,” as further defined in this document.

DATES: These restrictions go into effect at 12 a.m. Eastern Daylight Time (EDT) on June 22, 2021 and will remain in effect until 11:59 p.m. EDT on July 21, 2021, unless amended or rescinded prior to that time.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations Coronavirus Coordination Cell, U.S. Customs and Border Protection (CBP) at 202–325–0840.

SUPPLEMENTARY INFORMATION:**Background**

On March 24, 2020, DHS published notice of its decision to temporarily limit the travel of individuals from Canada into the United States at land ports of entry along the United States-Canada border to “essential travel,” as further defined in that document.¹ The document described the developing circumstances regarding the COVID–19 pandemic and stated that, given the outbreak and continued transmission and spread of the virus associated with COVID–19 within the United States and globally, DHS had determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Canada posed a “specific threat to human life or national interests.” DHS later published a series of notifications continuing such limitations on travel until 11:59 p.m. EDT on June 21, 2021.²

DHS continues to monitor and respond to the COVID–19 pandemic. As of the week of June 14, 2021, there have been over 172 million confirmed cases globally, with over 3.7 million confirmed deaths.³ There have been over 33 million confirmed and probable cases within the United States,⁴ over 1.3 million confirmed cases in Canada,⁵ and over 2.4 million confirmed cases in Mexico.⁶

DHS also notes positive developments in recent weeks. CDC reports that, as of June 14, over 310 million vaccine doses have been administered in the United States and almost 55% of adults in the

¹ 85 FR 16548 (Mar. 24, 2020). That same day, DHS also published notice of its decision to temporarily limit the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel,” as further defined in that document. 85 FR 16547 (Mar. 24, 2020).

² See 86 FR 27802 (May 24, 2021); 86 FR 21188 (Apr. 22, 2021); 86 FR 14812 (Mar. 19, 2021); 86 FR 10815 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83432 (Dec. 22, 2020); 85 FR 74603 (Nov. 23, 2020); 85 FR 67276 (Oct. 22, 2020); 85 FR 59670 (Sept. 23, 2020); 85 FR 51634 (Aug. 21, 2020); 85 FR 44185 (July 22, 2020); 85 FR 37744 (June 24, 2020); 85 FR 31050 (May 22, 2020); 85 FR 22352 (Apr. 22, 2020). DHS also published parallel notifications of its decisions to continue temporarily limiting the travel of individuals from Mexico into the United States at land ports of entry along the United States-Mexico border to “essential travel.” See 86 FR 27800 (May 24, 2021); 86 FR 21189 (Apr. 22, 2021); 86 FR 14813 (Mar. 19, 2021); 86 FR 10816 (Feb. 23, 2021); 86 FR 4969 (Jan. 19, 2021); 85 FR 83433 (Dec. 22, 2020); 85 FR 74604 (Nov. 23, 2020); 85 FR 67275 (Oct. 22, 2020); 85 FR 59669 (Sept. 23, 2020); 85 FR 51633 (Aug. 21, 2020); 85 FR 44183 (July 22, 2020); 85 FR 37745 (June 24, 2020); 85 FR 31057 (May 22, 2020); 85 FR 22353 (Apr. 22, 2020).

³ WHO, Coronavirus disease 2019 (COVID–19) Weekly Epidemiological Update (June 8, 2021), available at <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/situation-reports> (accessed June 14, 2021).

⁴ CDC, COVID Data Tracker (accessed June 14, 2021), https://covid.cdc.gov/covid-data-tracker/#cases_casesper100klast7days.

⁵ WHO, COVID–19 Weekly Epidemiological Update (June 8, 2021).

⁶ *Id.*

United States are fully vaccinated.⁷ On June 7, 2021, CDC moved Canada and Mexico from COVID–19 Level 4 (Very High) to Level 3 (High) in recognition of conditions that, while still requiring significant safeguards, are improving.⁸

Notice of Action

Given the outbreak and continued transmission and spread of COVID–19 within the United States and globally, the Secretary has determined that the risk of continued transmission and spread of the virus associated with COVID–19 between the United States and Canada poses an ongoing “specific threat to human life or national interests.”

U.S. and Canadian officials have mutually determined that non-essential travel between the United States and Canada currently poses additional risk of transmission and spread of the virus associated with COVID–19 and places the populace of both nations at increased risk of contracting the virus associated with COVID–19. Moreover, given the sustained human-to-human transmission of the virus, coupled with risks posed by new variants, returning to previous levels of travel between the two nations places the personnel staffing land ports of entry between the United States and Canada, as well as the individuals traveling through these ports of entry, at increased risk of exposure to the virus associated with COVID–19. Accordingly, and consistent with the authority granted in 19 U.S.C. 1318(b)(1)(C) and (b)(2),⁹ I have determined that land ports of entry along the

⁷ See CDC, COVID Data Tracker: COVID–19 Vaccinations in the United States (June 14, 2021), <https://covid.cdc.gov/covid-data-tracker/#vaccinations> (accessed June 15, 2021).

⁸ See CDC, Travel Notice; COVID–19 in Canada (June 7, 2021), <https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-canada> (accessed June 10, 2021); CDC, Travel Notice: COVID–19 in Mexico (June 7, 2021), <https://wwwnc.cdc.gov/travel/notices/covid-4/coronavirus-mexico> (accessed June 10, 2021). In addition, on June 8, 2021, the Department of State moved Canada and Mexico from Level 4 (Do Not Travel) to Level 3 (Reconsider Travel). See Department of State, Canada Travel Advisory (June 8, 2021), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/canada-travel-advisory.html> (accessed June 10, 2021); Department of State, Mexico Travel Advisory (June 8, 2021), <https://travel.state.gov/content/travel/en/traveladvisories/traveladvisories/mexico-travel-advisory.html> (accessed June 10, 2021).

⁹ 19 U.S.C. 1318(b)(1)(C) provides that “[n]otwithstanding any other provision of law, the Secretary of the Treasury, when necessary to respond to a national emergency declared under the National Emergencies Act (50 U.S.C. 1601 *et seq.*) or to a specific threat to human life or national interests,” is authorized to “[t]ake any . . . action that may be necessary to respond directly to the national emergency or specific threat.” On March 1, 2003, certain functions of the Secretary of the Treasury were transferred to the Secretary of Homeland Security. See 6 U.S.C. 202(2), 203(1). Under 6 U.S.C. 212(a)(1), authorities “related to Customs revenue functions” were reserved to the Secretary of the Treasury. To the extent that any authority under section 1318(b)(1) was reserved to the Secretary of the Treasury, it has been delegated to the Secretary of Homeland Security. See Treas. Dep’t Order No. 100–16 (May 15, 2003), 68 FR 28322 (May 23, 2003). Additionally, 19 U.S.C. 1318(b)(2) provides that “[n]otwithstanding any other provision of law, the Commissioner of U.S.

U.S.-Canada border will continue to suspend normal operations and will only allow processing for entry into the United States of those travelers engaged in “essential travel,” as defined below. Given the definition of “essential travel” below, this temporary alteration in land ports of entry operations should not interrupt legitimate trade between the two nations or disrupt critical supply chains that ensure food, fuel, medicine, and other critical materials reach individuals on both sides of the border.

For purposes of the temporary alteration in certain designated ports of entry operations authorized under 19 U.S.C. 1318(b)(1)(C) and (b)(2), travel through the land ports of entry and ferry terminals along the United States-Canada border shall be limited to “essential travel,” which includes, but is not limited to—

- U.S. citizens and lawful permanent residents returning to the United States;
 - Individuals traveling for medical purposes (*e.g.*, to receive medical treatment in the United States);
 - Individuals traveling to attend educational institutions;
 - Individuals traveling to work in the United States (*e.g.*, individuals working in the farming or agriculture industry who must travel between the United States and Canada in furtherance of such work);
 - Individuals traveling for emergency response and public health purposes (*e.g.*, government officials or emergency responders entering the United States to support federal, state, local, tribal, or territorial government efforts to respond to COVID–19 or other emergencies);
 - Individuals engaged in lawful cross-border trade (*e.g.*, truck drivers supporting the movement of cargo between the United States and Canada);
 - Individuals engaged in official government travel or diplomatic travel;
 - Members of the U.S. Armed Forces, and the spouses and children of members of the U.S. Armed Forces, returning to the United States; and
 - Individuals engaged in military-related travel or operations.
- The following travel does not fall within the definition of “essential travel” for purposes of this Notification—
- Individuals traveling for tourism purposes (*e.g.*, sightseeing, recreation, gambling, or attending cultural events).

Customs and Border Protection, when necessary to respond to a specific threat to human life or national interests, is authorized to close temporarily any Customs office or port of entry or take any other lesser action that may be necessary to respond to the specific threat.” Congress has vested in the Secretary of Homeland Security the “functions of all officers, employees, and organizational units of the Department,” including the Commissioner of CBP. 6 U.S.C. 112(a)(3).

At this time, this Notification does not apply to air, freight rail, or sea travel between the United States and Canada, but does apply to passenger rail, passenger ferry travel, and pleasure boat travel between the United States and Canada. These restrictions are temporary in nature and shall remain in effect until 11:59 p.m. EDT on July 21, 2021. This Notification may be amended or rescinded prior to that time, based on circumstances associated with the specific threat. Meanwhile, as part of an integrated U.S. government effort and guided by the objective analysis and recommendations of public health and medical experts, DHS is working closely with counterparts in Mexico and Canada to identify conditions under which restrictions may be eased safely and sustainably.

The Commissioner of U.S. Customs and Border Protection (CBP) is hereby directed to prepare and distribute appropriate guidance to CBP personnel on the continued implementation of the temporary measures set forth in this Notification. The CBP Commissioner may determine that other forms of travel, such as travel in furtherance of economic stability or social order, constitute “essential travel” under this Notification. Further, the CBP Commissioner may, on an individualized basis and for humanitarian reasons or for other purposes in the national interest, permit the processing of travelers to the United States not engaged in “essential travel.”

ALEJANDRO N. MAYORKAS,
Secretary,
U.S. Department of Homeland Security.

[Published in the Federal Register, June 23, 2021 (85 FR 32764)]



19 CFR PART 177

REVOCATION OF FOUR RULING LETTERS AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF INSULATED STAINLESS STEEL BEVERAGE CONTAINERS.

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

ACTION: Notice of revocation of four ruling letters, and of revocation of treatment relating to the tariff classification of insulated stainless steel beverage containers.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Imple-

mentation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking New York (“NY”) Ruling Letters N297758, N297169, N254461 and N264760, concerning the tariff classification of insulated stainless steel beverage containers under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 55, No. 9, on March 10, 2021. Four comments were received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after September 5, 2021.

FOR FURTHER INFORMATION CONTACT: Claudia Garver, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch Branch, Regulations and Rulings, Office of Trade, at (202) 325–0024.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 55, No. 9, on March 10, 2021, proposing to revoke four ruling letters pertaining to the tariff classification of insulated stainless steel beverage containers. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical

transactions. Any person involved in substantially identical transactions should have advised CBP during the comment period. An importer's failure to advise CBP of substantially identical transactions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of this notice.

In New York ("NY") Ruling Letters N297758, dated July 9, 2018, N297169, dated June 15, 2018, N254461, dated September 10, 2014, and N264760, dated June 16, 2015, CBP classified double-walled insulated stainless steel beverage containers with a vacuum between the two walls in heading 7323, HTSUS, specifically in subheading 7323.93.00, HTSUS, which provides for "Table, kitchen or other household articles and parts thereof, of iron or steel; iron or steel wool; pot scourers and scouring or polishing pads, gloves and the like, of iron or steel: other: of stainless steel." CBP has reviewed NY N297758, NY N297169, NY N254461 and NY N264760, and has determined the ruling letters to be in error.

It is now CBP's position that the containers at issue are properly classified in heading 9617, HTSUS, specifically in subheading 9617.00.10, HTSUS, which provides for "Vacuum flasks and other vacuum vessels, complete with cases; parts thereof other than glass inners: Vessels: Having a capacity not exceeding 1 liter."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is revoking NY N297758, NY N297169, NY N254461 and NY N264760 and revoking or modifying any other ruling not specifically identified to reflect the analysis contained in Headquarters Ruling Letter ("HQ") H303684, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

Dated: June 17, 2021

CRAIG T. CLARK,
Director
Commercial and Trade Facilitation Division

Attachment

HQ H303684

June 17, 2021

OT:RR:CTF:CPMM H303684 CKG

CATEGORY: Classification

TARIFF NO.: 9617.00.10

Ms. MARYANN LARKIN
GLOBE EXPRESS SERVICES
1550 E. GLENN CURTISS STREET
CARSON, CA 90746

RE: Revocation of NY N297758, NY N297169, NY N254461 and NY N264760; classification of insulated stainless steel beverage containers

DEAR Ms. LARKIN:

This is to inform you that U.S. Customs and Border Protection (“CBP”) has reconsidered New York (“NY”) Ruling Letters NY N297758 and NY N297169, issued to you on July 9, 2018, and June 15, 2018, concerning the classification of insulated stainless steel beverage containers. After reviewing the aforementioned rulings, we believe that they are in error. We have also reconsidered NY N254461, dated September 10, 2014, and NY N264760, dated June 16, 2015. For the reasons set forth below, we hereby revoke NY N297758, NY N297169, NY N254461 and NY N264760.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI, notice proposing to revoke NY N297758, NY N297169, NY N254461 and NY N264760 was published on March 10, 2021, in Volume 55, Number 9, of the *Customs Bulletin*. Four comments were received in opposition to this Notice and are addressed below.

FACTS:

The merchandise at issue in NY N297758 was described as follows:

[F]our, 12 oz. tumblers. The tumblers are beverage containers that are designed to carry hot or cold beverages. They feature bodies with a wider, rounded bottom that taper to a smaller top opening. The tumblers are made of double-walled stainless steel with a partial vacuum between the walls to serve as a barrier preventing heat transfer. Each item has a flat bottom that enables it to be placed on a flat surface such as a table. None of the items has a protective outer casing. Each item has a plastic lid designed to seal the container and keep the liquids inside from spilling. These items will be imported under item numbers 01976, 01987, 01988 and 10041. Item number 01976 is an assortment of four colors. Item number 10041 is an assortment of three colors. Item numbers 01987 and 01988 are only one color per item number. All items are identical except for color.

The merchandise at issue in NY N297169 was described as follows:

[F]ive, 40 oz. bottles. The bottles are beverage containers designed to hold cold or hot beverages. They feature cylindrical bodies made of double-walled stainless steel with a partial vacuum between the walls to serve as a barrier preventing heat transfer. Each item has a flat bottom that enables it to be placed on a flat surface such as a table. None of the items has a protective outer casing. Each item has a lid designed to seal the

container and keep the liquids inside from spilling. The lid also equipped with a carabiner top that makes it easy to hook on or carry. These items will be imported under item numbers 01840, 01841, 01842, 01843 and 01844. All items are identical except for color.

The merchandise at issue in NY N254461 was described as follows:

Each of the samples were identified as the CamelBak Forge 16 oz. Black Smoke, Style Number 57002. It consists of a black cylindrical stainless steel beverage bottle with a black, plastic screw-on lid. There is a lever on the side of the lid that, when depressed, exposes a sipping aperture on the top of the lid. The side of the lid is embossed with the raised letters "Camelbak." The bottom of the base of the item has the depressed letters "Camelbak Forge". The sample measures approximately 8½" in height, including the lid, 7¼" in height, not including the lid and 2¾" in diameter.

The bottle is a double walled container with a space separating the walls that provides a partial vacuum to serve as an insulating barrier to heat transfer. However, there is no protective outer casing around the double walled construction.

At issue in NY N264760 were five items, described as follows:

The five submitted illustrations depict items that are described as beverage containers that are designed to carry hot or cold beverages. They feature bodies made of double-walled stainless steel with a partial vacuum between the layers and each item has a flat bottom that enables it to be placed on a flat surface such as a table. None of the items have a protective outer casing. Each item has a plastic lid with features designed to seal the container and keep the liquids inside from spilling. The items are further described as follows:

Autoseal Westloop Stainless Travel Mug – This item is imported in 16, 20, and 24 ounce capacity sizes.

Extreme Stainless Travel Mug – This item holds 16 fluid ounces of liquid, incorporates a carry-handle that is attached to one side of the body and features a band of rubber around the middle to serve as a grip.

Snapseal Byron Stainless Travel Mug – This item is imported in 16 and 20 ounce capacity sizes. It has a band of rubber around the middle which serves as a grip.

Astor Stainless Travel Mug – This item holds 16 fluid ounces of liquid.

Autoseal Scout Kids Stainless Bottle – This item holds 12 fluid ounces of liquid.

ISSUE:

Whether the instant stainless steel beverage containers are classified as table, kitchen, or other household articles of steel in heading 7323, HTSUS, or as vacuum vessels of heading 9617, HTSUS.

LAW AND ANALYSIS:

Merchandise imported into the United States is classified under the HTSUS, in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 requires that classification be determined first according to the terms

of the headings of the tariff schedule and any relative section or chapter notes and, unless otherwise required, according to the remaining GRIs taken in order. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the heading and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order. Pursuant to GRI 6, classification at the subheading level uses the same rules, *mutatis mutandis*, as classification at the heading level.

The HTSUS provisions under consideration are as follows:

- 9617: Vacuum flasks and other vacuum vessels, complete with cases; parts thereof other than glass inners
- 7323: Table, kitchen or other household articles and parts thereof, of iron or steel; iron or steel wool; pot scourers and scouring or polishing pads, gloves and the like, of iron or steel:

Note 1(m) to Section XV provides as follows:

- (m) Hand sieves, buttons, pens, pencil-holders, pen nibs, monopods, bipods, tripods and similar articles or other articles of chapter 96 (miscellaneous manufactured articles);

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the official interpretation of the HTSUS. While not legally binding or dispositive, the ENs provide a commentary on the scope of each heading of the HTSUS and are generally indicative of the proper interpretation of these headings at the international level. *See* T.D. 89–80, 54 Fed. Reg. 35127 (August 23, 1989).

The EN to heading 9617 provides as follows:

This heading covers : (1) Vacuum flasks and other similar vacuum vessels, provided they are *complete with the cases*. This group includes vacuum jars, jugs, carafes, etc., designed to keep liquids, food or other products at fairly constant temperature, for reasonable periods of time. These articles consist of a double-walled receptacle (the inner), generally of glass, with a vacuum created between the walls, and a *protective outer casing* of metal, plastics or other material, sometimes covered with paper, leather, leather cloth, etc. The space between the vacuum container and the outer casing may be packed with insulating material (glass fibre, cork or felt). *The heading also includes double-walled stainless steel vacuum insulated thermal flasks without a protective outer case, which perform temperature retention.*

* * * *

The rulings under reconsideration classified various stainless steel water bottles having vacuum properties in heading 7323, HTSUS, as table, kitchen or other household articles of iron or steel. We have reconsidered these rulings, and it is now our position that this merchandise is properly classified in heading 9617, HTSUS, as vacuum flasks or other vacuum vessels.

Heading 9617, HTSUS, provides for vacuum flasks and other vacuum vessels, “*complete with cases*” (emphasis added). Heading 9617 does not specify what is meant by “complete with cases.” The Explanatory Note to heading 9617 clarify that “[t]hese articles consist of a double-walled receptacle (the inner), generally of glass, with a vacuum created between the walls, and a protective outer casing of metal, plastics or other material.” The EN does not clearly state that the outer casing cannot be the same as the outer wall.

The containers at issue in NY N297758, NY N297169, NY N254461 and NY N264760 feature an insulating, double-walled construction with a partial vacuum in between the two walls. However, the bottles lack an additional outer casing beyond the second stainless steel wall. CBP determined that the lack of an outer protective casing on the beverage containers at issue precluded their classification in heading 9617, HTSUS. We do not believe that this position is supported by the legal text or the ENs to heading 9617. Neither heading 9617 nor the EN to heading 9617 clearly state that the outer casing cannot be the same as the outer wall. In addition, the EN to heading 96.17 were revised in 2017 to explicitly clarify that “the heading also includes double-walled stainless steel vacuum insulated thermal flasks without a protective outer case, which perform temperature retention.” Thus, we find that the scope of heading 9617 is not limited to containers having both a double walled vacuum construction and an additional outer casing. The instant containers have a double-walled construction which performs temperature retention; therefore, the products meet the terms of heading 9617 whether they have an additional outer casing or not.

Note 1(m) to Section XV excludes products of Chapter 96 from classification in Chapters 72–83. As the instant merchandise is *prima facie* classifiable in heading 9617, it cannot be classified in heading 7323. The beverage containers at issue in NY N254461 and NY N264760 are therefore classified in heading 9617, subheading 9617.00.10, HTSUS.

This conclusion is consistent with prior CBP rulings (see e.g., NY I82229, dated September 3, 2022, NY K80408, dated December 10, 2003, NY N057957, dated July 2, 2009, and HQ 962648, dated November 9, 1999, classifying similar beverage containers with double-walled construction and vacuum properties in heading 9617, HTSUS), and with the decision by the Harmonized System Committee (HSC) of the World Customs Organization to classify a similar product in heading 9617, as reflected in the WCO Compendium of Classification Opinions (C.O.) at C.O. 961700/1 (“Double-walled stainless steel vacuum insulated thermal flask”). In classifying the stainless steel vacuum flask in heading 96.17, the HSC likewise considered that the outer layer could be regarded as an “outer casing of metal” and, that being so, the product was in conformity with the legal text and the Explanatory Note to heading 96.17 despite the lack of an additional outer casing.

The comments received in response to the Notice of Proposed Revocation argue that neither the change to the Explanatory Notes of heading 9617 nor the decision by the HSC to classify vacuum insulated steel containers in heading 9617 can alter the plain meaning of the legal text. We agree. As noted above, the legal text provides for “Vacuum flasks and other vacuum vessels, complete with cases.” The instant containers are clearly vacuum flasks within the meaning of the tariff, featuring vacuum insulation between the inner and outer shell of the container. They also have a hard, durable and protective outer shell of steel, which is consistent with the meaning of the term “case.” There is no requirement in the legal text that a case must be separate, distinct, unintegrated covering and not a protective outer shell or covering. Thus, we find that the legal text supports classification of the instant merchandise in heading 9617. The ENs and HSC classification decision are merely evidence of a common legal interpretation consistent with our own.

HOLDING:

Pursuant to GRIs 1 and 6, the stainless steel containers at issue are classified in heading 9617, specifically subheading 9617.00.10, HTSUS., which provides for “Vacuum flasks and other vacuum vessels, complete with cases; parts thereof other than glass inner: Vessels: Having a capacity not exceeding 1 liter.” The 2021 column one, general rate of duty is 7.2% *ad valorem*.

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

EFFECT ON OTHER RULINGS:

NY N297758, dated July 9, 2018, NY N297169, dated June 15, 2018, NY N254461, dated September 10, 2014, and NY N264760, dated June 16, 2015, are hereby revoked.

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

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division


**PROPOSED REVOCATION OF ONE RULING LETTER AND
PROPOSED REVOCATION OF TREATMENT RELATING TO
THE TARIFF CLASSIFICATION OF A CAT COLLAR**

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

ACTION: Notice of proposed revocation of one ruling letter and proposed revocation of treatment relating to the tariff classification of a Cat Collar.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to revoke one ruling letter concerning tariff classification of a Cat Collar under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

DATE: Comments must be received on or before August 6, 2021.

ADDRESS: Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325–1757.

FOR FURTHER INFORMATION CONTACT: Andrew Levey, Chemicals, Petroleum, Metals and Miscellaneous Classification Branch, Regulations and Rulings, Office of Trade, at (202) 325–3298.

SUPPLEMENTARY INFORMATION:

BACKGROUND

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

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to revoke one ruling letter pertaining to the tariff classification of a Cat Collar. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") 891581, dated November 1, 1993 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

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

In NY 891581, CBP classified a Cat Collar in heading 4201, HTSUS, specifically in subheading 4201.00.3000, HTSUS, which provides for "saddlery and harness for any animal (including traces, leads, knee pads, muzzles, saddle cloths, saddlebags, dog coats and the like), of any material: Dog leashes, collars, muzzles, harnesses and similar dog equipment." CBP has reviewed NY 891581 and has determined the ruling letter to be in error. It is now CBP's position that a Cat Collar is properly classified, in heading 4201, HTSUS, specifically in subheading 4201.00.6000, HTSUS, which provides for "saddlery and harness for any animal (including traces, leads, knee pads, muzzles, saddle cloths, saddle bags, dog coats and the like), of any material: other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to revoke NY 891581 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed HQ H310905, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated: June 4, 2021

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

Attachments

NY 891581

November 1, 1993

CLA-2-42:S:N:N5:353 891581

CATEGORY: Classification

TARIFF NO.: 4201.00.3000

MS. PAULA DUNN
NEXUS RUBICON
57 MAXWILL AVE.
TORONTO, ONTARIO
CANADA M5P2B4

RE: The tariff classification of a reflective cat collar from Canada.

DEAR MS. DUNN:

In your letter dated October 12, 1993 you requested a tariff classification ruling.

The submitted sample is a cat collar. The "tenth life" collar is a reflective, adjustable, break away cat collar. The item consists of nylon webbing or elastic with a reflective film on top. It has a plastic buckle and glide and a steel rectangular D- ring. The collar is used for cat identification and as a safety device to increase a cats visibility at night to automobiles.

The applicable subheading for the reflective cat collar will be 4201.00.3000, Harmonized Tariff Schedule of the United States (HTS), which provides for saddlery and harness for any animal (including traces, leads, knee pads, muzzles, saddle cloths, saddle bags, dog coats and the like), of any material: Dog leashes, collars, muzzles, harnesses and similar dog equipment. The rate of duty will be 2.4 percent ad valorem.

Goods classifiable under subheading 4201.00.3000 Harmonized Tariff Schedule of the United States (HTS), which have originated in the territory of Canada, will be entitled to a free rate of duty under the United States-Canada Free Trade Agreement (FTA) upon compliance with all applicable regulations.

This ruling is being issued under the provisions of Section 177 of the Customs Regulations (19 C.F.R. 177).

A copy of this ruling letter should be attached to the entry documents filed at the time this merchandise is imported. If the documents have been filed without a copy, this ruling should be brought to the attention of the Customs officer handling the transaction.

Sincerely,

JEAN F. MAGUIRE
Area Director
New York Seaport

HQ H310905

OT:RR:CTF:CPMM:ABL

CATEGORY: Classification

TARIFF NO.: 4201.00.6000

Ms. PAULA DUNN
 NEXUS RUBICON
 57 MAXWILL AVE.
 TORONTO, ONTARIO
 CANADA M5P2B4

RE: Revocation of NY 891581; classification of a reflective cat collar

DEAR Ms. DUNN,

This is in reference to the New York Ruling Letters (NY) 891581 issued to you by U.S. Customs and Border Protection (CBP) on November 1, 1993, concerning the classification of a reflective cat collar under the Harmonized Tariff Schedule of the United States (HTSUS). We have reviewed this ruling, and determined it is incorrect, with respect to the classification of the reflective cat collar under subheading 4201.00.3000, HTSUS, the provision for “saddlery and harness for any animal (including traces, leads, knee pads, muzzles, saddle cloths, saddlebags, dog coats and the like), of any material: Dog leashes, collars, muzzles, harnesses and similar dog equipment.” For the reasons set forth below, we are revoking the ruling.

FACTS:

The merchandise under consideration is identified as a cat collar. The “tenth life” collar is a reflective, adjustable, break away cat collar. The item consists of nylon webbing or elastic with a reflective film on top. It has a plastic buckle and glide and a steel rectangular D-ring. The collar is used for cat identification and as a safety device to increase a cat’s visibility at night to automobiles.

ISSUE:

Whether the subject merchandise consisting of a reflective cat collar should remain classified in subheading 4201.00.3000, HTSUS, as “saddlery and harness for any animal... Dog leashes, collars...” or subheading 4201.00.6000, HTSUS, as “other [harness for any animal].”

LAW AND ANALYSIS:

Classification of goods under the HTSUS is governed by the General Rules of Interpretation (GRI). GRI 1 provides that classification shall be determined according to the terms of the headings of the tariff schedule and any relative section or chapter notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRIs 2 through 6 may then be applied in order.

The HTSUS provisions at issue are as follows:

* * * * *

4201.00 Saddlery and harness for any animal (including traces, leads, knee pads, muzzles, saddle cloths, saddle bags, dog coats and the like), of any material:

4201.00.3000 Dog leashes, collars, muzzles, harnesses and similar dog equipment

4201.00.6000 Other

* * * * *

As noted above, the merchandise was originally classified in subheading 4201.00.3000, HTSUS which comprises of dog leashes, collars and other similar dog equipment. The present merchandise, however, is a cat collar, and therefore is not provided for in subheading 4201.00.3000, HTSUS, as it is not dog equipment. Therefore, the correct classification for the merchandise described in NY 891581 is 4201.00.6000, HTSUS.

HOLDING:

The applicable subheading for the reflective cat collar, will be 4201.00.6000, HTSUS, which provides for “saddlery and harness for any animal (including traces, leads, knee pads, muzzles, saddle cloths, saddle bags, dog coats and the like), of any material: other.”

The general, column 1 rate of duty for subheadings 4201.00.6000, HTSUS, is 2.8% *ad valorem*.

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

A copy of this ruling letter should be attached to the entry documents filed at the time the goods are to be entered. If the documents have been filed without a copy, this ruling should be brought to the attention of the CBP officer handling the transaction.

EFFECT ON OTHER RULINGS

New York Ruling letter N891581, dated November 1, 1993 is hereby REVOKED in accordance with the above analysis.

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

Sincerely,

CRAIG T. CLARK,

Director

Commercial and Trade Facilitation Division

CC: NIS Vikki Lazaro

U.S. Court of International Trade

Slip Op. 21–77

MAPLE LEAF MARKETING, INC., Plaintiff, v. UNITED STATES et al.,
Defendants.

Before: Claire R. Kelly, Gary S. Katzmann, and Jane A. Restani, Judges
Court No. 20–00125

[Granting Defendants’ partial motion to dismiss Plaintiffs’ complaint.]

Dated: June 22, 2021

Richard F. O’Neill and *John M. Peterson*, Neville Peterson LLP, of New York, NY, argued for plaintiff. Also on the brief was *Patrick B. Klein*.

Ann C. Motto, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendants. Also on the briefs were *Jeffrey Bossert Clark*, Acting Assistant Attorney General, *Jennifer B. Dickey*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director.

OPINION AND ORDER

Kelly, Judge:

Defendants move for partial dismissal of Plaintiff Maple Leaf Marketing Inc.’s (“Maple Leaf” or “Plaintiff”) challenge to the constitutionality and lawfulness of duties imposed on re-imported steel tubing from Canada pursuant to Section 232 of the Trade Expansion Act of 1962 (“Section 232”), as amended, 19 U.S.C. § 1862 (2018).¹ *See* Defs.’ Partial Mot. to Dismiss Compl., Sept. 23, 2020, ECF No. 14 (“Defs.’ Partial Mot. to Dismiss”); *see also* Compl., June 24, 2020, ECF No. 5. Defendants seek dismissal of any challenge raised by Plaintiff to any decision of U.S. Customs and Border Protection (“Customs” or “CBP”) when implementing duties imposed pursuant to Section 232 (“Section 232 duties”), either for lack of jurisdiction or as abandoned or waived. *See* Defs.’ Partial Mot. to Dismiss at 20–26;² *see also* Defs.’

¹ Further citations to the Trade Expansion Act of 1962, as amended, are to the relevant provisions of the U.S. Code, 2018 edition.

² Defendants request dismissal of the U.S. Trade Representative (“USTR”) from this action. *See* Defs.’ Partial Mot. to Dismiss at 19–20. Defendants argue that, contrary to Plaintiff’s allegations, the USTR is not generally responsible for publishing the Harmonized Tariff Schedule of the United States (“HTSUS”), that the President’s proclamation did not direct the USTR to make changes to the HTSUS, and that the USTR did not in fact make any such changes to the HTSUS. *See* Defs.’ Partial Mot. to Dismiss at 19–20; *see also* Defs.’ Reply Br. at 23–24. Defendants argue that Plaintiff otherwise fails to allege that the USTR acted unlawfully. *See* Defs.’ Partial Mot. to Dismiss at 19–20. As Plaintiff here challenges the actions of the Government more broadly, and the parties have not briefed the issue with respect to Count II—which Defendants here do not challenge—the court declines to dismiss the USTR at the motion to dismiss stage.

Reply Supp. Partial Mot. to Dismiss at 20–24, Jan. 15, 2021, ECF No. 22 (“Defs.’ Reply Br.”). Defendants contend that all remaining counts, except for Count II, should be dismissed for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) of the U.S. Court of International Trade (“USCIT”). See Defs.’ Partial Mot. to Dismiss at 1; see also USCIT R. 12(b)(6). Plaintiff requests the court deny Defendants’ motion, arguing that the court has jurisdiction over its claims, and maintaining that the remaining counts plausibly assert that the Government’s imposition and assessment of Section 232 duties in this instance violates the Due Process Clause of the Fifth Amendment to the U.S. Constitution, is untimely under 19 U.S.C. § 1862, and is otherwise an *ultra vires* and unlawful exercise of delegated statutory authority.³ See Pl.’s Resp. Opp. [Defs.’ Partial Mot. to Dismiss] at 1–6, Dec. 11, 2020, ECF No. 18 (“Pl.’s Br.”). For the following reasons, Defendants’ partial motion to dismiss is granted.

BACKGROUND

Section 232 empowers the President to adjust imports of articles that may threaten to impair the national security of the United States. The Secretary of Commerce (“Secretary”), in consultation with the Secretary of Defense and other appropriate officers, conducts an investigation to determine the effects on the national security of imports of certain articles. See 19 U.S.C. § 1862(b). The Secretary submits to the President a report that details the investigation’s findings, advises the President if the subject article is “being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security,” and, based on such findings, recommends action or inaction. See *id.* § 1862(b)(3)(A). Within ninety days after receiving the Secretary’s report, the President must decide whether he or she concurs; if so, the President must

³ Claiming that Defendants’ motion “relies on matters outside the pleadings,” Plaintiff also “invites the court” to treat Defendants’ motion to dismiss as a motion for summary judgment pursuant to USCIT Rule 12(d). See Pl.’s Br. at 7 n.1. “If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.” USCIT R. 12(d). “All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.” *Id.* However, where “there has been no serious contention that the facts are contested[,]” the issues are purely legal and the court need not convert a motion to dismiss to a motion for summary judgment. See, e.g., *Easter v. United States*, 575 F.3d 1332, 1336 (Fed. Cir. 2009) (“*Easter*”). Here, Plaintiff does not identify what matters Defendants relied upon that were beyond the pleadings. To the extent that Plaintiff references Defendants’ attachment of Cargo Systems Messaging Service (“CSMS”) messages to their motion, Defendants aver that Plaintiff’s complaint incorporated the CSMS messages by reference, and thus are appropriate to consider on a motion to dismiss. Defs.’ Reply Br. at 1–2 n.1; see also Compl. ¶¶ 63, 97–98, 100, 207. Since there are otherwise no serious contentions that the facts are disputed, see, e.g., *Easter*, 575 F.3d at 1336, and the matter before the court is purely legal, the court declines the Plaintiff’s invitation.

also 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). The President has fifteen days after the day on which he or she determines to take action to implement that action. *Id.* § 1862(c)(1)(B). Should the President decide that the action to be taken under § 1862(c)(1) is “the negotiation of an agreement which limits or restricts” imports of articles that threaten to “impair the national security,” and either “no such agreement is entered into before the date that is 180 days after the date on which the President ma[de] the determination[,]” or such agreement has entered into force but “is not being carried out or is ineffective in eliminating the threat to the national security[,] . . . the President shall take such other actions as the President deems necessary[.]” *Id.* § 1862(c)(3)(A). The President “shall publish in the Federal Register notice of any additional actions being taken under [19 U.S.C. § 1862] by reason of [19 U.S.C. § 1862 (c)(3)(A)].” *See id.* § 1862(c)(3)(A).⁴

On April 19, 2017, the Secretary initiated a Section 232 investigation to determine the effects of steel imports on national security. *See Notice Request for Public Comments and Public Hearing on Section 232 National Security Investigation of Imports of Steel*, 82 Fed. Reg. 19,205, 19,205 (Dep’t Commerce Apr. 26, 2017). The product scope of the investigation covered “steel mill products . . . which are defined at the Harmonized System (“HS”) 6-digit level as: 720610 through 721650, 721699 through 730110, 730210, 730240 through 730290, and 730410 through 730690, including any subsequent revisions to these HS codes.” *Publication of a Report on the Effect of Imports of Steel on the National Security*, 85 Fed. Reg. 40,202, 40,209 (Dep’t Commerce July 6, 2020) (an investigation conducted under [Section 232]) (“*Steel Report*”).

On January 11, 2018, the Secretary delivered the report to the President. *See Proclamation 9705 of March 8, 2018*, 83 Fed. Reg. 11,625, 11,625 (Mar. 15, 2018) (“*Proclamation 9705*”); *see also Steel Report*, 85 Fed. Reg. 40,202. The *Steel Report* “conclude[d] that the present quantities and circumstance of steel imports are ‘weakening our internal economy’ and threaten to impair the national security as defined in Section 232[.]” 85 Fed. Reg. at 40,204, and recommended that the President “impose a [63 percent] quota or [24 percent] tariff on all steel products covered in this investigation imported into the

⁴ If the President decides not to take further action, “the President shall publish in the Federal Register such determination and the reasons on which such determination is based.” 19 U.S.C. § 1862(c)(3)(B).

United States[.]” *Id.* at 40,205. “In selecting an alternative,” the *Steel Report* also advised that “the President could determine that specific countries should be exempted from the proposed 63 percent quota or 24 percent tariff . . . based on an overriding economic or security interest of the United States.” *Id.* at 40,226.

On March 8, 2018, within ninety days of receiving the report, the President issued *Proclamation 9705*. See 83 Fed. Reg. at 11,625, 11,628. Concurring with the Secretary’s findings, the President announced a 25 percent *ad valorem* tariff on steel articles “imported from all countries except Canada and Mexico.” *Id.* at 11,626 ¶ 8. *Proclamation 9705* states that, except as otherwise provided, “all steel articles imports specified in the Annex shall be subject to an additional 25 percent ad valorem rate of duty[.]” *Id.* at 11,627 cl. 2. The President implemented the tariffs by modifying Subchapter III of Chapter 99 of the Harmonized Tariff Schedule of the United States (“HTSUS”) to add a new note and a new tariff provision under the heading 9903.80.01. *Id.* at 11,627 cl. 2; see also *id.* at 11,629–30 (Annex to modify Chapter 99 of the [HTSUS]). Namely, the Annex added Note 16 to Subchapter III of Chapter 99, which provides, in relevant part, the following:

- (a) Heading 9903.80.01 sets forth the ordinary customs duty treatment applicable to all entries of iron or steel products from all countries, except products of Canada and of Mexico, classifiable in the headings or subheadings enumerated in this note. Such goods shall be subject to duty as provided herein. No special rates of duty shall be accorded to goods covered by heading 9903.80.01 under any tariff program enumerated in general note 3 (c)(i) to the tariff schedule. All anti-dumping, countervailing, or other duties and charges applicable to such goods shall continue to be imposed.
- (b) The rates of duty set forth in heading 9903.80.01 apply to all imported products of iron or steel classifiable in the provisions enumerated in this subdivision:
 - (i) flat-rolled products provided for in headings 7208, 7209, 7210, 7211, 7212, 7225 or 7226;
 - (ii) bars and rods provided for in headings 7213, 7214, 7215, 7227, or 7228, angles, shapes and sections of 7216 (except subheadings 7216.61.00, 7216.69.00 or 7216.91.00); wire provided for in headings 7217 or 7229; sheet piling provided for in subheading 7301.10.00; rails provided for in subheading 7302.10; fish-plates and sole plates pro-

vided for in subheading 7302.40.00; and other products of iron or steel provided for in subheading 7302.90.00;

- (iii) tubes, pipes and hollow profiles provided for in heading 7304, or 7306; tubes and pipes provided for in heading 7305.
- (iv) ingots, other primary forms and semi-finished products provided for in heading 7206, 7207 or 7224; and
- (v) products of stainless steel provided for in heading 7218, 7219, 7220, 7221, 7222 or 7223.

Proclamation 9705, 83 Fed. Reg. at 11,629 (Annex). With respect to Canada and Mexico, the President determined that it would be “necessary and appropriate . . . to continue ongoing discussions . . . and to exempt steel articles imports from these countries from the tariff, at least at this time.” *Id.* at 11,626 ¶ 10.

On March 22, 2018,⁵ the President amended *Proclamation 9705* to temporarily exempt from Section 232 duties steel articles imported from several more countries,⁶ pending negotiations with those countries. *See Proclamation 9711 of March 22, 2018*, 83 Fed. Reg. 13,361, 13,363–65 (Mar. 28, 2018) (“*Proclamation 9711*”). On April 30, 2018, having reached agreements in principle with the Argentine Republic (“Argentina”), the Commonwealth of Australia (“Australia”), and Federative Republic of Brazil (“Brazil”), the President extended the exemption from Section 232 duties on steel imports from those countries indefinitely, but declared that the exemption on steel imports from Canada would expire on June 1, 2018. *See Proclamation 9740 of April 30, 2018*, 83 Fed. Reg. 20,683, 20,684–66 (May 7, 2018) (“*Proclamation 9740*”). The proclamation also amended Note 16 in two noteworthy respects. First, *Proclamation 9740* amended subdivision (a) to provide, *inter alia*, that:

⁵ As recommended by the Secretary, *see Proclamation 9705*, 83 Fed. Reg. at 11,625, the President authorized the Secretary, in consultation with various other officials, to provide relief from Section 232 duties: “for any steel article determined not to be produced in the United States in a sufficient and reasonably available amount or of a satisfactory quality.” *Id.* at 11,627 cl. 3.

⁶ *Proclamation 9711* states that the United States:

is continuing discussions with Canada and Mexico, as well as the following countries, on satisfactory alternative means to address the threatened impairment to the national security by imports of steel articles from those countries: the Commonwealth of Australia (Australia), the Argentine Republic (Argentina), the Republic of Korea (South Korea), the Federative Republic of Brazil (Brazil), and the European Union (EU) on behalf of its member countries.

83 Fed. Reg. at 13,361.

Goods for which entry is claimed under a provision of Chapter 98 and which are subject to [Section 232 duties] shall be eligible for and subject to the terms of such provision . . . except that duties under subheading 9802.00.60 shall be assessed based upon the full value of the imported article.

83 Fed. Reg. at 20,687 (Annex). Second, the proclamation amended subdivision (b) to provide, *inter alia*, that:

Any reference above to iron or steel products classifiable in any heading or subheading of chapter 72 or 73, as the case may be, shall mean that any good provided for in the article description of such heading or subheading and of all its subordinate provisions (both legal and statistical) is covered by the provisions of this note and related tariff provisions.

Id. at 20,688 (Annex). On May 31, 2018, the President issued *Proclamation 9759 of May 31, 2018*, which announced agreements on a range of measures with Argentina, Australia, and Brazil. *See* 83 Fed. Reg. 25,857, 25,857–60 (June 5, 2018) (“*Proclamation 9759*”).

The temporary exemption from Section 232 duties covering steel imports from Canada expired on June 1, 2018. *See id.* at 25,858 ¶ 6 (“[I]t is necessary and appropriate, at this time, to maintain the current tariff level as it applies to other countries.”); *see also Proclamation 9740*, 83 Fed. Reg. at 20,684 ¶ 7, 20,685 cl. 1. Thus, 25 percent tariffs on steel imports from Canada took effect 85 days after the President issued *Proclamation 9705*.

On July 6, 2018, Customs issued a message communicating the contents of *Proclamation 9705* to importers via its Cargo Systems Messaging Service (“CSMS”). *See* Defs.’ Partial Mot. to Dismiss at Ex. 1 (“CSMS No. 18–000424”). Regarding the applicability of Section 232 duties to products imported under the provisions of Chapter 98 of the HTSUS, Customs stated that:

where a valid claim for Chapter 98 treatment is made for goods that would have otherwise been subject to Section 232 duties (i.e., classifiable in one of the named provisions in Ch. 72, 73 or 76 and a product of a country other than the United States or an exempt country), Section 232 duties are assessed in the same manner as regular customs duties. This means that goods eligible for Chapter 98 provisions that provide duty-free treatment are free of Section 232 duties. By contrast, where the Chapter 98 provision provides for the assessment of duties on a portion of the article, such as the value of the repair or other processing, Section 232 duties are to be assessed on that value. However, an exception occurs for subheading 9802.00.60, HTSUS. If covered

goods are entered under this provision, Section 232 duties are to be assessed on the entire value of the articles.

CSMS No. 18–000424.

On May 19, 2019, the President proclaimed that the United States had come to agreements with Canada and Mexico on “satisfactory alternative means to address the threatened impairment of the national security posed by steel articles imports[.]” *Proclamation 9894 of May 19, 2019*, 84 Fed. Reg. 23,987, 23,987 ¶ 5 (May 23, 2019). Therefore, the President “exclude[d] Canada and Mexico from the tariff proclaimed in Proclamation 9705, as amended.” *Id.* at 23,988–89 ¶ 6, cl. 1. On April 13, 2020, Customs sent a CSMS message stating that:

where a valid claim for Chapter 98 treatment is made for goods that are also subject to Section 232 duties (i.e., classifiable in one of the named provisions in Ch. 72, 73 or 76 and a product of a country other than the United States or an exempt country), Chapter 98 treatment will be applied. However, in addition, Section 232 duties, under Chapter 99, will be assessed independently from any Chapter 98 treatment and in accordance with the applicable chapter 99 note. Furthermore, where the Chapter 98 provision provides for the assessment of duties on a portion of the article, such as the value of the repair or other processing, Section 232 duties are to be assessed on that value. However, an exception occurs for subheading 9802.00.60, HTSUS. If covered goods are entered under this provision, Section 232 duties are to be assessed on the entire value of the articles.

See Defs.’ Partial Mot. to Dismiss at Ex. 2 (“CSMS No. 42355735”) (emphasis removed).

According to the complaint, Maple Leaf is the exclusive U.S. importer and distributor of a specially hardened and boronized J-55 steel tubing product called EndurAlloy™. Compl. ¶¶ 11, 47. EndurAlloy™ is “the end-product of a specialized chemical deposition alteration treatment performed exclusively” by a company in Canada which sources steel tubing of certain specifications from U.S. vendors, and subjects the tubing to a proprietary alteration treatment. *See id.* ¶ 48. The result is a steel tubing product “with significantly improved hardness and technical advantages.” *Id.* ¶ 48. Although primarily classified under HTSUS subheadings 7304 and 7306, *id.* ¶ 51, Maple Leaf asserted during entry that its imports of EndurAlloy™ steel tubing qualified for special treatment under HTSUS subheading 9802.00.50 “as goods subject to repair and alteration treatments

abroad.” *Id.* ¶ 53. As of its first importation of EndurAlloy™ steel tubing on June 25, 2018, Maple Leaf alleges that CBP has assessed Section 232 duties on the cost or value of repairs or alterations to its steel imports that qualify for special treatment under Chapter 98 of the HTSUS. *See id.* ¶¶ 21, 62–63, 92.

On June 24, 2020, Plaintiff Maple Leaf commenced this challenge to the lawfulness of the Government’s assessment of Section 232 duties on its imports of steel from Canada. *See* Compl. ¶ 1; Summons, June 24, 2020, ECF No. 1. Count I contests the President’s imposition of Section 232 duties on steel imports from Canada as untimely. *See* Compl. at ¶¶ 71–77. Count II contests the Bureau of Industry and Security’s denial of Plaintiff’s request for exclusion from Section 232 duties. *See id.* ¶¶ 78–87. Count III alleges that the Government’s assessment of Section 232 duties on steel articles qualifying for repair and alteration treatment under Chapter 98 of the HTSUS, as well as CBP’s guidance communicating the applicability of Section 232 duties to steel imports qualifying for treatment under Chapter 98, are unlawful. Compl. ¶¶ 88–100. Count IV alleges that the Government acted in excess of its statutory authority under Section 232 since it failed to publish the *Steel Report* in the Federal Register. *See* Compl. ¶¶ 4, 101–03; *see also* 19 U.S.C. § 1862(b)(3)(B). Count V claims that the Government’s imposition of Section 232 duties on its entries of steel articles violates its right to due process under the U.S. Constitution. *See* Compl. ¶¶ 104–08; *see also* U.S. CONST. amend. V. Count VI claims that Section 232 is an unconstitutional delegation of authority to the Executive Branch. *See* Compl. ¶¶ 109–10. Defendants timely moved to dismiss all counts raised in Plaintiff’s complaint, except for Count II. *See generally* Defs.’ Partial Mot. to Dismiss.

JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction under 28 U.S.C. § 1581(i)(2), (4) (2018).⁷ In deciding a motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes all factual allegations in the complaint to be true and draws all reasonable inferences in favor of the plaintiff. *See Cedars-Sinai Med. Ctr. v. Watkins*, 11 F.3d 1573, 1584 n.13 (Fed. Cir. 1993); *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991). However, the “[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citations and footnote omitted). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory state-

⁷ Further citations to Title 28 of the U.S. Code are to the 2018 edition.

ments, [will] not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). “[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.” *Id.* at 679 (citations omitted). Interpretations of the scope of a presidential proclamation is a question of law. *See Florsheim Shoe Co. v. United States*, 19 CIT 295, 297, 880 F. Supp. 848, 850–51 (1995).

DISCUSSION

I. Duties on Re-Imported Steel Tubing from Canada

Defendants seek dismissal of Plaintiff’s challenges to the timeliness of the President’s imposition of Section 232 duties on imports of steel articles from Canada and goods imported under Chapter 98 of the HTSUS for failure to state a claim upon which relief can be granted. *See generally* Defs.’ Partial Mot. to Dismiss; *see also* Compl. ¶¶ 35, 71–77, 88–100 (Counts I & III). Defendants argue that *Proclamation 9705* complies with Section 232’s timing provisions because it simultaneously imposed Section 232 duties on steel imports from Canada and exempted from operation of Section 232 duties those imports pending negotiations. *See* Defs.’ Partial Mot. to Dismiss at 16–18. Defendants assert that Plaintiff otherwise fails to plausibly allege that the President’s imposition of Section 232 duties on Chapter 98 goods was unlawful. *See id.* at 30–41. Plaintiff counters that *Proclamation 9705* did not impose duties on goods from Canada or on goods entered under Chapter 98 of the HTSUS, and that subsequent proclamations seeking to do so are untimely or otherwise unlawful. *See* Pl.’s Br. at 16–35. Plaintiff claims that even if the President commenced negotiations under 19 U.S.C. § 1862(c)(3)(A), the statute requires that the President negotiate with Canada for 180 days before imposing Section 232 duties. *See id.* at 29. For the following reasons, the court holds that the President lawfully imposed Section 232 duties on Plaintiff’s imports of steel articles from Canada and goods covered under Chapter 98 of the HTSUS, and therefore dismisses Counts I and III of Plaintiff’s complaint for failure to state a claim upon which relief can be granted.

A. Section 232 Duties on Steel Imports from Canada

In issuing *Proclamation 9705*, the President took timely action consistent with his powers under 19 U.S.C. § 1862(c)(1) to adjust steel imports from Canada. As explained, Section 232 empowers the President, within ninety days of receiving a report from the Secretary finding that an article is being imported under circumstances that threaten the national security of the United States, to “determine the nature and duration of the action that” in his judgment must be taken

to adjust imports that threaten the national security. *See* 19 U.S.C. § 1862(c)(1)(A)(ii). Upon so deciding, the President has 15 days to take remedial action. *Id.* § 1862(c)(1)(B). In seeking to remedy the threat, if the President decides that the action to be taken under 19 U.S.C. § 1862(c)(1) is the negotiation of an agreement “which limits or restricts” imports of the article that threatens to impair the national security, and “no such agreement is entered into before the date that is 180 days after the date on which the President makes the determination under [19 U.S.C. § 1862(c)(1)(A)] to take such action, or . . . such an agreement that has been entered into is not being carried out or is ineffective in eliminating the threat to the national security posed by imports of [the subject] article,” the President shall take other action as he deems necessary. *Id.* § 1862(c)(3).

Proclamation 9705 imposed a 25 percent tariff on all steel imports while exempting imports from Canada and Mexico pending the outcome of ongoing negotiations. The President has the power to determine the nature and duration of the action to be taken to adjust imports that, in his judgment, will protect the national security. The “nature and duration” of the action the President deems necessary to adjust imports may be a contingent tariff. Such a tariff may be contingent upon whatever condition the President, in his judgment, determines will adjust imports and protect the national security. *See* 19 U.S.C. § 1862(c)(1)(A)(ii).

Here, the President’s judgment led him to impose a contingent tariff on steel imports from Canada, subject to the condition that negotiations with Canada fail to result in a satisfactory agreement. The language of *Proclamation 9705* indicates that the President’s action to adjust imports included a decision to impose a tariff on all steel imports and temporarily exempt steel imports from Canada in hopes of reaching a satisfactory agreement. The President “determined that the necessary and appropriate means to address the threat to the national security posed by imports of steel articles from Canada and Mexico is to continue ongoing discussions with these countries and to exempt steel articles imports from these countries from the tariff, at least at this time.” *Proclamation 9705*, 83 Fed. Reg. at 11,626 ¶ 10. The President’s use of the word “exempt” and qualification that Section 232 duties would not apply “at this time” when describing the action to be taken with respect to steel imports from Canada in the prefatory section of the proclamation indicate a temporary exemption from the effect of the President’s imposition of Section 232 duties for the pendency of ongoing negotiations. The President then observed that “[w]ithout this tariff and satisfactory outcomes in ongoing negotiations with Canada and Mexico, the industry will continue to de-

cline[.]” *Id.* at 11,627 ¶ 11. Accordingly, the President directed, in clause two of *Proclamation 9705*, that “an additional 25 percent ad valorem rate of duty” shall apply “to imports of steel articles from all countries except Canada and Mexico.” *Id.* at 11,627 cl. 2. The President’s imposition of Section 232 duties on steel imports from Canada, contingent upon failure to negotiate a satisfactory agreement, falls within the President’s power to determine the nature and duration of the action to be taken to adjust imports granted by 19 U.S.C. § 1862(c)(1). Subsequent proclamations regarding the status of negotiations and further exemptions from Section 232 duties did not enlarge the action set out in *Proclamation 9705* with respect to Canada so as to implicate the statute’s procedural safeguards. *Cf. Transpacific Steel LLC v. United States*, 44 CIT __, __, 466 F. Supp. 3d 1246, 1251–53 (2020). The court holds that the President’s actions in this instance were timely and authorized. *See* 19 U.S.C. § 1862(c)(1).

Plaintiff submits that Congress limited the President’s authority in such a way as to preclude the contingent action taken here; however, Section 232 empowers the President to determine the “nature . . . of the action” that, in his judgment, “must be taken to adjust the imports of the article” that threatens to impair the national security. *See id.* § 1862(c)(1)(A)(ii). Nothing in the statute purports to limit the President’s authority to act without contingencies; to the contrary, the broad grant of authority under 19 U.S.C. § 1862(c)(1) empowers the President to exercise his judgment and determine the nature of the action necessary to adjust imports that threaten the national security. Plaintiff advances the view that the President must take a singular action, but, even if Plaintiff is correct that the President must take a singular action, Plaintiff does not explain its view of what singular action would mean under the statute. Nor does Plaintiff explain how here the President’s action, though multifaceted, cannot constitute a singular action taken to adjust imports.

Similarly, Plaintiff argues that the President’s determination to continue ongoing discussions does not indicate that the President commenced negotiations pursuant to 19 U.S.C. § 1862(c)(3). *See* Pl.’s Br. at 25–28. According to Plaintiff, the President did not “say the words” necessary to commence negotiations, and thus the imposition of tariffs following the failure of negotiations is unlawful. *See id.* However, the President’s power to take contingent action here stems from 19 U.S.C. § 1862(c)(1), not subsection (c)(3).⁸ Subsection (c)(1)

⁸ As both parties recognize, 19 U.S.C. § 1862(c)(3) further empowers the President to “take such other actions” necessary should negotiations fail. *See* Defs.’ Partial Mot. to Dismiss at 16–18; Pl.’s Br. at 23–24. Thus, had the President not imposed a contingent tariff in *Proclamation 9705*, he arguably would have nonetheless been able to impose a tariff, or some other measure, pursuant to 19 U.S.C. § 1862(c)(3). However, the court need not reach

does not require the President to “say the words”; to the contrary, 19 U.S.C. § 1862(c)(1) empowers 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[.]” *Id.* § 1862(c)(1)(A)(ii).

Finally, Plaintiff submits that the language of *Proclamation 9705* indicates that the President himself elected not to take action against steel imports from Canada because “[a]n ‘exemption’ from action is in no uncertain terms a formal declination to act[.]”⁹ Pl.’s Br. at 20. Here, however, the exemption was not a formal declination to act, but rather a necessary component of the contingent tariff imposed by the Proclamation. As discussed above, *Proclamation 9705* imposed a tariff on all steel imports while exempting imports from Canada and Mexico pending the outcome of ongoing negotiations. Therefore, the court dismisses Count I of Plaintiff’s complaint for failure to state a claim.

B. Section 232 Duties on Goods Eligible for Chapter 98 Classification

Proclamation 9705 lawfully imposes Section 232 duties on imports of steel articles, including those that are re-imported under Chapter 98. In *Proclamation 9705*, the President added Note 16 to Chapter 99, which broadly encompasses goods that are classifiable as steel articles. *Proclamation 9740* later explains the availability of Chapter 98 entry for goods subject to the Section 232 duties. Articulating as much

whether 19 U.S.C. § 1862(c)(3) would apply in this case, as the President’s power stems from 19 U.S.C. § 1862(c)(1). Further, although Plaintiff argues that 19 U.S.C. § 1862 requires that the President negotiate the entire 180 days before taking further action, *see* Pl.’s Br. at 29–35, neither the wording of the statute nor its legislative history would seem to compel such a result. *See Universal Steel Prods., Inc. v. United States*, 45 CIT __, __, 495 F. Supp. 3d 1336, 1352–54 (2021). In relevant part, 19 U.S.C. § 1862(c)(3) states that “[i]f . . . the action taken by the President . . . is the negotiation of an agreement which limits or restricts” imports “of the article that threatens to impair national security, and . . . no such agreement is entered into before the date that is 180 days after the date on which the President makes the determination under [19 U.S.C. § 1862(c)(1)(A)] to take such action,” “the President shall take such other actions as the President deems necessary to adjust the imports of such article so that such imports will not threaten to impair the national security.” 19 U.S.C. § 1862(c)(3)(A). The statute uses the word “if”, denoting two conditions which, if not met, require further action. 19 U.S.C. § 1862(c)(3)(A)(ii).

⁹ Clause 2 to *Proclamation 9705* provides:

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

83 Fed. Reg. at 11,627 cl. 2.

does not invalidate the President's imposition of Section 232 duties on imports of steel articles from Canada.¹⁰

Proclamation 9705 provides that "all steel articles imports specified in the Annex shall be subject to an additional 25 percent ad valorem rate of duty[.]" 83 Fed. Reg. at 11,627 cl. 2. The Annex to *Proclamation 9705* amends Chapter 99 of the HTSUS by adding Note 16, which provides that goods classifiable in specific subheadings "shall be subject" to Section 232 duties and lists the specific subheadings.¹¹ *Proclamation 9705*, 83 Fed. Reg. at 11,629 (Annex). Thus, Section 232 duties apply to all steel imports classifiable in the subheadings delineated in the Annex. Plaintiff's complaint acknowledges that the disputed goods were "primarily classified upon entry under subheadings of 7304 and 7306 [of the] HTSUS," Compl. ¶ 51, and both headings are enumerated in the Annex. See *Proclamation 9705*, 83 Fed. Reg. at 11,629 (Annex). Plaintiff does not point to any language in *Proclamation 9705* that purports to preclude steel articles qualifying for entry under Chapter 98.

Contrary to Plaintiff's contention, *Proclamation 9740* did not expand Section 232 duties to include articles re-imported under Chapter 98.¹² Rather, in reaffirming that Section 232 duties apply to

¹⁰ Plaintiff also argues that Section 232 duties cannot be applied to goods re-imported under Chapter 98 because there was no specific investigation by the Secretary into the effect of Chapter 98 goods on national security. See Pl.'s Br. at 30–35. According to Plaintiff, imposing tariffs on goods qualifying for special duty treatment as goods repaired or altered abroad under Chapter 98 amounts to a tariff on services performed abroad, and such a tariff is unlawful because services were not addressed in the Secretary's report. See *id.* at 33–34. Again, steel articles imported under Chapter 98 are still steel articles, regardless of whether they have been repaired or altered. See subheading 9802.00.50, HTSUS (2018); U.S. Note 3(c), Subchapter II, Chapter 98, HTSUS (2018). For the same reasons set forth above, Plaintiff's contentions fail.

¹¹ The Section 232 duties apply to the following subheadings:

- (i) flat-rolled products provided for in headings 7208, 7209, 7210, 7211, 7212, 7225 or 7226;
- (ii) bars and rods provided for in headings 7213, 7214, 7215, 7227, or 7228, angles, shapes and sections of 7216 (except subheadings 7216.61.00, 7216.69.00 or 7216.91.00); wire provided for in headings 7217 or 7229; sheet piling provided for in subheading 7301.10.00; rails provided for in subheading 7302.10; fish-plates and sole plates provided for in subheading 7302.40.00; and other products of iron or steel provided for in subheading 7302.90.00;
- (iii) tubes, pipes and hollow profiles provided for in heading 7304, or 7306; tubes and pipes provided for in heading 7305.
- (iv) ingots, other primary forms and semi-finished products provided for in heading 7206, 7207 or 7224; and
- (v) products of stainless steel provided for in heading 7218, 7219, 7220, 7221, 7222 or 7223.

Proclamation 9705, 83 Fed. Reg. at 11,629 (Annex).

¹² Subject to certain exceptions, merchandise that leaves the Customs territory of the United States remains subject to duty upon each subsequent re-importation. See U.S. Note 2, Subchapter XXII, Chapter 98, HTSUS; 19 C.F.R. 141.2 (2018); *cf.*, also *Maple Leaf Petroleum, Ltd. v. United States*, 25 C.C.P.A. 5, T.D. 48976 (1937).

imports of all steel articles, *Proclamation 9740* explained that covered imports were nonetheless eligible for special duty treatment under Chapter 98. 83 Fed. Reg. at 20,687 (Annex) (modifying the text of subdivision (a) of U.S. Note 16 to provide, in relevant part, that “[g]oods for which entry is claimed under a provision of chapter 98 and which are subject to the additional duties prescribed herein shall be eligible for and subject to the terms of such provision and applicable [CBP] regulations . . .”). Thus, Plaintiff fails to state a plausible claim that the President’s imposition of Section 232 duties on steel articles also qualifying for treatment under Chapter 98 is unlawful.

II. Claim against CBP Actions

Defendants request the court dismiss any claims that Plaintiff asserts against CBP. Defendants argue that CBP’s issuance of the CSMS guidance is not a final agency action subject to review, and that Plaintiff otherwise fails to state a claim that the guidance was unlawful. *See* Defs.’ Partial Mot. to Dismiss at 26–30.¹³ Plaintiff acknowledges that it is not challenging a meaningful CBP decision. *See* Pl.’s Br. at 10 (“At its heart, this is not a challenge to a meaningful decision made by a CBP officer, but rather a challenge to the President’s authority to issue a Presidential proclamation without authority . . .”). To the extent that Plaintiff’s complaint could be construed as asserting a claim against CBP, particularly the CSMS message,¹⁴ that claim is dismissed for failure to state a claim upon which relief can be granted.

“The APA, by its terms, provides a right to judicial review of all ‘final agency action[s] for which there is no other adequate remedy in

¹³ Defendants also move to dismiss Plaintiff’s challenges to CBP’s assessment of Section 232 duties for lack of jurisdiction. *See* Defs.’ Partial Mot. to Dismiss at 20–26. To the extent that Plaintiff alleges that CBP’s assessment of duties reflect a meaningful decision, Defendants argue that jurisdiction does not arise under 28 U.S.C. § 1581(i) because Plaintiff would be required to protest that decision as required by § 1581(a). *See id.*; *see also* 28 U.S.C. § 1581(a) (“The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under . . . [19 U.S.C. § 1515.1]”); *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987). However, Plaintiff acknowledges that CBP made no meaningful decision. *See* Pl.’s Br. at 10. Since CBP’s actions are an implementation of the President’s proclamations over which CBP has no control, jurisdiction under 28 U.S.C. § 1581(a) is unavailable. *See U.S. Shoe Corp. v. United States*, 114 F.3d 1564, 1570 (Fed. Cir. 1997) (holding jurisdiction does not arise under 28 U.S.C. § 1581(a) where Customs does not make a protestable decision).

¹⁴ Defendants’ partial motion to dismiss addresses Count III of Plaintiff’s complaint, which appears to focus on CBP’s conduct, including CBP’s CSMS messages. *See* Defs.’ Partial Mot. to Dismiss at 19–30; Compl. ¶ 92 (“CBP’s assessment of Section 232 duties on articles qualifying for repair and alteration treatment under subheading 9802.00.50, HTSUS, is contrary to law.”); *id.* ¶ 97 (“CBP’s CSMS No. 42355735 of April 13, 2020 is an unlawful action seeking ‘to adjust imports’ and attempts to subject goods classifiable under subheading 9802.00.50, HTSUS, to Section 232 duties of 25 [percent] by applying such duties to the cost or value of repairs, alterations, or processing performed abroad, but this modification is untimely[.]”); *see also id.* ¶¶ 97–100.

a court[.]” *Bennett v. Spear*, 520 U.S. 154, 175 (1997) (“*Bennett*”) (citing 5 U.S.C. § 704). “‘Agency action’ includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.” 5 U.S.C. § 551(13). An agency action is final when it: (1) “mark[s] the ‘consummation’ of the agency’s decision making process”; and (2) is a decision “by which ‘rights or obligations have been determined,’ or from which ‘legal consequences will flow[.]’” *Bennett*, 520 U.S. at 177–78 (citations omitted).

The CSMS messages are not a “rule, order, license, sanction, [or] relief[.]” nor does Plaintiff claim them to be. In response to Defendants’ jurisdictional argument, Plaintiff asserts that “[i]t is plain that CBP . . . lacks the power to hold the Presidential proclamations herein challenged to be unlawful, or to set it aside.” Pl.’s Br. at 10. Thus, despite Plaintiff’s articulation of its Count III claiming that “CBP’s assessment of Section 232 duties on Plaintiff’s re-imported steel products which are altered in Canada . . . are contrary to law and must be set aside[.]” Compl. ¶ 99, Plaintiff acknowledges that the true nature of its claim is “not a challenge to a meaningful decision made by a CBP officer, but rather a challenge to the President’s authority to issue a Presidential proclamation.” Pl.’s Br. at 10. CBP’s CSMS messages do not mark the consummation of an agency decision-making process,¹⁵ see *Bennett*, 520 U.S. at 177–78, and Plaintiff does not plausibly allege that CBP made any other meaningful decisions with respect to the imposition of Section 232 duties on steel imports. Thus, any claim against CBP for such a decision is dismissed.

III. Publication of the Steel Report

Defendants argue that Plaintiff’s challenge to the Government’s failure to publish the *Steel Report* is moot because the report has since been published. See Defs.’ Partial Mot. to Dismiss at 3, 41; see also Compl. ¶¶ 31, 101–103 (citing, *inter alia*, 19 U.S.C. § 1862(b)(3)(B)). Plaintiff responds that its complaint plausibly alleges that failure to publish the *Steel Report* “invalidates the President’s actions[.]” Pl.’s Br. at 39–42. Count IV of Plaintiff’s complaint is dismissed.

Section 1862(b)(3)(B) states that the Secretary’s report must be published; contrary to Plaintiff’s position, see Pl.’s Br. at 39–42, the

¹⁵ CBP issued CSMS No. 18–000424, entitled “UPDATE: Additional Duty on Imports of Steel and Aluminum Articles Under Section 232.” The message states, for example, that “[t]he aforementioned Presidential Proclamations include provisions for the treatment of steel and aluminum articles admitted to a U.S. foreign trade zone (FTZ). The current provisions, as amended, are outlined in the following paragraphs.” CSMS No. 18–000424 at 2. CBP’s message is an update to the trade community regarding various Presidential proclamations, and does not mark the consummation of an agency decision-making process.

provision does not state when the report must be published or that publication is a pre-condition to the President's authority to act. *See* 19 U.S.C. § 1862(b)(3)(B) ("Any portion of the report submitted by the Secretary under subparagraph (A) which does not contain classified information or proprietary information shall be published in the Federal Register."); *cf. also, e.g., Cause of Action Inst. v. U.S. Dep't of Com.*, No. 1:19-CV-00778 (CJN), 2021 WL 148386, at *7–8 (D.D.C. Jan. 14, 2021) (concluding, in light of the fact that Congress did not establish a deadline for publication of the report generated by the Secretary pursuant to a Section 232 investigation, that the President has a legitimate confidentiality interest in delaying publication so as not to compromise efforts to address the threat to the national security); *Silfab Solar, Inc. v. United States*, 892 F.3d 1340, 1346 (Fed Cir. 2018). Here, the *Steel Report* has been published. *See generally* 85 Fed. Reg. 40,202. Therefore, Count IV of Plaintiff's complaint is dismissed.

IV. Constitutional Challenges

A. Due Process

Defendants request the court dismiss Count V of Plaintiff's complaint, arguing that Maple Leaf neither demonstrates that the Government failed to comply with Due Process requirements nor identifies an independent source giving rise to a property interest. *See* Defs.' Partial Mot. to Dismiss at 43–44. Plaintiff argues that it has identified a protectable claim of entitlement to re-import of steel products from Canada, and that the Government imposed Section 232 duties without affording due process of law, thus violating the Due Process Clause of the U.S. Constitution. *See* Pl.'s Br. at 37–39; *see also* Compl. ¶¶ 1, 3, 8, 104–08.

The Fifth Amendment guarantees that "[n]o person shall be . . . deprived of life, liberty, or property, without due process of law[.]" U.S. CONST. amend. V. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) ("*Eldridge*") (citing *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). Once it has been established that "the plaintiff has been deprived of a protected interest in 'property' or 'liberty[.]'" the court evaluates whether sufficient process of law has been afforded. *Int'l Custom Prods. v. United States*, 791 F.3d 1329, 1337 (Fed. Cir. 2015) (citation omitted); *Eldridge*, 424 U.S. at 333–49.

Plaintiff fails to explain how the Government did not afford sufficient process under the law. Maple Leaf essentially argues that the

Government's imposition of Section 232 duties was unlawful. *See* Pl.'s Br. at 5; Oral Arg. at 00:53:28–00:54:32, Apr. 12, 2021, ECF No. 27 (clarifying that Plaintiff's Due Process argument amounts to the same challenge it poses to the Government's alleged failure to comply with the statute). Regardless of whether Plaintiff has a protected interest, a claim that challenges the lawfulness of the Government's actions does not on its own demonstrate that Maple Leaf was deprived of a meaningful opportunity to be heard, or that more process was due to protect its interests. *See Eldridge*, 424 U.S. at 332–33. Count V is dismissed.

B. Non-Delegation Doctrine

In Count VI of the complaint, Plaintiff challenges Section 232 as “unconstitutional delegation of authority from Congress to the Executive Branch lacking an intelligible principle.” Compl. ¶ 110. Previously, the Supreme Court in *Federal Energy Administration v. Algonquin SNG, Inc.*, 426 U.S. 548 (1976) (“*Algonquin*”) held that Section 232 satisfies non-delegation requirements because the enactment contains clear conditions that must be satisfied in order for the President to act. *See id.* at 559–60. Despite *Algonquin*'s holding, some 40 years later, plaintiffs in *American Institute for International Steel, Inc. v. United States*, 806 F. App'x 982 (Fed. Cir. 2020) sought again to challenge Section 232 on non-delegation grounds. Nonetheless, this Court and the U.S. Court of Appeals for the Federal Circuit (“Court of Appeals”) held that *Algonquin* controlled, and the Supreme Court denied certiorari. *Am. Inst. for Int'l Steel, Inc. v. United States*, 43 CIT __, 376 F. Supp. 3d 1335 (2019); *aff'd*, 806 F. App'x 982, *cert. denied*, 141 S. Ct. 133 (2020); *Am. Inst. for Int'l Steel, Inc. v. United States*, 141 S. Ct. 133, 207 L. Ed. 2d 1079 (2020). Plaintiff's complaint, filed two days after the Supreme Court's denial of certiorari, nonetheless claimed Section 232 violated the non-delegation doctrine. Compl. ¶¶ 109–10 (Count VI). Defendants move to dismiss Count VI based upon the continuing vitality of *Algonquin*. In response, Plaintiff tries to recast its argument regarding the non-delegation doctrine. Plaintiff now argues that “any holding of this Court which would diminish the ‘clear preconditions’ set by Congress in Section 232(b) or (c) . . . would present significant separation of powers concerns that would be appropriately revisited by the Supreme Court based on the allegations in Count VI.” Pl.'s Br. at 45. Plaintiff's recharacterization of its Count VI, which presupposes that an adverse ruling of this Court results in a construction of Section 232 that runs afoul of non-delegation requirements, is meritless. As explained above, *Proclamation 9705* timely imposed Section 232 duties on re-imported steel products from

Canada. The preconditions set forth in Section 232 have been met. That Plaintiff disagrees does not create a non-delegation doctrine claim. Accordingly, Count VI of Maple Leaf's complaint is dismissed.

CONCLUSION

For the foregoing reasons, the court grants Defendants' partial motion to dismiss Plaintiff's complaint. Therefore, it is

ORDERED that Defendants' partial motion to dismiss is granted; and it is further

ORDERED that all counts except Count II of Plaintiff's complaint are dismissed.

Dated: June 22, 2021

New York, New York

/s/ Claire R. Kelly

CLAIRE R. KELLY, JUDGE

/s/ Gary S. Katzmann

GARY S. KATZMANN, JUDGE

/s/ Jane A. Restani

JANE A. RESTANI, JUDGE

Slip Op. 21-78

ZHEJIANG MACHINERY IMPORT & EXPORT CORP., Plaintiff, v. UNITED STATES, Defendant.

Before: Gary S. Katzmann, Judge

Court No. 19-00039

PUBLIC VERSION

[The court affirms Commerce's *Remand Results*.]

Dated: June 23, 2021

Adams C. Lee, Harris Bricken Sliwoski LLP, of Seattle, WA, for plaintiff.

Kelly A. Krystyniak, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for defendant. With her on the confidential brief were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *L. Misha Preheim*, Assistant Director. Of counsel on the brief was *Nikki Kalbing*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, D.C. With them on the public version of the brief was *John V. Coghlan*, Deputy Assistant Attorney General of the Federal Programs Branch, delegated the functions and duties of the Acting Assistant Attorney General.

OPINION

Katzmann, Judge:

The court returns to a case involving whether an exporter in a non-market economy (“NME”) sufficiently established independence from government control to qualify for a separate antidumping (“AD”) duty rate and whether nominal ownership of majority shareholder rights by a labor union may prevent a company from rebutting a presumption of government control. Before the court is Commerce’s *Final Results of Redetermination Pursuant to Court Remand* (Dep’t Commerce Nov. 19, 2020), ECF No. 46 (“*Remand Results*”), which the court ordered in *Zhejiang Machinery Import & Export Corp. v. United States*, 44 CIT __, 471 F. Supp. 3d 1313 (2020) (“*Zhejiang I*”), so that Commerce could further explain its determination in *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People’s Republic of China: Final Results of Antidumping Duty Administrative Review; 2016–2017*, 84 Fed. Reg. 6,132, 6,132–34 (Dep’t Commerce Feb. 26, 2019), (“*Final Results*”). On remand, Commerce accepted previously rejected evidence, re-examined the record evidence related to the ability of the majority shareholder’s government-affiliated labor union to control its activities, and continued “to find that [Plaintiff] failed to demonstrate an absence of de facto government control over its export activities and is therefore not eligible for a separate rate.” *Remand Results* at 2. Plaintiff Zhejiang Machinery Import & Export Corporation (“ZMC”), an exporter of tapered roller bearings and parts thereof (“TRBs”),¹ continues to challenge Commerce’s decision as unsupported by substantial evidence and otherwise not in accordance with law. Pl. ZMC’s Cmts. on DOC’s Remand Determination, Dec. 21, 2020, ECF No. 49 (“Pl.’s Br.”). Defendant the United States (“Government”) requests that the court sustain Commerce’s *Remand Results*. Def.’s Resp. to Cmts. on Remand Redetermination at 1, Feb. 8, 2021, ECF No. 54 (“Def.’s Br.”). The court affirms Commerce’s *Remand Results* and enters judgment for the Government.

BACKGROUND

The court set out the relevant legal and factual background of the proceedings in further detail in its previous opinion, *Zhejiang I*, 471 F. Supp. 3d at 1325–30. Information relevant to the instant opinion is set forth below.

¹ “TRBs are a type of antifriction bearing made up of an inner ring (cone) and an outer ring (cup). Cups and cones sell either individually or as a preassembled ‘set.’” *NTN Bearing Corp. of Am. v. United States*, 127 F.3d 1061, 1063 (Fed. Cir. 1997).

In 2009, Commerce updated the AD duty rate on TRBs for the People's Republic of China to 92.84 percent, after first setting an AD duty on TRBs in 1987. *See Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China*, 74 Fed. Reg. 3,987, 3,987–90 (Dep't Commerce Jan. 22, 2009) (“the Order”); *Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China*, 52 Fed. Reg. 22,667 (Dep't Commerce June 15, 1987). In June 2017, Commerce published a notice of opportunity to request review of the *Order. Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity to Request Administrative Review*, 82 Fed. Reg. 26,441, 26,441–44 (Dep't Commerce June 7, 2017).

As summarized in the court's previous opinion, during the review, ZMC applied for a separate rate and submitted details of its ownership structure. *Zhejiang I*, 471 F. Supp. 3d at 1327. ZMC stated it was entirely owned by its parent company, Zhejiang Sunny I/E Corp (“Sunny”). *Id.* ZMC further noted that Sunny, in turn, was owned by Zhejiang Province Metal & Minerals Import and Export Co., Ltd. and Sunny's labor union, with the labor union as majority owner. *Id.* Zhejiang Province Metal & Minerals Import and Export Co., Ltd., was fully owned by Zhejiang International Business Group Co., Ltd., whose complete owner was the Zhejiang Provincial State-owned Assets Supervision and Administration Commission (“SASAC”) — an entity within the Government of China (“GOC”). *Id.* ZMC also stated that Sunny's labor union was listed as the nominal owner of the majority of Sunny's shares in Sunny's Articles of Association (“Sunny's AoAs”) because the ultimate owners of those shares were members of Sunny's employee stock ownership committee (“ESOC”), which is not allowed legal personhood under Chinese law and therefore could not be assigned shares. *Id.* Based on this information, Commerce preliminarily determined that ZMC failed to demonstrate that the GOC lacked de facto control over its export activities. *See Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Preliminary Results and Intent to Rescind the Review in Part; 2016–2017*, 83 Fed. Reg. 32,263, 32,263 (Dep't Commerce July 12, 2018) (“Preliminary Results”).

ZMC then submitted a case brief that included, among other information, a revision of the original translation of the ESOC's Articles of Association (“ESOC Articles”) it had provided to Commerce. *Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People's Republic of China: Case Br. at 3* (Aug. 23, 2018), P.R. 241, C.R. 158 (“Aug. Submission”). This revised translation changed

[[

]] whereas

the original translation indicated [[

]], Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People’s Republic of China: Resubmission of Case Brief at Ex. 7 (Dec. 6, 2018), P.R. 255, C.R. 162. Commerce determined that the brief included untimely factual information, rejected it, and allowed ZMC the opportunity to submit a revised brief. 30th Administrative Review of Tapered Roller Bearings and Parts Thereof, Finished and Unfinished from the People’s Republic of China: Rejection of Untimely-Filed New Factual Information (Dec. 3, 2018), P.R. 253. Commerce then published its *Final Results* on February 26, 2019, in which it maintained its decision that ZMC did not rebut the presumption of government control.

On March 25, 2019, ZMC initiated the instant litigation challenging Commerce’s *Final Results*. Summons, ECF No.1; Compl., ECF No. 2. On August 21, 2020, the court concluded that “Commerce failed to meet its obligation to consider corrective information and provide a reasoned explanation for its determination.” *Zhejiang I*, 469 F. Supp. 3d at 1330. Thus, the court remanded that conclusion to Commerce for further explanation. *Id.* at 1349. Commerce filed its *Remand Results* on November 19, 2020, concluding that Zhejiang was still not eligible for a separate rate and “is part of the China-wide entity with a weighted-average dumping margin of 92.84 percent.” *Remand Results* at 9.² Plaintiff Zhejiang filed comments on the *Remand Results* on December 21, 2020. Pl.’s Br. The Government replied in support of Commerce’s redetermination on February 8, 2021. Def.’s Br.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over this action pursuant to 28 U.S.C. § 1581(c). The standard of review in this action is set forth in 19 U.S.C. § 1516a(b)(1)(B)(i): “[t]he court shall hold unlawful any determination, finding or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” The court also reviews the determinations pursuant to remand “for compliance with the court’s remand order.” *See Beijing Tianhai Indus. Co. v. United States*, 39 CIT __, __, 106 F. Supp. 3d 1342, 1346 (2015) (citations omitted).

² Many citations are to confidential filings for clarity in explaining the timeline of events. Public versions, occasionally filed at later dates, are available on the public docket with corresponding pagination.

DISCUSSION

When AD duties apply to goods from an NME country, “Commerce presumes that all respondents to the proceeding are government-controlled and therefore subject to a single country wide [AD] duty rate.” *Shandong Rongxin Imp. & Exp. Co. v. United States*, 42 CIT ___, ___, 331 F. Supp. 3d 1390, 1394 (2018) (citing *Dongtai Peak Honey Indus. Co. v. United States*, 777 F.3d 1343, 1349–50 (Fed. Cir. 2015)). To rebut this presumption and receive a rate separate from the country-wide rate, respondents must demonstrate that the government lacks both de jure and de facto control over their activities. *Id.* A respondent may show an absence of de facto government control by establishing that it does each of the following: “(1) sets its prices independently of the government and of other exporters, (2) negotiates its own contracts, (3) selects its management autonomously, and (4) keeps the proceeds of its sales (taxation aside).” *Id.* (citing *AMS Assocs. v. United States*, 719 F.3d 1376, 1379 (Fed. Cir. 2013)). If a respondent fails to demonstrate its independence, which it has the burden of establishing, Commerce may deny it a separate rate and instead apply the country-wide AD rate. *Id.* (citing *Dongtai Peak Honey*, 777 F.3d at 1350).

In its previous opinion, the court remanded the *Final Results* to Commerce. Specifically, the court remanded to Commerce

its determination that ZMC failed to establish an absence of de facto government control over its activities to: (1) consider the revised translation; (2) address how the labor union had the potential to exercise majority shareholder rights in light of the ESOC; and (3) address how the revised translation impacts its analysis.

Zhejiang I, 471 F. Supp. 3d at 1349. The court based this remand order on several conclusions indicating that Commerce’s decision was not supported by substantial evidence. First, the court concluded that Commerce abused its discretion in rejecting ZMC’s revised translation of the ESOC Articles, and that because “the revised translation in ZMC’s August Submission calls into question a major component of Commerce’s response to ZMC, and Commerce itself indicated its reliance on the ‘accuracy’ of the original translation, the rejection undermines the accuracy of Commerce’s final determination.” *Id.* at 1335. Second, the court concluded that “Commerce failed to adequately address the argument that the labor union cannot exercise majority shareholder rights because the ESOC does,” and thus failed to adequately address conflicting evidence. *Id.* at 1347–48. Third, the court concluded that, because Commerce improperly rejected ZMC’s

revised translation, it did not adequately explain whether the ESOC and the labor union are connected such that there was a potential for government control. *Id.* at 1348–49.

However, the court upheld Commerce’s determination that “that the GOC can control labor union activity through the ACFTU and that Sunny’s labor union had sufficient activities that the ACFTU could influence.” *Id.* at 1346. The court explained that ZMC failed to rebut or provide sufficient detracting evidence for Commerce’s explanation of GOC’s ability to influence Sunny’s labor union because: “(1) the ACFTU has a ‘legal monopoly on all trade union activities;’ (2) ‘[t]he Chinese government prohibits independent unions;’ and (3) the ACFTU ‘preside[s] over a network of subordinate trade unions.’” *Id.* at 1344 (quoting 30th Administrative Review of the Antidumping Duty Order on Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People’s Republic of China: China’s Status as a Non–Market Economy at 21 (Dep’t Commerce Oct. 26, 2017), P.R. 226 (“NME Status Memo”). Finally, the court noted that it took “no position on the issue of whether, with more robust analysis, explanation, and consideration of the evidence, Commerce’s determination may be supported by substantial evidence.” *Id.* at 1349.

On remand, Commerce, “under respectful protest,” “accepted ZMC’s revised translation of Articles 1 and 2 of the ESOC’s [Articles].” *Remand Results* at 10. Upon reconsideration of the record, Commerce nevertheless concluded that “other record evidence demonstrates a connection between the labor union and the ESOC” and, therefore, Zhejiang had not rebutted its presumption of de facto government control. *Id.* Specifically, Commerce cited Article 20³ of the ESOC Articles, which indicated a “[

].” *Id.* Commerce also cited to record evidence of Zhejiang’s ownership structure indicating “that the individual shareholders who exercise majority rights . . . are also labor union members.” *Id.* at 11. Contrary to ZMC’s claims before Commerce, Commerce noted that it does not distinguish between labor union membership and labor union leadership “because the GOC has the ability to control labor union members to the same extent as labor union leaders, and collectively, these individuals, who are members of the labor union, direct [] of the equity ownership of Sunny through the ESOC.” *Id.* at 12. Thus, Commerce concluded that notwithstanding ZMC’s claims that the ESOC was the true majority shareholder of ZMC, the “GOC can exercise control over the ESOC

³ Article 20 states: [

]]. *Remand Results* at 10 (citation omitted).

through its labor union members and, consequently, exercise control over Sunny,” specifically through influencing the composition of the board of directors and management. *Id.* at 14. In short, Commerce concluded that, “[b]ecause ZMC is wholly owned by Sunny, the GOC can, through Sunny, in turn exercise influence over ZMC’s selection of management and export activities,” and thus that ZMC failed to rebut the presumption of government control. *Id.*

ZMC challenges Commerce’s *Remand Results* as unsupported by substantial evidence. ZMC claims that Commerce “changed its position and relies almost entirely on the argument that the [Chinese Community Party (“CCP”)] controlled Sunny because all of the individual owners of Sunny’s ESOC were also members of Sunny’s labor union.” Pl.’s Br. at 2–3. First, ZMC contends that Commerce’s determination that the labor union can control ESOC is not supported by the record because the ESOC and its members constitute a distinct organization unrelated to the GOC or the labor union. *Id.* at 5–8. Similarly, ZMC argues that the overlapping membership between Sunny’s labor union and the ESOC is insufficient to support Commerce’s finding of potential de facto control because, “[a]lthough union members can perhaps be controlled by union leaders for union activities,” there is no basis “to conclude that union control over union members extends to non-union activities.” *Id.* at 14. ZMC also argues that Commerce’s reliance on Article 20 to support its conclusion that Sunny’s labor union and the ESOC were connected is insufficient because, as ZMC explains, “Article 20 . . . merely allows labor union members to become members of Sunny’s ESOC,” but does not require as much. *Id.* at 15. Thus, ZMC argues that Commerce’s reliance on Article 20 ignores that “Articles 19 and 21 demonstrate that the Sunny labor union has no authority to appoint ESOC members, nor to require the ESOC members be members of the labor union.” *Id.* Finally, ZMC argues that the *Remand Results* “would fundamentally alter the legal standard that [Commerce] uses for its separate rates analysis,” by basing its finding on “any linkage to a CCP entity.” *Id.* at 22; *see also id.* at 10–11.

The Government responds that the *Remand Results* “focused on connections between Sunny’s labor union and its ESOC and identified additional record evidence . . . that demonstrated such linkages.” Def.’s Br. at 10–11. Specifically, the Government points to Commerce’s discussion and analysis of the complete overlap of ESOC members and labor union members, as well as Article 20 of the ESOC Articles. *Id.* at 12–13. Thus, the Government contends that “Commerce has cited to record evidence demonstrating that[,] even if the ESOC does

actually exercise majority shareholder rights,” overlapping membership in the ESOC and the labor union results in the potential for the GOC to control Sunny through the ESOC. *Id.* at 13. Additionally, the Government denies ZMC’s contention that Commerce changed its position from its original decision, but instead claims that Commerce “provided additional evidence . . . that demonstrates the labor union is not simply a nominal shareholder with no ability to control Sunny, but rather has the actual ability to exercise majority shareholder rights within Sunny through the common membership of the individual shareholders of Sunny’s ESOC with Sunny’s labor union.” *Id.* at 14. Finally, the Government contests ZMC’s contention that ESOC members act in their personal capacity unconnected to their labor union membership by pointing the nature of Commerce’s de facto analysis as a rebuttable presumption and explaining that overlapping membership means that “the GOC has the ability to override the actions that union members might individually take if they were free of government control.” *Id.* at 18. Thus, the Government argues that Commerce reasonably determined that there was de facto government control because of these indicators of “a high degree of coordination between the labor union and the ESOC” and that “Commerce makes no such distinction between union members as individuals or a group in terms of the relative authority the GOC is able to exert.” *Id.* at 23.

The court concludes that Commerce’s *Remand Results* are supported by substantial evidence and in accordance with law. First, Commerce complied with the court’s remand instructions by accepting ZMC’s revised translation and further identifying and explaining how the record evidence shows an ability by the GOC to control Sunny through the ESOC and Sunny’s labor union. The court does not agree with ZMC that Commerce failed to address its argument “that the GOC does not have the ability to control the ESOC because the GOC cannot control individuals to the same extent as an entity.” Pl.’s Br. at 4. Commerce specifically explained the ability of the ACFTU to influence labor unions and their members via reference to the NME Status Memo. *Remand Results* at 28. Further, Commerce explained that “ZMC’s effort to distinguish labor union membership from labor union leadership mischaracterizes the issue by attempting to minimize the influence [the] GOC is able to exert through the ACFTU over all labor unions and their members, regardless of leadership hierarchy within a labor union.” *Id.* Thus, Commerce specifically addressed and explained this aspect of its decision and concluded that “the GOC has the ability to control labor union members to the same extent as labor union leaders [and that] [b]ecause each of

the . . . members of Sunny’s ESOC are also members of its labor union, the ACFTU has the ability to exert control over the ESOC and influence the votes of all labor union members of the ESOC.” *Id.* Commerce’s conclusion that ZMC did not rebut the presumption was based on substantial evidence, including reasonable inferences about that evidence. See *Suramerica de Aleaciones Laminadas, C.A. v. United States*, 44 F.3d 978, 985 (Fed. Cir. 1994) (stating that Commerce’s findings may be supported by substantial evidence despite the existence of “contradictory evidence or evidence from which conflicting inferences could be drawn” (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 487 (1951))). As requested by the court, Commerce adequately explained that record evidence indicating that Sunny’s government-affiliated labor union and the members of the ESOC are intertwined. See *Zhejiang I*, 471 F. Supp. 3d at 1346–49.

Second, the court is unpersuaded by ZMC’s additional challenges to the *Remand Results*. ZMC’s arguments are largely based on its disagreement with Commerce’s separate rate analysis, which presumes that an entity is subject to potential or actual government control unless a respondent can rebut that presumption by showing independence in each of four indicators analyzed by Commerce. See *Shandong Rongxin Imp. & Exp. Co.*, 331 F. Supp. 3d at 1394. ZMC argues that Commerce’s *Remand Results* attempt to transform this standard into “an irrebuttable presumption that could never be overcome.” Pl.’s Br. at 3. However, ZMC’s arguments erroneously reverse the burden of rebutting the presumption of government control by arguing that Commerce needed to have shown more direct evidence of actual control above the evidence relied upon. See, e.g., *id.* at 16 (arguing that Commerce “[h]as [n]ot [r]ebuted” record evidence that undermines its conclusion).

Commerce’s conclusion that ZMC failed to rebut the presumption of de facto government control through the connection between Sunny’s labor union and the ESOC does not require a showing of actual control, but simply a potential for government control. See *Sigma Corp. v. United States*, 117 F.3d 1401, 1405–06 (Fed. Cir. 1997). ZMC’s argument that “[t]he record shows that the Sunny employees are ultimately individuals acting in their capacity as employee members in the ESOC,” Pl.’s Br. at 9, is unpersuasive because it fails to show that Sunny’s employees could not act in the interests of the labor union when acting on behalf of the ESOC. Rather, record evidence showing that there is complete overlap between Sunny’s labor union and the ESOC members, that Sunny’s labor union registers as the nominal shareholder on behalf of the ESOC, and that both the ESOC and Sunny’s labor union exist under the same corporate umbrella

reasonably supports the conclusion that there exists a potential for the GOC, through Sunny's labor union, to control the ESOC and Sunny. *Remand Results* at 28; see also Def.'s Br. at 23. Furthermore, ZMC's contention that Commerce must separately examine whether individuals are acting as labor union members or as ESOC members is not administrable, particularly where other evidence supports the two groups' affiliation. In response to ZMC's comments on the draft remand results, Commerce also explained that its separate rate inquiry always includes analysis of affiliations of top shareholders and connections to CCP membership or leadership because of its need to determine "any ability to control, or possess an interest in controlling, the operations of the company" by an NME government. *Remand Results* at 21 (citation omitted). Thus, because the burden is on a separate rate applicant to show that there is no potential for government control, ZMC's various arguments that Commerce needed to show actual control are unpersuasive.

Because the remainder of ZMC's arguments rest on this mischaracterization of Commerce's de facto government control analysis and the contention that Commerce should have analyzed the actions of the activities of overlapping ESOC and labor union members separately, the court is unpersuaded by and declines to address those additional arguments. In short, the court concludes that Commerce's *Remand Results* can be upheld as supported by substantial evidence, in accordance with law and the court's remand instructions.

CONCLUSION

For the reasons stated, the court sustains Commerce's *Remand Results*. Judgment will enter accordingly in favor of Defendant.

SO ORDERED.

Dated: June 23, 2021

New York, New York

/s/ Gary S. Katzmann

GARY S. KATZMANN, JUDGE

Index

Customs Bulletin and Decisions
Vol. 55, No. 26, July 7, 2021

U.S. Customs and Border Protection

General Notices

	<i>Page</i>
Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico	1
Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Canada	5
Revocation of Four Ruling Letters and Revocation of Treatment Relating to the Tariff Classification of Insulated Stainless Steel Beverage Containers.	9
Proposed Revocation of One Ruling Letter and Proposed Revocation of Treatment Relating to the Tariff Classification of a Cat Collar	16

U.S. Court of International Trade

Slip Opinions

	<i>Slip Op. No.</i>	<i>Page</i>
Maple Leaf Marketing, Inc., Plaintiff, v. United States et al., Defendants.	21-77	25
Zhejiang Machinery Import & Export Corp., Plaintiff, v. United States, Defendant.	21-78	42