U.S. Customs and Border Protection

DEPARTMENT OF THE TREASURY

19 CFR PART 12

CBP DEC. 24–02

RIN 1515–AE88

EXTENSION AND AMENDMENT OF IMPORT RESTRICTIONS ON ARCHAEOLOGICAL AND ECCLESIASTICAL ETHNOLOGICAL MATERIALS OF BULGARIA

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

ACTION: Final rule.

SUMMARY: This document amends the U.S. Customs and Border Protection (CBP) regulations to reflect the extension and modification of import restrictions on certain archaeological and ecclesiastical ethnological material of Bulgaria. The Assistant Secretary for Educational and Cultural Affairs, United States Department of State, has made the requisite determinations for extending and modifying the import restrictions originally imposed by CBP Dec. 14–01, and amended by CBP Decision 19–01. The restrictions are being extended through January 14, 2029. The CBP regulations are being amended to reflect these changes. The Designated List of materials to which the restrictions apply is published below.

DATES: Effective January 14, 2024.

FOR FURTHER INFORMATION CONTACT: For legal aspects, W. Richmond Beevers, Chief, Cargo Security, Carriers and Restricted Merchandise Branch, Regulations and Rulings, Office of Trade, (202) 325–0084, *ot-otrrculturalproperty@cbp.dhs.gov.* For operational aspects, Julie L. Stoeber, Chief, 1USG Branch, Trade Policy and Programs, Office of Trade, (202) 945–7064, *1USGBranch @cbp.dhs.gov.*

SUPPLEMENTARY INFORMATION:

Background

The Convention on Cultural Property Implementation Act (Pub. L. 97–446, 19 U.S.C. 2601 *et seq.*) (CPIA), which implements the 1970 United Nations Educational, Scientific and Cultural Organization (UNESCO) Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (823 U.N.T.S. 231 (1972)) (the Convention), allows for the conclusion of an agreement between the United States and another party to the Convention to impose import restrictions on eligible archaeological and ethnological materials. Under the CPIA and applicable U.S. Customs and Border Protection (CBP) regulations, found in section 12.104 of title 19 of the Code of Federal Regulations (19 CFR 12.104), the restrictions are effective for no more than five years beginning on the date on which an agreement enters into force with respect to the United States (19 U.S.C. 2602(b)). This period may be extended for additional periods, each extension not to exceed five years, if it is determined that the factors justifying the initial agreement still pertain and no cause for suspension of the agreement exists (19 U.S.C. 2602(e); 19 CFR 12.104g(a)).

On January 14, 2014, the United States entered into a memorandum of understanding (2014 MOU) with the Republic of Bulgaria (Bulgaria), concerning the imposition of import restrictions on certain categories of archaeological and ecclesiastical ethnological material of Bulgaria. On January 16, 2014, CBP published a final rule, CBP Dec. 14–01, in the **Federal Register** (79 FR 2781) to reflect the imposition of restrictions on this material, including a list designating the types of archaeological and ecclesiastical ethnological materials covered by the restrictions. Consistent with the requirements of 19 U.S.C. 2602(b) and 19 CFR 12.104g, these restrictions were effective for a period of five years, through January 14, 2019.

The import restrictions were subsequently extended in accordance with 19 U.S.C. 2602(e) and 19 CFR 12.104g(a). On January 8, 2019, the United States entered into a superseding memorandum of understanding (2019 MOU) with Bulgaria to extend the import restrictions. Accordingly, CBP published a final rule, CBP Dec. 19–01, in the **Federal Register** (84 FR 112) amending 19 CFR 12.104g(b) to extend the import restrictions and correct an inconsistency in the 2014 MOU listing the ecclesiastical ethnological material as ranging in date from A.D. 681 rather than as listed in the Designated List as from the beginning of the 4th century A.D.

On May 19, 2023, the United States Department of State published a proposal to extend and amend the 2019 MOU, in the **Federal Register** (88 FR 32265). On November 7, 2023, after considering the views and recommendations of the Cultural Property Advisory Committee, the Acting Assistant Secretary for Educational and Cultural Affairs, United States Department of State, made the determinations necessary to extend and amend the 2019 MOU. Following an exchange of diplomatic notes, the United States Department of State and the Ministry of Foreign Affairs of the Republic of Bulgaria have agreed to amend the 2019 MOU, and extend the restrictions for an additional five-year period, through January 14, 2029.

Accordingly, CBP is amending 19 CFR 12.104g(a) to reflect the extension of the import restrictions and amendment of the Designated List of cultural property described in CBP Dec. 14–01 and revised by CBP Dec. 19–01. The amendments include the expansion of dates for archaeological and ecclesiastical ethnological material, corrections to minor inconsistencies in the Designated List in CBP Dec. 19–01, and explicit clarification that wood is covered by import restrictions on archaeological organic materials. The restrictions on the importation of archaeological and ecclesiastical ethnological material will be in effect through January 14, 2029. Importation of such material of Bulgaria, as described in the Designated List below, will be restricted through that date unless the conditions set forth in 19 U.S.C. 2606 and 19 CFR 12.104c are met.

The Designated List includes archaeological and ecclesiastical ethnological material. Archaeological material ranges in date from approximately 1.6 million years ago through approximately A.D. 1750. Ecclesiastical ethnological material ranges in date from the beginning of the 4th century A.D. through approximately A.D. 1900. For the reader's convenience, CBP is reproducing the Designated List contained in CBP Dec. 14–01 and last revised by CBP Dec. 19–01 in its entirety, with the changes discussed herein.

The list is divided into the following categories of objects:

I. Archaeological Material

A. Stone

B. Metal

C. Ceramic

D. Bone, Ivory, Horn, Wood, and other Organics

E. Glass and Faience

F. Paintings

G. Mosaics

II. Ecclesiastical Ethnological Material

A. Stone

B. Metal

C. Ceramic

D. Bone and Ivory Objects

E. Wood

F. Glass

G. Textile

H. Parchment

I. Painting

J. Mosaics

The Designated List and additional information may also be found at the following website address: *https://eca.state.gov/cultural-heritage-center/cultural-property-advisory-committee/current-import-restrictions* by selecting the material for "Bulgaria."

Designated List of Archeological and Ecclesiastical Ethnological Material of Bulgaria

The bilateral agreement between the United States and Bulgaria includes, but is not limited to, the categories of objects described in the designated list set forth below. These categories of objects are subject to the import restrictions set forth above, in accordance with the above explained applicable law and the regulation amended in this document (19 CFR 12.104g(a)).

The import restrictions cover complete examples of objects and fragments thereof.

The archaeological materials represent the following periods and cultures: Paleolithic, Neolithic, Chalcolithic, Bronze Age, Iron Age, Thracian, Hellenistic, Roman, Middle Ages, First Bulgarian Empire, Byzantine, Second Bulgarian Empire, and Ottoman. The ecclesiastical ethnological materials represent the following periods and cultures: Middle Ages, First Bulgarian Empire, Byzantine, Second Bulgarian Empire, Ottoman, and Third Bulgarian State. Ancient place names associated with the region of Bulgaria include Odrysian Kingdom, Thrace, Thracia, Moesia Inferior, Moesia Superior, Coastal Dacia, Inner Dacia, Rhodope, Haemimontus, Europa, Bulgaria, and Eyalet of Rumeli.

I. Archaeological Material

The categories of Bulgarian archaeological objects on which import restrictions are imposed were made from approximately 1.6 million years ago through approximately A.D. 1750.

A. Stone

1. Sculpture

a. Architectural Elements—In marble, limestone, gypsum, and other kinds of stone. Types include acroterion, antefix, architrave, base, capital, caryatid, coffer, column, crowning, fountain, frieze, pediment, pilaster, mask, metope, mosaic and inlay, jamb, tile, triglyph, tympanum, basin, and wellhead.

Approximate date: First millennium B.C. to A.D. 1750.

b. Monuments—In marble, limestone, granite, sandstone, and other kinds of stone. Types include, but are not limited to, votive statues, funerary, documentary, votive stelae, military columns, herms, stone blocks, bases, and base revetments. These may be painted, carved with borders, carry relief sculpture, and/or carry dedicatory, documentary, official, or funerary inscriptions, written in various languages including Thracian, Proto-Bulgarian, Greek, Latin, Hebrew, Turkish, and Bulgarian.

Approximate date: First millennium B.C. through A.D. 1750.

c. Sarcophagi and Ossuaries—In marble, limestone, and other kinds of stone. Some have figural scenes painted on them, others have figural scenes carved in relief, and some are plain or just have decorative moldings.

Approximate date: Third millennium B.C. through A.D. 1750.

d. Large Statuary—Primarily in marble, also in limestone and sandstone. Subject matter includes human and animal figures and groups of figures in the round. Common types are large-scale, free-standing statuary from approximately 1 m to 2.5 m in height and life-size busts (head and shoulders of an individual).

Approximate date: Third millennium B.C. through A.D. 1750.

e. Small Statuary and Figurines—In marble and other stone. Subject matter includes human and animal figures and groups of figures in the round. These range from approximately 10 cm to 1 m in height.

Approximate date: Paleolithic through A.D. 1750.

f. Reliefs—In marble and other stone. Types include carved relief vases and slabs carved with subject matter such as a horseman, vegetative, floral, or decorative motifs, sometimes inscribed. Used for architectural decoration, funerary, votive, or commemorative monuments.

Approximate date: Third millennium B.C. through A.D. 1750.

g. Furniture—In marble and other stone. Types include tables, thrones, and beds.

Approximate date: Third millennium B.C. through A.D. 1750.

2. Vessels—In marble, steatite, rock crystal, and other stone. These may belong to conventional shapes such as bowls, cups, jars, jugs, and lamps, or may occur in the shape of a human or animal, or part of a human or animal.

Approximate date: Neolithic through A.D. 1750.

3. Tools, Instruments, and Weapons— In flint, quartz, obsidian, and other hard stones. Types of stone tools include large and small blades, borers, scrapers, sickles, awls, harpoons, cores, loom weights, and arrow heads. Ground stone types include grinders (*e.g.,* mortars, pestles, millstones, whetstones), choppers, axes, hammers, moulds, and mace heads.

Approximate date: Paleolithic through A.D. 1750.

4. Seals and Beads—In marble, limestone, and various semiprecious stones including rock crystal, amethyst, jasper, agate, steatite, and carnelian. May be incised or cut as gems or cameos.

Approximate date: Paleolithic through A.D. 1750.

B. Metal

1. Sculpture

a. Large Statuary—Primarily in bronze, including fragments of statues. Subject matter includes human and animal figures, and groups of figures in the round. Common types are large-scale, free-standing statuary from approximately 1 m to 2.5 m in height and life-size busts (head and shoulders of an individual).

Approximate date: Fifth millennium B.C. through A.D. 1750.

b. Small Statuary and Figurines— Subject matter includes human and animal figures, groups of figures in the round, masks, plaques, and bronze hands of Sabazios. These range from approximately 10 cm to 1 m in height.

Approximate date: First millennium B.C. through Roman.

c. Reliefs—In gold, bronze, or lead. Types include burial masks, leaves, and appliqué with images of gods, mythical creatures, etc.

Approximate date: First millennium B.C. through Roman.

d. Inscribed or Decorated Sheet Metal—In bronze or lead. Engraved inscriptions, "military diplomas," and thin metal sheets with engraved or impressed designs often used as attachments to furniture.

Approximate date: First millennium B.C. through A.D. 1750.

2. Vessels—In bronze, gold, and silver. Bronze may be gilded or silver-plated. These may belong to conventional shapes such as bowls,

cups, jars, jugs, strainers, cauldrons, candelabras, and lamps, or may occur in the shape of a human or animal or part of a human or animal.

Approximate date: Fifth millennium B.C. through A.D. 1750.

3. Personal Ornaments—In copper, bronze, gold, and silver. Bronze may be gilded or silver-plated. Types include torques, rings, beads, pendants, belts, belt buckles, belt ends/appliqués, earrings, ear caps, diadems, spangles, straight and safety pins, necklaces, mirrors, wreaths, cuffs, pectoral crosses, and beads.

Approximate date: Fifth millennium B.C. through A.D. 1750.

4. Tools—In copper, bronze, and iron. Types include knives, hooks, weights, axes, scrapers (strigils), trowels, keys, dies for making coins, and the tools of physicians and artisans such as carpenters, masons, and metal smiths.

Approximate date: Fifth millennium B.C. through A.D. 1750.

5. Weapons and Armor—In copper, bronze, and iron. Types include both launching weapons (harpoons, spears, and javelins) and weapons for hand-to-hand combat (swords, daggers, battle axes, rapiers, maces etc.). Armor includes body armor, such as helmets, cuirasses, shin guards, and shields, and horse armor/chariot decorations often decorated with elaborate engraved, embossed, or perforated designs.

Approximate date: Fifth millennium B.C. through A.D. 1750.

6. Seals—In lead, tin, copper, bronze, silver, and gold. Types include rings, amulets, stamps, and seals with shank. They pertain to individuals, kings, emperors, patriarchs, and other spiritual leaders.

Approximate date: Bronze Age through A.D.1750.

7. Coins—In copper, bronze, silver, and gold. Many of the listed coins with inscriptions in Greek can be found in B. Head, *Historia Numorum: A Manual of Greek Numismatics* (London, 1911) and C.M. Kraay, *Archaic and Classical Greek Coins* (London, 1976). Many of the Roman provincial mints in modern Bulgaria are covered in I. Varbanov, *Greek Imperial Coins I: Dacia, Moesia Superior, Moesia Inferior* (Bourgas, 2005), id., *Greek Imperial Coins II: Thrace (from Abdera to Pautalia)* (Bourgas, 2005), id., *Greek Imperial Coins III: Thrace (from Perinthus to Trajanopolis), Chersonesos Thraciae, Insula Thraciae, Macedonia* (Bourgas 2007). A non-exclusive list of pre-Roman and Roman mints includes Mesembria (modern Nesembar), Dionysopolis (Balchik), Marcianopolis (Devnya), Nicopolis ad Istrum (near Veliko Tarnovo), Odessus (Varna), Anchialus (Pomorie), Apollonia Pontica (Sozopol), Cabyle (Kabile), Deultum (Debelt), Nicopolis ad Nestum (Garmen), Pautalia (Kyustendil), Philippopolis (Plovdiv), Serdica (Sofia), and Augusta Traiana (Stara Zagora). Later coins may be found in A. Radushev and G. Zhekov, *Catalogue of Bulgarian Medieval Coins IX–XV c.* (Sofia 1999) and J. Youroukova

and V. Penchev, *Bulgarian Medieval Coins and Seals* (Sofia 1990).

a. Pre-monetary media of exchange including "arrow money," bells, and bracelets.

Approximate date: 13th century B.C. through 6th century B.C.

b. Thracian and Hellenistic coins struck in gold, silver, and bronze by city-states and kingdoms that operated in the territory of the modern Bulgarian state. This designation includes official coinages of Greek-using city-states and kingdoms, Scythian and Celtic coinage, and local imitations of official issues. Also included are Greek coins from nearby regions that are found in Bulgaria.

Approximate date: 6th century B.C. through 1st century B.C.

c. Roman provincial coins—Locally produced coins usually struck in bronze or copper at mints in the territory of the modern state of Bulgaria. May also be silver, silver plate, or gold.

Approximate date: 1st century B.C. through 4th century A.D.

d. Coinage of the First and Second Bulgarian Empires and Byzantine Empire—Struck in gold, silver, and bronze by Bulgarian and Byzantine emperors at mints within the modern state of Bulgaria.

Approximate date: 4th century A.D. through A.D. 1396.

e. Ottoman coins—Struck at mints within the modern state of Bulgaria.

Approximate date: A.D. 1396 through A.D. 1750.

C. Ceramic

1. Sculpture

a. Architectural Elements—Baked clay (terracotta) elements used to decorate buildings. Elements include tiles, acroteria, antefixes, painted and relief plaques, metopes, cornices, roof tiles, pipes, and revetments. May be painted as icons. Also included are wall and floor plaster decorations.

Approximate date: First millennium B.C. through A.D. 1750.

b. Large Statuary—Subject matter includes human and animal figures and groups of figures in the round. Common types are large-scale, free-standing statuary from approximately 1 m to 2.5 m in height and life-size busts (head and shoulders of an individual).

Approximate date: Neolithic through 6th century A.D.

c. Small Statuary—Subject matter is varied and includes human and animal figures, human body parts, groups of figures in the round, shrines, houses, and chariots. These range from approximately 10 cm to 1 m in height.

Approximate date: Neolithic through 6th century A.D.

2. Vessels

a. Neolithic and Chalcolithic Pottery—Handmade, decorated with appliqué and/or incision, sometimes decorated with a lustrous burnish or added paint. These come in a variety of shapes from simple bowls and vases with three or four legs, anthropomorphic and zoomorphic vessels, to handled scoops and large storage jars.

b. Bronze Age through Thracian Pottery—Handmade and wheelmade pottery in shapes for tableware, serving, storing, and processing, with lustrous burnished, matte, appliqué, incised, and painted decoration.

c. Black Figure and Red Figure Pottery—These are made in a specific set of shapes (*e.g.,* amphorae, kraters, hydriae, oinochoi, kylikes) decorated with black painted figures on a clear clay ground (Black Figure), decorative elements in reserve with background fired black (Red Figure), and multi-colored figures painted on a white ground (White Ground).

Approximate date: First millennium B.C.

d. Terra Sigillata—Is a high-quality tableware made of red to reddish brown clay and covered with a glossy slip.

Approximate date: Roman.

e. Middle Ages Pottery—Includes undecorated plain wares, utilitarian wares, tableware, serving and storage jars, and special containers such as pilgrim flasks. These can be matte painted or glazed, including incised as "sgraffito," stamped, and with elaborate polychrome decorations using floral, geometric, human, and animal motifs.

3. Seals—On the handles and necks of bottles (amphorae).

Approximate date: First millennium B.C. through Middle Ages.

D. Bone, Ivory, Horn, Wood, and other Organics

1. Small Statuary and Figurines— Subject matter includes human and animal figures and groups of figures in the round. These range from approximately 10 cm to 1 m in height.

Approximate date: Paleolithic through Middle Ages.

2. Personal Ornaments—In bone, ivory, wood, and spondylus shell. Types include amulets, combs, pins, spoons, small containers, bracelets, buckles, and beads.

Approximate date: Paleolithic through Middle Ages.

3. Seals and Stamps—Small devices with at least one side engraved with a design for stamping or sealing; they can be discoid, cuboid, conoid, or in the shape of animals or fantastic creatures (*e.g.,* a scarab).

Approximate date: Neolithic through Middle Ages.

4. Tools and Weapons—In bone, horn, and wood. Needles, awls, chisels, axes, hoes, picks, and harpoons.

Approximate date: Paleolithic through Middle Ages.

E. Glass and Faience

1. Vessels—Shapes include small jars, bowls, animal shaped, goblet, spherical, candle holders, and perfume jars (unguentaria).

Approximate date: First millennium B.C. through A.D. 1750.

2. Beads—Globular and relief beads.

Approximate date: Bronze Age through Middle Ages.

F. Paintings

1. Domestic and Public Wall Painting—These are painted on mud plaster, lime plaster (wet—buon fresco—and dry—secco fresco); types include simple applied color, bands and borders, landscapes, scenes of people and/or animals in natural or built settings.

Approximate date: First millennium B.C. through A.D. 1750.

2. Tomb Paintings—Paintings on plaster or stone, sometimes geometric or floral but usually depicting gods, goddesses, or funerary scenes.

Approximate date: First millennium B.C. through 6th century A.D.

G. Mosaics—Floor mosaics including landscapes, scenes of humans or gods, and activities such as hunting and fishing. There may also be vegetative, floral, or decorative motifs.

Approximate date: First millennium B.C. through A.D. 1750.

II. Ecclesiastical Ethnological Material

The categories of Bulgarian ecclesiastical ethnological objects on which import restrictions are imposed were made from the beginning of the 4th century A.D. through approximately A.D. 1900.

A. Stone

1. Architectural Elements—In marble and other stone, including thrones, upright "closure" slabs, circular marking slabs (*omphalion*), altar partitions, and altar tables which may be decorated with crosses, human, or animal figures.

2. Monuments—In marble and other stone; types such as ritual crosses, funerary inscriptions.

3. Vessels—Containers for holy water.

4. Reliefs—In steatite or other stones, carved as icons in which religious figures predominate in the figural decoration.

B. Metal

1. Reliefs—Cast as icons in which religious figures predominate in the figural decoration.

2. Boxes—Containers of gold and silver, used as reliquaries for sacred human remains.

3. Vessels—Containers of lead, which carried aromatic oils and are called "pilgrim flasks."

4. Ceremonial Paraphernalia—In bronze, silver, and gold including censers (incense burners), book covers, processional crosses, liturgical crosses, archbishop's crowns, buckles, and chests. These are often decorated with molded or incised geometric motifs or scenes from the Bible, and encrusted with semi-precious or precious stones. The gems themselves may be engraved with religious figures or inscriptions. Ecclesiastical treasure may include all of the above, as well as rings, earrings, and necklaces (some decorated with ecclesiastical themes) and other implements (*e.g.,* spoons, baptism vessels, chalices).

C. Ceramic—Vessels which carried aromatic oils and are called "pilgrim flasks."

D. Bone and Ivory Objects—Ceremonial paraphernalia including boxes, reliquaries (and their contents), plaques, pendants, candelabra, stamp rings, crosses. Carved and engraved decoration includes religious figures, scenes from the Bible, and floral and geometric designs.

E. Wood—Wooden objects include architectural elements such as painted wood screens (iconostases), carved doors, crosses, painted wooden beams from churches or monasteries, furniture such as thrones, chests, and other objects, including musical instruments. Religious figures predominate in the painted and carved figural decoration. Ecclesiastical furniture and architectural elements may also be decorated with geometric or floral designs.

F. Glass—Vessels of glass include lamps and candle sticks.

G. Textile—Robes, vestments and altar cloths are often of a fine fabric and richly embroidered in silver and gold. Embroidered designs include religious motifs and floral and geometric designs.

H. Parchment—Documents such as illuminated ritual manuscripts occur in single leaves or bound as a book or "codex" and are written or painted on animal skins (cattle, sheep/goat, camel) known as parchment.

I. Painting

1. Wall Paintings—On various kinds of plaster and which generally portray religious images and scenes of Biblical events. Surrounding paintings may contain animal, floral, or geometric designs, including borders and bands.

2. Panel Paintings (Icons)—Smaller versions of the scenes on wall paintings, and may be partially covered with gold or silver, sometimes encrusted with semi-precious or precious stones, and are usually painted on a wooden panel, often for inclusion in a wooden screen (iconostasis). May also be painted on ceramic.

J. Mosaics—Wall mosaics generally portray religious images and scenes of Biblical events. Surrounding panels may contain animal, floral, or geometric designs. They are made from stone and glass cut into small bits (*tesserae*) and laid into a plaster matrix.

Inapplicability of Notice and Delayed Effective Date

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

Executive Orders 12866 and 13563

Executive Orders 12866 (as amended by Executive Order 14994) and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. CBP has determined that this document is not a regulation or rule subject to the provisions of Executive Orders 12866 and 13563 because it pertains to a foreign affairs function of the United States, as described above, and therefore is specifically exempted by section 3(d)(2) of Executive Order 12866 and, by extension, Executive Order 13563.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996, requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (*i.e.,* small businesses, small organizations, and small governmental jurisdictions) when the agency is required to publish a general notice of proposed rulemaking for a rule. Since a general notice of proposed rulemaking is not necessary for this rule, CBP is not required to prepare a regulatory flexibility analysis for this rule.

Signing Authority

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

Troy A. Miller, the Senior Official Performing the Duties of the Commissioner, having reviewed and approved this document, has delegated the authority to electronically sign this document to the Director (or Acting Director, if applicable) of the Regulations and Disclosure Law Division for CBP, for purposes of publication in the **Federal Register**.

List of Subjects in 19 CFR Part 12

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

Amendment to the CBP Regulations

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

PART 12—SPECIAL CLASSES OF MERCHANDISE

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

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

* * * * *

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

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■ 2. In § 12.104g, the table in paragraph (a) is amended by revising the entry for Bulgaria to read as follows:

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

(a) * * *

State party	Cultural property	Decision No.
	* * * * * * *	
Bulgaria	Archaeological material from Bulgaria ranging from approximately 1.6 million years ago through approximately A.D. 1750, and ecclesiastical ethnological material of Bulgaria ranging in date from the beginning of the 4th century A.D. through approximately A.D. 1900.	CBP Dec. 24–02.
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ROBERT F. ALTNEU,
Director, Regulations & Disclosure Law Division, Regulations & Rulings, Office of Trade U.S. Customs and Border Protection.

THOMAS C. WEST, JR.,
Deputy Assistant Secretary of the Treasury for Tax Policy.

TEST CONCERNING ENTRY OF SECTION 321 LOW-VALUE SHIPMENTS THROUGH THE AUTOMATED COMMERCIAL ENVIRONMENT (ACE) (ALSO KNOWN AS ENTRY TYPE 86); REPUBLICATION WITH MODIFICATIONS

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

ACTION: General notice.

SUMMARY: This document republishes with modifications and supersedes a U.S. Customs and Border Protection (CBP) notice published in the **Federal Register** on August 13, 2019, announcing a test to allow certain low-value shipments, including those shipments subject to Partner Government Agency (PGA) data requirements, to be entered by filing a new type of informal entry electronically in the Automated Commercial Environment (ACE). The test is known as the ACE Entry Type 86 Test. This document modifies the ACE Entry Type 86 Test to clarify the waiver of certain regulations and consequences of misconduct by test participants. In addition, this document makes minor technical changes to the original notice.

DATES: The ACE Entry Type 86 Test commenced September 28, 2019, and will continue until concluded by an announcement published in the **Federal Register**. Comments will be accepted throughout the duration of the test. The changes set forth in this modification will go into effect on February 15, 2024.

ADDRESSES: Comments concerning this notice and any aspect of this test may be submitted at any time during the test via email to ecommerce@*cbp.dhs.gov*. In the subject line of your email, please indicate, "Comment on the ACE Entry Type 86 Test."

FOR FURTHER INFORMATION CONTACT: Christopher Mabelitini, Director, Intellectual Property Rights & E-Commerce Division, Trade Policy & Programs, Office of Trade, U.S. Customs and Border Protection, 202–325–6915, *ecommerce@cbp.dhs.gov*.

SUPPLEMENTARY INFORMATION: On August 13, 2019, U.S. Customs and Border Protection (CBP) published a notice (the August 13 Notice) in the **Federal Register** (84 FR 40079) announcing a test allowing low-value shipments meeting the requirements for admission under the administrative exemption in 19 U.S.C. 1321(a)(2)(C) (Section 321)[1] and the implementing regulation in 19 CFR 10.151, including those shipments subject to Partner Government Agency (PGA) data requirements, to be

[1] For purposes of this test, all references to "Section 321" refer to the administrative exemption in 19 U.S.C. 1321(a)(2)(C), and do not refer to any other exemption in 19 U.S.C. 1321.

entered by filing a new type of informal entry electronically in the Automated Commercial Environment (ACE). The test is known as the ACE Entry Type 86 Test. The ACE Entry Type 86 Test allows CBP to address the growing volume of Section 321 low-value shipments resulting from the global shift in trade to an e-commerce platform, test the new functionality in ACE, facilitate cross-border e-commerce, and allow Section 321 low-value shipments subject to PGA data requirements to utilize a Section 321 low-value shipment entry process for the first time. Further background on entry type 86 and the entry type 86 process can be found in Sections I and II below.

This document republishes and supersedes the August 13 Notice, with the modifications described below. These changes are being made in response to enforcement challenges surrounding low-value shipments entered via the ACE Entry Type 86 Test. Such challenges include, but are not limited to, CBP's efforts to prevent the importation of illicit substances like fentanyl and other narcotics, counterfeits and other intellectual property rights violations, and goods made with forced labor. CBP's enforcement efforts for merchandise entered using entry type 86 have brought to light violations such as entry by parties without the right to make entry, incorrect manifesting of cargo, misclassification, misdelivery (*e.g.,* delivery of goods prior to release from CBP custody), undervaluation, and incorrectly executed powers of attorney.

To address these problems, CBP is making the following amendments to the ACE Entry Type 86 Test. This notice modifies the deadline to file entry type 86 from "within 15 days" of the arrival of the cargo to "upon or prior to arrival" (*see* Section IV). The traditional entry timeframe, allowing filing up to 15 days after arrival of the cargo, has proven to be inconsistent with the expedited process envisioned for the ACE Entry Type 86 Test. As a result, CBP is amending the test to require that the entry type 86 must be filed prior to or upon arrival of the cargo.

In addition, this notice clarifies that only those regulations specified in this notice are waived by the test (*see* Sections IV and V). All other regulations, including those allowing CBP to require formal entry, remain in force. This notice also clarifies the consequences of misconduct by participants in the ACE Entry Type 86 Test (*see* Section VIII). Lastly, this notice makes stylistic and structural changes, standardizing the terminology used, restructuring, and renumbering the sections of the August 13 Notice, and adding additional section headings to guide the reader.

For ease of reference, the August 13 Notice is republished below, with the amendments and clarifications described above.

I. Background

A. Exemption for Section 321 Low-Value Shipments

Section 321(a)(2)(C) of the Tariff Act of 1930 (19 U.S.C. 1321(a)(2)(C)), as amended by the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), Section 901, Public Law 114–125, 130 Stat. 122 (19 U.S.C. 4301 note), authorizes CBP to provide an administrative exemption to admit free from duty and any tax imposed on or by reason of importation, shipments of merchandise (other than bona-fide gifts and certain personal and household goods) imported by one person on one day having an aggregate fair retail value in the country of shipment of not more than $800. The regulations issued under the authority of section 321(a)(2)(C) are set forth in sections 10.151 and 10.153 of title 19 of the Code of Federal Regulations (19 CFR 10.151 and 10.153).

A shipment of merchandise valued at $800 or less, which qualifies for informal entry under 19 U.S.C. 1498 and meets the requirements in 19 U.S.C. 1321(a)(2)(C), and 19 CFR 10.151, is referred to in this document as a "Section 321 low-value shipment." Unless a CBP official has reason to believe that a Section 321 low-value shipment fails to comply with any pertinent law or regulation, section 10.153 sets forth the guidance to be applied by a CBP officer in determining whether an article or parcel shall be exempted from duty and tax under section 10.151 and qualify as a Section 321 low-value shipment. Accordingly, consolidated shipments addressed to one consignee shall be treated as one importation; alcoholic beverages and cigars (including cheroots and cigarillos) and cigarettes containing tobacco, cigarette tubes, cigarette papers, smoking tobacco (including water pipe tobacco, pipe tobacco, and roll-your-own tobacco), snuff, or chewing tobacco are not exempt; any merchandise subject to antidumping and countervailing duties is not exempt; any merchandise of a class or kind provided for in any absolute or tariff-rate quota, whether the quota is open or closed, is not exempt; and, there is no exemption from any tax imposed under the Internal Revenue Code that is collected by other agencies on imported goods.

B. "Release From Manifest" Process for Section 321 Low-Value Shipments

Pursuant to 19 CFR 10.151, merchandise subject to the Section 321(a)(2)(C) administrative exemption shall be entered under informal entry procedures. If formal entry is deemed necessary pursuant to 19 CFR 143.22, a shipment otherwise qualifying for the exemption may not be entered pursuant to 19 CFR 10.151. The relevant informal

entry procedures for Section 321 low-value shipments are set forth in 19 CFR 128.24 and 19 CFR part 143, subpart C. Pursuant to the CBP regulations, a Section 321 low-value shipment may be entered, using reasonable care, by the owner, purchaser, or consignee of the shipment, or, when appropriately designated by one of these persons, a customs broker licensed under 19 U.S.C. 1641. *See* 19 CFR 143.26(b).

Section 321 low-value shipments may be entered by presenting the bill of lading or a manifest listing each bill of lading. *See* 19 CFR 143.23(j)(3). This type of informal entry is termed the "release from manifest" process. Generally, such shipments are released from CBP custody based on the information provided on the manifest or bill of lading. Such information may be provided by express consignment operators, carriers, or brokers. The following information must be provided as part of the "release from manifest" process: the country of origin of the merchandise; shipper name, address and country; ultimate consignee name and address; specific description of the merchandise; quantity; shipping weight; and value. *See* 19 CFR 128.21(a) and 19 CFR 143.23(k). No Harmonized Tariff Schedule of the United States (HTSUS) subheading or entry summary is required on an advance manifest for Section 321 low-value shipments. *See* 19 CFR 143.23(k) and 19 CFR 128.24(e).

A Section 321 low-value shipment is not exempt from PGA requirements. Many agencies do not have *de minimis* exemptions for their PGA reporting requirements, and require strict accountability of imported goods for national security, health and safety reasons, and to identify specific shipments of potentially violative products for reporting or enforcement targeting purposes. Low-value shipments may also require the payment of applicable PGA duties, fees or applicable excise taxes collected by other agencies. Shipments that have PGA data reporting requirements, or require the payment of any duties, fees, or taxes may not benefit from the use of a less complex Section 321 entry process like the "release from manifest" process, and must be entered using the appropriate informal or formal entry process to ensure that the PGA requirements are met. All shipments subject to PGA requirements are currently ineligible for entry under the "release from manifest" process.

II. Establishment of an Electronic Entry Process for Section 321 Low-Value Shipments Through ACE

On August 13, 2019, CBP published the August 13 Notice announcing the ACE Entry Type 86 Test to allow Section 321 low-value shipments, including those shipments subject to PGA data requirements, to be entered by filing a new type of informal entry electronically in ACE. Prior to the development of entry type 86, Section 321

low-value shipments subject to PGA requirements were required to be entered using the more complex informal entry type "11" or formal entry. The ACE Entry Type 86 Test provides a less complex entry and release process for Section 321 low-value shipments, including those subject to PGA data requirements, and expedites the clearance of compliant Section 321 low-value shipments into the United States through the use of ACE. Merchandise imported by mail is excluded from the ACE Entry Type 86 Test and may not be entered under the entry type 86.

In developing the ACE Entry Type 86 Test, CBP coordinated with the Commercial Customs Operations Advisory Committee (COAC), trade industry representatives, and PGAs, and considered the public comments received from the "Administrative Exemption on Value Increased for Certain Articles" interim final rule (Administrative Exemption IFR). On August 26, 2016, CBP published the Administrative Exemption IFR in the **Federal Register** (81 FR 58831), which amended the CBP regulations to implement section 901 of TFTEA by raising the value of the Section 321 administrative exemption from $200 to $800, and solicited comments regarding the collection of data on behalf of PGAs for shipments valued at $800 or less. CBP received eight public comments. A more detailed analysis of the comments received and CBP's responses to the public comments will be addressed at a later date. In summary, of the eight public comments, seven addressed the collection of data for Section 321 low-value shipments. Among these seven comments, five commenters encouraged the automated clearance of Section 321 low-value shipments using ACE and the collection of PGA data using a Section 321 *de minimis* entry process.

Five of the commenters encouraged CBP to automate Section 321 clearance using ACE. These commenters pointed out that automating Section 321 clearance through ACE will increase CBP's ability to provide risk-based targeting of inbound shipments, assure supply chain security, enforce trade laws, and protect intellectual property rights. Various ACE clearance processes were suggested by the commenters, including using the Automated Broker Interface (ABI) to allow the owner, purchaser, consignee, or designated customs broker to file the necessary information.

Most commenters also asserted that any ACE Section 321 clearance process should allow for the submission of PGA data. One commenter pointed out that unless Section 321 low-value shipments subject to PGA requirements could be cleared under a Section 321 *de minimis* entry process, the *de minimis* exemption would be of little use to the greater public because a large percentage of these imported shipments are regulated by PGAs. Commenters also noted that the pri-

mary purpose of increasing the Section 321 administrative exemption was to benefit e-commerce micro and small businesses engaging in global trade and the vast majority of these businesses lack the capacity to comply with complex trade rules.

CBP believes that the development of the new entry type 86 effectively addresses the public comments; facilitates legitimate trade while also allowing CBP to enhance its targeting capabilities; ensures that PGAs can identify potentially violative products for reporting or enforcement targeting purposes while allowing filers to utilize a less complex entry process; and decreases the challenges faced by CBP in targeting, locating and examining Section 321 low-value shipments by collecting necessary data. Processing Section 321 low-value shipments in ACE utilizes the "single window" system, thereby granting all government agencies involved with the importation of goods into the United States access to data concerning the shipments and gives the trade a single mechanism to enter data.

III. Authorization for the Test

The test described in this notice is authorized pursuant to 19 CFR 101.9(a), which grants the Commissioner of CBP the authority to impose requirements different from those specified in the CBP regulations for purposes of conducting a test program or procedure designed to evaluate the effectiveness of new technology or operational procedures regarding the processing of passengers, vessels, or merchandise, to the extent that such different requirements do not affect the collection of the revenue, public health, safety, or law enforcement.

The ACE Entry Type 86 Test allows CBP to test ACE functionality, and to test the new operational procedures involved with the new entry type, including any challenges that may result and any coordination that is necessary with PGAs. Additionally, the test allows CBP to determine if entry type 86 effectively addresses the threats and complexities resulting from the global shift in trade to an e-commerce platform and the vast increase in Section 321 low-value shipments, and facilitates cross-border e-commerce.

IV. ACE Entry Type 86 Test Requirements

A Section 321 low-value shipment may be entered by the owner, purchaser, or consignee of the shipment, or, when appropriately designated by one of these persons, a customs broker licensed under 19 U.S.C. 1641. *See* 19 CFR 143.26(b). For purposes of the ACE Entry Type 86 Test, CBP is deviating from this regulation and requiring that consignees intending to file an entry type 86 appoint a customs broker to act as the importer of record (IOR) for the shipment. All

customs brokers designated to enter a qualifying entry type 86 shipment must be appointed through a valid power of attorney, and must comply with all other applicable broker statutory and regulatory requirements. *See* 19 CFR 141.46; *see, e.g.,* 19 U.S.C. 1641; 19 U.S.C. 1484; 19 CFR part 111; 19 CFR part 141. The filing of entry type 86 is considered "customs business" under 19 U.S.C. 1641.[2]

To participate in this test, an owner, purchaser, or customs broker appointed by an owner, purchaser, or consignee will file an informal entry type 86 in ACE through ABI. ABI allows participants to electronically file all required import data with CBP, and transfers that data into ACE. To participate in ABI, a filer must meet the requirements and procedures set forth in 19 CFR part 143, subpart A, and must meet the technical requirements set forth in the Customs and Trade Automated Interface Requirements (CATAIR).[3]

The test is open to all owners, purchasers, consignees, and designated customs brokers of Section 321 low-value shipments, including those subject to PGA requirements, imported by all modes of cargo transportation, except mail. CBP encourages all eligible parties to participate in this test to test the functionality of the new entry type. Importers of Section 321 low-value shipments that do not contain any PGA data requirements may continue to utilize the "release from manifest" process or may utilize the ACE Entry Type 86 Test.

When filing an entry type 86, a bond and entry summary documentation are not required. Under entry type 86, the importing party is exempt from payment of the harbor maintenance tax and merchandise processing fee for merchandise released as a Section 321 low-value shipment. *See* 19 CFR 24.23(c)(1)(v) and 24.24(d)(3). However, any merchandise that is not exempt from the payment of any applicable PGA duties, fees, or taxes imposed under applicable statute or regulation by other agencies on imported goods does not qualify for entry as a Section 321 low-value shipment. An entry type 86 filing that is determined to owe any duties, fees, or taxes will be rejected by CBP and must be refiled using the appropriate informal or formal entry process. Additionally, CBP may require formal entry for any

[2] Pursuant to 19 U.S.C. 1641, "customs business" is defined as those activities involving transactions with CBP concerning the entry and admissibility of merchandise, its classification and valuation, the payment of duties, taxes, or other charges assessed or collected by CBP on merchandise by reason of its importation, or the refund, rebate, or drawback of those duties, taxes, or other charges. "Customs business" also includes the preparation of documents or forms in any format and the electronic transmission of documents, invoices, bills, or parts thereof, intended to be filed with CBP in furtherance of such activities, whether or not signed or filed by the preparer, or activities relating to such preparation, but does not include the mere electronic transmission of data received for transmission to CBP.

[3] *See* General Notice of August 26, 2008 (73 FR 50337) for a complete discussion on the procedures for obtaining an ACE Portal Account.

merchandise if it is deemed necessary for import admissibility enforcement purposes, revenue protection, or the efficient conduct of customs business. *See* 19 CFR 143.22. Further clarification pertaining to CBP's authority under 19 CFR 143.22 and the waiver of certain regulations under the ACE Entry Type 86 Test can be found below in Section V.

An entry type 86 requires the owner, purchaser, or customs broker appointed by the owner, purchaser, or consignee to file the following data elements with CBP at any time prior to or upon arrival of, the cargo:

(1) The bill of lading or the air waybill number;
(2) Entry number;
(3) Planned port of entry;
(4) Shipper name, address, and country;
(5) Consignee name and address;
(6) Country of origin;
(7) Quantity;
(8) Fair retail value in the country of shipment;
(9) 10-digit HTSUS number;
(10) IOR number of the owner, purchaser, or broker when designated by a consignee (conditional).

The IOR number is a conditional ACE Entry Type 86 Test data element and is required when the shipment is subject to PGA data reporting requirements. The IOR number provided must be that of the shipment's owner, purchaser, or broker when designated by a consignee.

Upon receipt of the data in an entry type 86 filing, CBP will determine whether the shipment is subject to PGA data reporting requirements. Any PGA data reporting requirements would be satisfied by the PGA Message Set and the filing of any supporting documentation via the Document Image System (DIS). The PGA Message Set enables the trade community to electronically submit all data required by the PGAs only once to CBP, eliminating the necessity for the submission and subsequent manual processing of paper documents, and makes the required data available to the relevant PGAs for import and transportation-related decision making. *See* the December 13, 2013 **Federal Register** notice (78 FR 75931) for a further discussion of the PGA Message Set and the October 15, 2015 **Federal Register** notice (80 FR 62082) for a further discussion of DIS.

A "CBP release" message indicates that CBP has determined that the Section 321 low-value goods may be released from CBP custody. All merchandise released by CBP is released conditionally and remains subject to recall through the issuance of a Notice of Redelivery. Merchandise that is regulated by one or more PGAs may not proceed

into commerce until CBP releases the merchandise and all PGAs that regulate the merchandise have issued a "may proceed" message.

The definitions of the ACE data elements, the technical requirements for submission, and information describing how filers receive transmissions are set forth in the CATAIR guidelines for ACE, which may be found at *https://www.cbp.gov/trade/ace/catair*.

V. Waiver of Regulations Under the Test

For purposes of this test, 19 CFR 10.151 will be waived for test participants only insofar as the informal entry procedures for "release from manifest" are inconsistent with the requirements in this notice. Additionally, 19 CFR 128.21(a), 128.24(e), 143.23(j) and (k), and 143.26(b) will be waived for test participants to the extent such procedures are inconsistent with the requirements of this notice. In addition, 19 CFR 141.5 is waived to the extent that it conflicts with the requirement in this notice that entry type 86 be filed prior to arrival, or upon arrival of the cargo. Regulations not specifically waived by the ACE Entry Type 86 Test remain in full force, including CBP's authority under 19 CFR 143.22 to require that any shipment, even a low-value shipment that would otherwise be eligible for entry using entry type 86, be formally entered instead. As noted below, if CBP requires that a shipment be formally entered, the filer will have up to 15 days after arrival to file formal entry, consistent with 19 CFR 141.5 and 142.2(a).

Pursuant to 19 CFR 143.22, CBP has the authority to require that any shipment, including a shipment for which an entry type 86 has been filed, be formally entered instead. In particular, CBP may require formal entry for a shipment that would otherwise be eligible for informal entry, including an entry type 86, if formal entry is "deemed necessary for import admissibility enforcement purposes; revenue protection; or the efficient conduct of customs business." *Id.*

This notice clarifies that when CBP exercises its authority under 19 CFR 143.22 to require formal entry for a shipment, the entry type 86 filer will be notified that the entry type 86 filing will not be accepted for purposes of making entry. In such circumstances, the requirement to file entry within 15 days of the date of arrival for the merchandise is not waived and will not be satisfied by the rejected entry type 86 filing. 19 CFR 141.5; 19 CFR 142.2(a). In order to comply with CBP's determination to require formal entry for a shipment, a party with the right to make entry must file an entry and entry summary in accordance with 19 CFR parts 141 and 142, which include the associated filing timeframes and the requirement to obtain a bond. 19 CFR 142.4(a). Failure to timely file the requisite entry summary will

result in an immediate demand for liquidated damages in the entire amount of the bond in the case of a single entry bond, or an equivalent amount if a continuous bond was filed. 19 CFR 142.15.

VI. Comments

All interested parties are invited to comment on any aspect of this test at any time. CBP requests comments and feedback on all aspects of this test, including the design, conduct and implementation of the test, in order to determine whether to modify, alter, expand, limit, continue, end, or fully implement this new entry process.

VII. Paperwork Reduction Act

In accordance with the Paperwork Reduction Act of 1995 (44 U.S.C. 3507), an agency may not conduct, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number assigned by the Office of Management and Budget (OMB). The collections of information for the ACE Entry Type 86 Test are included in an existing collection for CBP Form 3461 (OMB control number 1651–0024).

VIII. Misconduct Under This Test

A test participant may be subject to civil and criminal penalties, administrative sanctions, or liquidated damages, as provided by law, for any of the following:

(1) Failure to follow the rules, requirements, terms, and conditions of this test;

(2) Failure to exercise reasonable care in the execution of participant obligations; or

(3) Failure to abide by applicable laws and regulations that have not been waived.

These penalties, administrative sanctions, and liquidated damages may be imposed under any statutory authority or under any CBP regulations that have not been waived by the test. CBP may suspend or remove a filer from further participation in the ACE Entry Type 86 Test based on a determination that that filer's participation in the test poses an unacceptable compliance risk.

Dated: January 10, 2024.

ANNMARIE R. HIGHSMITH,
Executive Assistant Commissioner,
Office of Trade.

Slip Op. 24–1

OMAN FASTENERS, LLC, Plaintiff, v. UNITED STATES, Defendant, and MID CONTINENT STEEL & WIRE, INC., Defendant-Intervenor.

Before: M. Miller Baker, Judge
Court No. 22–00348
Public Version

[The court sustains the Department of Commerce's remand redetermination.]

Dated: January 5, 2024

Adam H. Gordon, *Jennifer M. Smith*, and *Benjamin J. Bay*, The Bristol Group PLLC of Washington, DC, on the comments for Defendant-Intervenor.

Brian M. Boynton, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; *Tara K. Hogan*, Assistant Director; and *Kelly M. Geddes*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice of Washington, DC, on the comments for Defendant. Of counsel on the comments was *Ian A. McInerney*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce of Washington, DC.

Michael R. Huston, *Michael P. House*, and *Andrew Caridas*, Perkins Coie LLP of Washington, DC, on the comments for Plaintiff.

OPINION

***Baker*, Judge:**

In this return visit following remand, a domestic competitor challenges the Department of Commerce's redetermination of the dumping margin for an Omani producer and importer of steel nails. Finding the decision to be supported by substantial evidence, the court sustains it.

I

The court's previous opinion provides the factual and procedural backdrop here. *See Oman Fasteners, LLC v. United States*, Ct. No. 22–00348, Slip Op. 23–17, at 5–10, 2023 WL 2233642, at **2–3 (as amended, CIT Feb. 22, 2023), *appeal pending*, No. 2023–1661 (Fed. Cir. Mar. 27, 2023). To summarize, Plaintiff Oman Fasteners, LLC, filed one part of a supplemental questionnaire response 16 minutes late, so Commerce rejected the entire response as untimely and struck it from the record. *Id.* at 5, 7, 2023 WL 2233642, at *2, *3. The Department found that the response's absence meant the record lacked "necessary information," requiring the use of facts otherwise

available under 19 U.S.C. § 1677e(a). *Id.* at 9, 2023 WL 2233642, at *3. Finding that Oman's 16-minute delay represented a failure to cooperate justifying the use of an adverse inference in selecting from among the facts otherwise available, Commerce assigned the company a 154.33 percent rate. *Id.* at 9–10, 2023 WL 2233642, at *3.

Oman brought this suit and sought a preliminary injunction requiring the government to collect antidumping duty deposits from the company at the preexisting 1.65 percent rate set in the preceding administrative review. *Id.* at 4, 2023 WL 2233642, at *1. The court conducted an evidentiary hearing, found that "Commerce's challenged actions here are the very definition of abuse of discretion," and granted judgment on the agency record and injunctive relief to Oman. *Id.* at 4–5, 2023 WL 2233642, at **1–2. The court remanded and directed the Department to place the company's supplemental response on the record and to consider it for purposes of calculating the dumping rate. ECF 91, ¶ 3.

On remand, Oman resubmitted its supplemental response, Appx01000, which Commerce used along with other information to calculate an estimated weighted-average dumping margin of zero. Appx01001–01002. One result of that outcome is that the private litigants have traded places. Mid Continent, notionally a defendant-intervenor, now challenges the Department's redetermination, while Oman, notionally the plaintiff, supports it.

II

Oman brought this suit under 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (B)(iii), which allow an interested party who was a party to an antidumping proceeding to contest Commerce's final determination. The court has subject-matter jurisdiction over such actions under 28 U.S.C. § 1581(c).

The standard of review for a remand redetermination is the same as that on previous review. *Bethlehem Steel Corp. v. United States*, 223 F. Supp. 2d 1372, 1375 (CIT 2002). In actions brought under 19 U.S.C. § 1516a(a)(2), "[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." 19 U.S.C. § 1516a(b)(1)(B)(i). That is, the question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record as a whole permits Commerce's conclusion.

> Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if

> substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up).

III

Mid Continent's challenge to the remand redetermination raises three issues: (1) whether Commerce should have rejected Oman's supplemental questionnaire response and assigned the company a 154.33 percent dumping margin based on the use of facts otherwise available with an adverse inference, *see* ECF 116, at 1–6—an argument that the court rejected in its earlier opinion and is pending on appeal;[1] (2) whether the Department erred by using quarterly costs, instead of annual costs, to calculate Oman's margin, *see* ECF 116, at 6–10; and (3) whether Commerce erred by not deducting Section 232 duties from the U.S. sales prices for all of Oman's entries, rather than just three entries, *id.* at 10–13. The court addresses the latter two questions.

A

In analyzing whether "there are reasonable grounds to believe or suspect that sales of the foreign like product have been made at prices that are less than" the cost of production, Appx01022–01023, Commerce stated that its "normal practice is to calculate an annual weighted-average cost" for the period of review. Appx01023. It explained, however, that sometimes it deviates from this practice based on "two primary criteria":

> (1) the change in the cost of manufacturing recognized by the respondent during the [period of review] must be deemed significant; and (2) the record evidence must indicate that the sales prices during the shorter cost averaging periods could be reasonably linked with the [cost of production] or [constructed value] during the same shorter cost-averaging periods.

Id. (defined term omitted).

The Department found that Oman's cost data here met both criteria. First, "record evidence shows that Oman Fasteners experienced significant cost changes (*i.e.*, changes that exceeded 25 percent) between the high and low quarterly" cost of manufacturing during the

[1] Because an appeal is pending, the court lacks jurisdiction to reconsider this issue. *See* 20 *Moore's Federal Practice— Civil* § 303.32[2][a][ii].

relevant period. Appx01024. Second, because the cost changes were significant, the Department examined whether there was "evidence of a linkage" between the cost changes and sales prices during the relevant period and found that there was a "reasonable correlation" between them sufficient to find a "linkage." *Id.* Because the data satisfied both criteria, Commerce based its cost-averaging analysis on quarterly, rather than annual, data. Appx01024–01025.

Mid Continent now argues that the Department erred in so departing from its normal practice of relying on annual data. ECF 116, at 7. The company asserts that there are "two significant issues with the agency's position." *Id*.

First, Mid Continent contests Commerce's finding that the "majority of Oman Fasteners' top [control numbers][2] sold to the United States pass our test for significant changes in direct material costs and pass our test for correlation between cost of manufacturing and U.S. price." ECF 116, at 7–8 (quoting Appx01035). But Mid Continent *acknowledges* that the majority of Oman's control numbers experienced significant changes in material costs. *See* ECF 117, at 8.[3] It appears that the former's theory is that not enough of the latter's control numbers satisfied the test for a "significant change," but it is silent about what percentage it believes *would* be enough. The Department's finding that a majority of Oman's control numbers experienced significant changes in material costs is supported by substantial evidence, as Mid Continent has effectively admitted that fact.

Mid Continent's second line of attack is that Oman did not provide "direct material costs on a quarterly basis," ECF 116, at 8, thereby undermining the Department's finding that Oman experienced significant changes in material costs. Mid Continent asserts that Oman's data comes from a worksheet that "sets out an adjustment factor that was only calculated on an annual basis," *id.* at 10, and further contends that although Oman's worksheet includes quarterly adjustment factors, "no data, formulas, or calculations for how those values were derived were given." *Id.*

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[2] "Control number" refers to a system Commerce uses "[t]o ensure that the normal value can accurately be compared to the export price or constructed export price for the same product." *Dalian Meisen Woodworking Co. v. United States*, 571 F. Supp. 3d 1364, 1369 (CIT 2021). "All products whose product hierarchy characteristics are identical are deemed to be part of the same control number and are regarded as identical merchandise for the purposes of comparing export prices to normal value." *Id.* at 1370 (quoting *Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321, 1340 (CIT 2020)).

[3] Mid Continent argues that "[[ ]] [control numbers] sold in the U.S. market have a variation in prices and costs greater than 25 percent" and that "[[ ]]" satisfy that criterion. ECF 117, at 8. Therefore, the company contends, "[b]ecause [[ ]] of the [control numbers] meet[ ] the required threshold, the use of quarterly costs methodology is not warranted in this case." *Id.* But [[ ]] *is a majority*, just as Commerce found.

Mid Continent, however, acknowledges that Oman relied on these quarterly adjustment factors to calculate its costs and that Commerce in turn used these factors. *Id*. at 9–10. Mid Continent's real complaint is that Oman did not provide the underlying calculations, but it's the Department's job—not the court's—to determine the weight to accord to Oman's data. Accordingly, substantial evidence supports Commerce's decision to base its cost-averaging analysis on Oman's quarterly, rather than annual, data.

B

The last issue Mid Continent raises is whether Commerce should have deducted Section 232 duties from Oman's U.S. sales prices in calculating the antidumping margin. (The lower the U.S. sales price of an imported product, the more likely that either a duty will be imposed or that any such duty will be higher.) Mid Continent acknowledges that an injunction in a different case exempted Oman from paying such duties at the time of importation but argues that because the Federal Circuit has since reversed that ruling, "Section 232 duties presently are owed, and have accrued or been paid on Oman Fasteners' entries of steel nails made during the [period of review]," and therefore Commerce should have deducted those duties, "whether accrued or paid." ECF 116, at 11–12 (citing *PrimeSource Bldg. Prods. v. United States*, 59 F.4th 1255 (Fed. Cir. 2023)).

First some background: The Department imposed the original antidumping duty order on Oman's steel nails in 2015.[4] The Tariff Act of 1930, as amended, requires Commerce to conduct "periodic" reviews—generally known as "administrative reviews"—of the amount of duty. *See* 19 U.S.C. § 1675. In short, the Department examines the imports during the relevant 12-month period of review to determine their normal value (home market sales price) and export price or constructed export price (U.S. sales price) to determine whether, and how much, dumping occurred during that 12-month period. *See id.* § 1675(a)(1)(B) (requiring reviews); *id.* § 1675(a)(2)(A) (requiring that Commerce determine the normal value and export price or constructed export price, as well as the dumping margin, for each entry during the period of review); *see also* Appx01003 (stating that Commerce sought "to determine whether Oman Fasteners' sales of steel nails from Oman to the United States during the [period of review] were made at less than normal value").

[4] *See Certain Steel Nails from the Republic of Korea, Malaysia, the Sultanate of Oman, Taiwan, and the Socialist Republic of Vietnam*, 80 Fed. Reg. 39,994 (Dep't Commerce July 13, 2015).

The period of review at issue here covered July 1, 2020, through June 30, 2021. *See* Appx01000. In January 2020, shortly before the start of that period, the President issued Proclamation 9980, which imposed a 25 percent duty under Section 232 of the Trade Expansion Act of 1962[5] on certain steel derivative products, including Oman's steel nails. *See* Proclamation 9980 of January 24, 2020, *Adjusting Imports of Derivative Aluminum Articles and Derivative Steel Articles into the United States*, 85 Fed. Reg. 5281 (Jan. 29, 2020). As a result of initially successful litigation that Oman brought in this court challenging the legality of Proclamation 9980, *see Oman Fasteners, LLC. v. United States*, 520 F. Supp. 3d 1332 (CIT 2021), *rev'd sub nom. PrimeSource Bldg. Prods., Inc.*, 59 F.4th 1255 (Fed. Cir. 2023), *pet. for cert. filed*, No. 23–432 (U.S. Oct. 20, 2023), the company was not required to pay Section 232 duties on any of its entries during the period of review.

The remand redetermination explains that Mid Continent argued that because Oman "is now required to pay Section 232 duties" due to the Federal Circuit's decision, Commerce should deduct those amounts from all prior sales during the period of review. Appx01048. The Department generally declined, stating that the administrative record established that Oman did not pay Section 232 duties during the period of review except for three entries.[6] Appx01048–01049. As the government aptly puts it, "Commerce determined to deduct only the Section 232 duties that Oman Fasteners actually paid." ECF 120, at 16 (citing ECF 110–1, at 49–50).

The government correctly explains that the Department's statutory obligation is to deduct "the amount, if any, *included in [the export] price*, attributable to any . . . United States import duties." *Id.* at 17 (emphasis in original) (quoting 19 U.S.C. § 1677a(c)(2)(A)). The words "included in [the export] price" are the key. Mid Continent cites no evidence to show that Oman's pricing reflected amounts attributable to Section 232 duties. As the government persuasively argues, "Mid Continent offers no justification for its unsupported assumption that, if a party is ultimately found to owe duties, those duties must have therefore been included in a price that was paid at an earlier time." *Id.* at 18. Oman's summation is surely correct: "Commerce's determinations as to the deduction of Section 232 duties were based not on the status of legal proceedings challenging the Section 232 duties, but on the straightforward factual question of whether Oman Fasteners paid Section 232 duty deposits on the relevant entry." ECF 122, at 13. The court therefore finds that the Department's decision not to deduct

[5] Section 232 is codified, as amended, at 19 U.S.C. § 1862.

[6] Commerce did deduct Section 232 duties for those three entries. Appx01049.

Section 232 duties, except as to the three entries for which Oman actually paid them, was both lawful and supported by substantial evidence.

* * *

For the foregoing reasons, the court **SUSTAINS** the Department of Commerce's remand redetermination. Judgment shall issue. *See* USCIT R. 58(a).

Dated: January 5, 2024
New York, NY

/s/ M. Miller Baker
JUDGE

Slip Op. 24–3

COLUMBIA ALUMINUM PRODUCTS, LLC, Plaintiff, v. UNITED STATES, Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 19–00185

[Granting relief on plaintiff's motion for judgment on the agency record and denying defendant's request for a stay of the entry of judgment pending an appeal in a separate proceeding]

Dated: January 16, 2024

Jeremy W. Dutra, Squire Patton Boggs (US) LLP, of Washington, D.C., for plaintiff. With him on the briefs was *Peter J. Koenig*.

Alexander J. Vanderweide, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, N.Y., for defendant. With him on the brief was *Justin R. Miller*, Attorney-in-Charge, and *Aimee Lee*, Assistant Director. Also on the brief were *Patricia M. McCarthy*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., and *Brian M. Boynton*, Principal Deputy Assistant Attorney General. Of counsel on the brief was *Tamari J. Lagvilava*, Attorney, Office of the Chief Counsel, U.S. Customs and Border Protection, of Washington, D.C.

OPINION AND ORDER

Stanceu, Judge:

Plaintiff Columbia Aluminum Products, LLC ("Columbia Aluminum" or "Columbia") contests determinations by U.S. Customs and Border Protection ("Customs" or "CBP") that Columbia's imports of certain "door thresholds" from Vietnam evaded antidumping and countervailing duty orders on aluminum extrusions from the People's Republic of China ("China" or "the PRC"). Before the court is Columbia's motion for judgment on the agency record, submitted under USCIT Rule 56.2, which defendant opposes. Also before the court is

defendant's request for a stay of any judgment in favor of Columbia pending the outcome of certain appellate litigation. The court grants relief on Columbia's Rule 56.2 motion, orders Customs to submit a redetermination expeditiously, and denies defendant's request for a stay.

I. BACKGROUND

Background on this case is set forth in a prior opinion of the court, *Columbia Aluminum Products, LLC. v. United States*, 46 CIT __, __, 609 F. Supp. 3d 1405, 1406–08 (2022), and is supplemented herein.

A. The Contested Determinations

Columbia contests CBP's final determination that Columbia's imports evaded the antidumping and countervailing duty orders on aluminum extrusions from China (the "Final Evasion Determination"). *Notice of Final Determination as to Evasion* (Mar. 20, 2019), P.R. Doc. 61 ("*Final Evasion Determination*").[1] The "Trade Remedy & Law Enforcement Directorate," or "TRLED," entity within Customs issued this determination under "subsection (c)" of Title IV, Section 421 of the Trade Facilitation and Enforcement Act (the "Enforce and Protect Act" or "EAPA"), 19 U.S.C. § 1517(c).[2] In the Final Evasion Determination, Customs concluded that the door thresholds Columbia imported from Vietnam were "covered merchandise" for purposes of the EAPA, i.e., merchandise covered by the antidumping and countervailing duty orders pertaining to China, and that they were entered into the United States "through evasion." *Final Evasion Determination* at 1.

Columbia also contests an "Administrative Review Determination" that the "Regulations and Rulings," or "R&R," entity within Customs issued under subsection 421(f) of the EAPA ("subsection (f)"), 19 U.S.C. § 1517(f), in which Customs administratively affirmed in part, and reversed in part, its Final Evasion Determination. *Enforce and Protect Act ("EAPA") Case Number 7232* (Aug. 26, 2019), P.R. Doc. 67 ("*Admin. Review Determination*"). In the Administrative Review Determination, Customs again found evasion but on appeal limited its finding of evasion to Columbia's entries of door thresholds from Vietnam that were made on or after December 19, 2018. *Id*. at 2.

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[1] Documents in the Administrative Record (Oct. 23, 2019), ECF Nos. 24 (Public), 25 (Conf.) and the Joint Appendix (Apr. 28, 2023), ECF Nos. 82 (Public), 83 (Conf.) are cited herein as "P.R. Doc. __." All citations to record documents are to the public versions of these documents.

[2] Citations to the United States Code are to the 2018 edition.

B. The Antidumping and Countervailing Duty Orders

The International Trade Administration, U.S. Department of Commerce ("Commerce" or the "Department"), issued in 2011 the antidumping duty order (the "AD Order"), and the countervailing duty order (the "CVD Order") (collectively, the "Orders"), on aluminum extrusions from the People's Republic of China. *Aluminum Extrusions from the People's Republic of China: Antidumping Duty Order*, 76 Fed. Reg. 30,650 (Int'l Trade Admin. May 26, 2011) ("*AD Order*"); *Aluminum Extrusions From the People's Republic of China: Countervailing Duty Order*, 76 Fed. Reg. 30,653 (Int'l Trade Admin. May 26, 2011) ("*CVD Order*").

C. Allegations of Evasion of the Orders

The contested decisions resulted from an EAPA investigation that Customs initiated in response to allegations by Endura Products, Inc. ("Endura"), a domestic producer of door thresholds. *EAPA Case Number 7232: Initiation of Investigation* (Feb. 9, 2018), P.R. Doc. 12.

Customs declined to take action in response to an allegation by Endura that Columbia evaded the AD Order by misclassifying its imported door thresholds as "wall plates." *Final Evasion Determination* at 2, 6; *Admin. Review Determination* at 2 (identifying the allegation as having been submitted by Endura on January 11, 2018), 2 n.5 (affirming the decision not to proceed on that allegation). Endura did not contest CBP's decision declining to act on this allegation. *Admin. Review Determination* at 2 n.5.[3]

In a supplemental filing dated March 20, 2018, Endura alleged that Columbia was evading the AD Order by importing door thresholds assembled in Vietnam using aluminum extrusions of Chinese origin.[4] *Id*. at 2. Customs acted upon this allegation, as described below.

D. "Interim Measures" and Subsequent Actions by Customs

In response to Endura's March 20, 2018 allegation, Customs notified Columbia that "[b]ecause the evidence thus far uncovered establishes a reasonable suspicion that Columbia has entered covered merchandise into the United States through evasion, CBP has im-

[3] Endura Products, Inc., formerly a defendant-intervenor, withdrew from this action. Motion to Withdraw (Feb. 21, 2023), ECF No. 73; Order (Mar. 14, 2023), ECF No. 76.

[4] In the March 20, 2018 submission, "Endura newly alleged that Columbia was importing door thresholds assembled by Houztek Architectural Products Company, Ltd. ('Houztek') in Vietnam using Chinese-origin aluminum extrusions furnished by Shanghai Top Ranking Aluminum Products Co., Ltd. ('STR') of China, and exported from Vietnam, to evade the payment of antidumping duties on aluminum extrusions from China." *Enforce and Protect Act ("EAPA") Case Number 7232* at 2 (Aug. 26, 2019), P.R. Doc. 67 ("*Admin. Review Determination*").

posed interim measures pursuant to 19 CFR § 165.24." *Notice of Initiation of Investigation and Interim Measures* at 1 (May 17, 2018), P.R. Doc. 18. The "Interim Measures" included "rate-adjusting" the entries subject to the investigation for the collection of cash deposits, requiring "live entry" for "all future imports of products believed to be aluminum thresholds by Columbia" such that "all entry documents and duties must be provided before cargo is released by CBP into U.S. commerce," and extending and suspending liquidation of entries. *Id.* at 6–7.

The Final Evasion Determination concluded that:

> Evidence and observations collected by the CBP site verification team as well as communications between Columbia and Houztek indicate that Houztek used Chinese-extruded aluminum in producing door thresholds for the [*sic*] Columbia, the use of which renders Columbia's imports of door thresholds into the United States subject to the duty orders at issue in this investigation.

Final Evasion Determination at 8. The Final Evasion Determination continued the Interim Measures. *Id.* at 9.

The Administrative Review Determination affirmed the Final Evasion Determination only "with respect to entries of door thresholds on or after December 19, 2018" and reversed it "with respect to entries of door thresholds before December 19, 2018." *Admin. Review Determination* at 28. Customs chose the beginning date of December 19, 2018 for its affirmative determination of evasion because that was the date Commerce, after conducting a "scope inquiry," issued a "Scope Ruling" on ten models of door thresholds Columbia imported from China.[5] *Antidumping and Countervailing Duty Orders on Aluminum Extrusions from the People's Republic of China: Final Scope Rulings on Worldwide Door Components, Inc., MJB Wood Group, Inc., and*

[5] The Administrative Review Determination stated as follows:

> Commerce decided the scope inquiry on December 19, 2018, and determined that completed door thresholds were covered by the *Orders*. Commerce's delay in issuing the ruling highlights that there was not an overt or obvious case that completed thresholds are within the scope of the *Orders*. Because the scope ruling was issued on December 19, 2018, CBP's suspension of liquidation and requirement for cash deposits should not apply to completed door thresholds Columbia imported before December 19, 2018, the date Commerce decided the scope inquiry. All pertinent Columbia imports at issue occurred before that date.

Admin. Review Determination at 13.

Columbia Aluminum Products Door Thresholds (Int'l Trade Admin. Dec. 19, 2018) ("*Scope Ruling*").[6]

The door thresholds at issue in the Scope Ruling issued by Commerce were not "aluminum extrusions" as defined by the Orders. Each door threshold was produced in China and contained an "aluminum extrusion," as defined by the Orders, among other, non-aluminum components, including components made of polyvinyl chloride ("PVC") and, for some models, injection molded wood filled plastic substrate. *Scope Ruling* at 13–14. Commerce concluded in the Scope Ruling that an aluminum extrusion component in each door threshold, but not any of the other components in the assembly, was subject to the Orders. *Id*. at 33.

E. Plaintiff's Rule 56.2 Motion, Defendant's Motion for a Remand, and Defendant's Opposition to Plaintiff's Rule 56.2 Motion

Plaintiff commenced this action on October 1, 2019, Summons, ECF No. 1, Compl., ECF No. 2, and moved for judgment on the agency record pursuant to USCIT Rule 56.2 in early 2020. Pl. Columbia Aluminum Products, LLC's Rule 56.2 Mot. for J. on the Agency R. (Jan. 8, 2020), ECF Nos. 53 (Conf.), 56 (Public) ("Columbia's Motion"); Mem. of Points and Authorities in Supp. of Pl. Columbia Aluminum Products, LLC's Rule 56.2 Mot. for J. on the Agency R. (Jan. 8, 2020), ECF Nos. 53 (Conf.), 56 (Public) ("Columbia's Br.").

After Columbia filed its Rule 56.2 motion, defendant moved for a "voluntary remand" and a suspension of the current briefing schedule, citing a decision by the U.S. Court of Appeals for the Federal Circuit (the "Court of Appeals"), *Sunpreme Inc. v. United States*, 946 F.3d 1300 (Fed. Cir. 2020). Def.'s Mot. for Voluntary Remand and to Suspend the Current Briefing Schedule (Jan. 22, 2020), ECF No. 57. The court denied the motion for a remand but allowed additional time for the filing of a response to Columbia's motion. *Columbia Aluminum Products, LLC. v. United States*, 46 CIT __, 609 F. Supp. 3d 1405 (2022).

Defendant United States opposed Columbia's motion. Def.'s Resp. to Pl.'s Rule 56.2 Mot. for J. on the Agency R. (Mar. 7, 2023), ECF Nos. 74 (Conf.), 75 (Public) ("Def.'s Resp."). Columbia replied to defendant's opposition. Pl. Columbia Aluminum Products, LLC's Reply in Further Supp. of its Rule 56.2 Mot. for J. on the Agency R. (Apr. 6, 2023), ECF No. 80 ("Columbia's Reply").

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[6] The referenced Scope Ruling, as issued by the International Trade Administration, U.S. Department of Commerce, improperly was omitted from the administrative record despite having been considered during the administrative proceeding resulting in this litigation. The document was made available on access.trade.gov (document barcode 3784481–01).

II. DISCUSSION

A. Jurisdiction and Standard of Review

The court exercises jurisdiction according to section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under the EAPA, including actions contesting a determination by Customs that "covered merchandise was entered into the customs territory of the United States through evasion." 19 U.S.C. § 1517(g)(1).

The court is directed by Congress to decide whether a determination of evasion issued by Customs under 19 U.S.C. § 1517(c), or a *de novo* administrative review of such a determination of evasion issued by Customs under 19 U.S.C. § 1517(f), "is conducted in accordance with those subsections" by examining "whether the Commissioner fully complied with all procedures under subsections (c) and (f)" and "whether any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id*. § 1517(g)(2).

B. The Final Evasion Determination and the Administrative Review Determination

In issuing the Final Evasion Determination and the Administrative Review Determination, Customs committed multiple errors, both of fact and of law. The errors are discussed below.

1. The Record Does Not Support CBP's Finding that "Columbia 'Transshipped' Aluminum Door Thresholds from China through Vietnam"

Both the Final Evasion Determination and the Administrative Review Determination rest, in part, upon unsupported findings of fact. In the Final Evasion Determination, Customs found that "[s]ubstantial evidence demonstrates that Columbia imported aluminum door thresholds made from aluminum extruded in China by transshipping the thresholds through Vietnam and falsely declaring the country of origin." *Final Evasion Determination* at 1. Similarly, the Final Evasion Determination states as a finding that "[t]he factual record includes substantial evidence that Columbia transshipped aluminum thresholds from China through Vietnam during the period of investigation."[7] *Id*. at 7. While reducing the time period for the finding of

[7] Customs defined the "period of investigation" as applying to entries of merchandise beginning on January 19, 2017 and "through the pendency of the investigation." *Notice of Initiation of Investigation and Interim Measures* at 1–2 (May 17, 2018), P.R. Doc. 18.

"transshipment," the Administrative Review Determination impliedly incorporates these errors:

> Based upon our *de novo* review of the administrative record in this case . . . with respect to the issue of transshipment, the March 20 Determination of evasion under 19 USC § 1517(c) is:
>
> AFFIRMED, IN PART, with respect to entries of door thresholds on or after December 19, 2018; and
>
> REVERSED, IN PART, with respect to entries of door thresholds before December 19, 2018.

Admin. Review Determination at 27–28. The uncontradicted record evidence was that the door thresholds subject to CBP's investigation were not "aluminum" door thresholds and that they were produced in Vietnam, not in China. *See, e.g.*, *Admin. Review Determination* at 8. In both determinations, Customs addressed record evidence that it characterized as showing that some of these door thresholds were assembled in Vietnam using, among various other, non-aluminum-extrusion components, a Chinese-origin component part (described by Customs as an aluminum "profile," *see e.g.*, *Final Evasion Determination* at 8) that was made from an aluminum extrusion.

Columbia asserts that "[t]here is no genuine dispute that the thresholds Columbia Aluminum imported from Vietnam are multi-component products fully and permanently assembled before importation" and that "[w]hile each door threshold contains an aluminum extrusion, the aluminum component is not the principal contributor to the weight, value, or functionality of the finished threshold products." Columbia's Reply 6 (citations omitted). Defendant does not dispute these specific assertions. *See* Def.'s Resp. 19–26.

Neither the Final Evasion Determination nor the Administrative Review Determination cites record evidence that Columbia, during the period of investigation, obtained "aluminum door thresholds" from China, that it "transshipped" aluminum thresholds from China through Vietnam, or that it falsely declared the country of origin of these door thresholds as products of Vietnam instead of China. These findings are arbitrary and capricious and, therefore, invalid when viewed according to the standard of review.

2. The Final Evasion Determination Erroneously Interpreted the Orders to Apply to Merchandise Produced in a Third Country

The scope languages of the AD Order and of the CVD Order, which essentially are the same, apply to "aluminum extrusions" from the

PRC made of specified aluminum alloys. The scope language defines the term "aluminum extrusions" as "shapes and forms, produced by an extrusion process" and provides that following extrusion they remain within the scope even if subjected to further fabrication and finishing. *AD Order*, 76 Fed. Reg. at 30,650; *CVD Order*, 76 Fed. Reg. at 30,653. A provision in the scope language, the "subassemblies" provision, extends the scope of the Orders to aluminum extrusion components that, at the time of importation, are attached to non-aluminum extrusion components to form what the Orders describe as "subassemblies, i.e., partially assembled merchandise," but "[t]he scope does not include the non-aluminum extrusion components of subassemblies." *AD Order*, 76 Fed. Reg. at 30,650–01; *CVD Order*, 76 Fed. Reg. at 30,654.

The Orders also contain a "finished merchandise exclusion," which reads as follows:

> The scope also excludes finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels.

AD Order, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

The Final Evasion Determination concluded that Columbia "entered into the customs territory of the United States through evasion merchandise covered by antidumping duty (AD) order A-570–976 and covered by countervailing duty order C-570–968." *Final Evasion Determination* at 1 (footnotes citing *Orders* by Federal Register publication omitted). In so concluding, Customs misinterpreted the Orders.

The Final Evasion Determination found that the Vietnamese producer of the assembled door thresholds, Houztek Architectural Products Company, Limited ("Houztek") used Chinese-extruded aluminum in producing door thresholds for Columbia in Vietnam, "the use of which renders Columbia's imports of door thresholds into the United States subject to the duty orders at issue in this investigation." *Id*. at 8. This conclusion was incorrect. A Chinese-origin extruded aluminum component, if present within an assembled door threshold produced in Vietnam and imported into the United States by Columbia, would not convert such a good to "covered merchandise."

Customs found in the Administrative Review Determination that "[t]he record evidence shows that the door thresholds were completed

or assembled in Vietnam using Chinese-origin aluminum and non-aluminum extrusions components" and that "[t]he record evidence also shows that the door thresholds were exported from Vietnam." *Admin. Review Determination* at 21. The Administrative Review Determination concluded that "[t]he *Orders*, as written, do not address the country of origin of products assembled in other foreign countries from aluminum profiles extruded in China." *Id*. at 22. It concluded, further, that "[t]here is no indication that the *Orders*, as written, were intended to cover door thresholds completed or assembled in another foreign country, and exported from another foreign country." *Id*.

In opposing Columbia's Rule 56.2 motion, defendant does not argue that the Administrative Review Determination was incorrect in its decision that the Orders as written did not apply to door thresholds assembled in Vietnam using a Chinese-origin extruded aluminum component. Nor does defendant seek a remand for reconsideration of this decision. Therefore, defendant has waived any objection to that decision. Even were defendant not to have waived any objection, the court still would conclude that the Orders as issued in 2011 do not pertain to merchandise produced in, and exported from, countries other than China. *See AD Order*, 76 Fed. Reg. at 30,650 (stating that Commerce "is issuing an antidumping duty order on aluminum extrusions *from the People's Republic of China ('PRC')*" (emphasis added); *CVD Order*, 76 Fed. Reg. at 30,653 (stating that Commerce "is issuing a countervailing duty order on aluminum extrusions *from the People's Republic of China ('PRC')*" (emphasis added)). Although the "subassemblies" provision, discussed previously, extends the scope to include certain "partially assembled merchandise" containing an aluminum extrusion as a component part, nothing in the Orders provides that an assembled good produced in a third country and incorporating a Chinese-origin aluminum extrusion as a component part is within the scope that the Orders specify.

While correctly interpreting the Orders as issued in 2011 not to apply to goods produced in a third country, the Administrative Review Determination commits errors of law in interpreting two determinations issued by Commerce—the "Circumvention Determination" and the Scope Ruling—as discussed below.

3. The Administrative Review Determination Misinterpreted the Effect of the Circumvention Determination and the Scope Ruling, Neither of Which Pertained to the Issue in the EAPA Proceeding

For its determination of evasion, the Administrative Review Determination relies on a "Circumvention Determination" that Commerce issued in 2019 following an inquiry initiated under Section 781(b) of

the Tariff Act, 19 U.S.C. § 1677j(b). *See Aluminum Extrusions From the People's Republic of China: Final Affirmative Determination of Circumvention of the Antidumping Duty Orders and Partial Recission*, 84 Fed. Reg. 39,805 (Int'l Trade Admin. Aug. 12, 2019) ("*Circumvention Determination*"). That reliance was misplaced. Although the Circumvention Determination, unlike the Orders as issued in 2011, applies to goods produced in a third country (Vietnam), it applies only to "aluminum extrusions" exported from Vietnam that are produced from aluminum previously extruded in China. Read according to its express terms, the Circumvention Determination does not apply to an assembled good exported from Vietnam in which an aluminum extrusion is only a component among non-aluminum-extrusion components within that assembled good.

Based on the Circumvention Determination and the Scope Ruling, Customs concluded in the Administrative Review Determination that the assembled door thresholds Columbia imported from Vietnam were "covered merchandise" under the EAPA. Customs reached this conclusion by reasoning as follows:

> The legal effect of Commerce's anti-circumvention inquiry under Section 781(b) and subsequent determination is to bring aluminum extrusions entered on or after May 5, 2018 from Vietnam, and made from aluminum previously extruded in China, within the scope of the *Orders*. However, not all aluminum extrusions exported from Vietnam are brought within the scope of the *Orders*, rather only those that meet the description of the *Orders*. On December 19, 2018, the date that Commerce decided Columbia's scope inquiry, Columbia's door thresholds exported from Vietnam were brought within the description and scope of the *Orders* and became "covered merchandise" under 19 U.S.C. § 1517(a)(3).

Admin. Review Determination at 27 (footnote omitted). The first sentence, which is addressed to imported "aluminum extrusions," is irrelevant to this case, as Columbia did not import aluminum extrusions from Vietnam. The conclusion in the remainder of the paragraph is a non-sequitur.

On the issue of where the aluminum extrusion components within Columbia's door thresholds were extruded, Customs made the following factual findings:

> Although the record evidence shows that some door thresholds assembled in Vietnam by Houztek may have been made using aluminum extruded in Vietnam, CBP's site verification of Houztek's facility revealed that the inventory of aluminum profiles

> did not contain marks, stamps or serial numbers, and was not otherwise segregated to allow for the separate identification of such products. In addition, inventory records could not be provided to demonstrate that a particular lot of aluminum profiles was removed from inventory and used in a particular assembly operation run. Accordingly, the record supports a conclusion that aluminum previously extruded in China was used in Houztek's production of aluminum door thresholds exported to the United States.

Id. (footnotes omitted). The Administrative Review Determination proceeded to conclude, invalidly, that "Columbia thus falsely entered the door thresholds exported from Vietnam on entry type '01' consumption entries, instead of on entry type '03' AD/CVD entries" and that Columbia falsely omitted the antidumping duty and countervailing duty investigation numbers from its entry summaries. *Id*. Customs determined, ultimately, that "[t]hese false statements and omissions were material because they resulted in the non-payment, i.e., evasion, of applicable AD and CVD cash deposits" and that "there is substantial record evidence that on or after December 19, 2018 [the date of the Scope Ruling], covered merchandise, that is, door thresholds with aluminum extruded in China and exported from Vietnam, was entered into the United States by means of evasion, as defined in 19 U.S.C. § 1517(a)(5)(A)." *Id*.

An affirmative determination of circumvention Commerce reaches under Section 781(b) of the Tariff Act, 19 U.S.C. § 1677j(b), is a fact-specific determination by Commerce with respect to merchandise "of the same class or kind" as merchandise that is subject to an antidumping or countervailing order and that, prior to importation into the United States, is "completed or assembled" in a foreign country other than the country to which that order applies, i.e., a "third" country. Commerce may direct action under 19 U.S.C. § 1677j(b) to merchandise that is either "completed" in the third country, or "assembled" in the third country, or both.

Here, the Circumvention Determination applies to merchandise that, following operations in the third country (in this instance, Vietnam) remain "aluminum extrusions" that are exported to the United States. *Circumvention Determination*, 84 Fed. Reg. at 39,806. Commerce, "after taking into account any advice provided by the [U.S. International Trade] Commission . . ., may include such imported merchandise within the scope" of the order if three conditions are met. 19 U.S.C. § 1677j(b). The "process of assembly or completion" in the third country must be "minor or insignificant," the value of the

merchandise produced in the country to which the antidumping or countervailing duty order applies must be "a significant portion of the total value of the merchandise exported to the United States," and Commerce must determine that taking action under 19 U.S.C. § 1677j(b) "is appropriate . . . to prevent evasion" of the antidumping or countervailing duty order. *Id*. § 1677j(b)(1)(C)–(E). Commerce made no such findings as to a good assembled in Vietnam using a Chinese-origin aluminum extrusion as a component part.

Based on the plain meaning of the Circumvention Determination, Columbia argues that "[t]he anti-circumvention inquiry did not involve Columbia or its assembled thresholds." Columbia's Br. 7 (citing *Circumvention Determination*, 84 Fed. Reg. at 39,806); Columbia's Reply 4 ("Commerce's circumvention determination had nothing to do with the merchandise at issue."). The court agrees.

The Federal Register notice announcing the Circumvention Determination is inconsistent with the overly broad interpretation Customs placed upon it. The Circumvention Determination applies, expressly, to "*aluminum extrusions exported from Vietnam*, that are produced from aluminum previously extruded in the People's Republic of China (China)." *Circumvention Determination*, 84 Fed. Reg. at 39,805 (emphasis added). In the Circumvention Determination, Commerce determined, specifically, "that aluminum extrusions exported from Vietnam, that are produced from aluminum previously extruded (including billets created from re-melted Chinese extrusions) in China, are circumventing the *Orders*." *Id.*, 84 Fed. Reg. at 39,806. Contrary to the CBP's assumption, Commerce did not include in the Circumvention Determination goods exported from Vietnam that are *not* aluminum extrusions but merely contain an aluminum extrusion as a component in an assembled good. Underlying, publicly available documentation, of which the court takes judicial notice, further confirms that the circumvention inquiry was directed solely to aluminum extrusions, and not assemblies merely containing them, that are exported from Vietnam.

Commerce initiated "anti-circumvention inquiries" upon the request of petitioner Aluminum Extrusions Fair Trade Committee "to determine whether extruded aluminum products that are exported from the Socialist Republic of Vietnam (Vietnam) by China Zhongwang Holdings Ltd. and its affiliates (collectively, Zhongwang) are circumventing the antidumping duty (AD) and countervailing duty (CVD) orders on aluminum extrusions from the People's Republic of China (China)." *Aluminum Extrusions From the People's Republic of China: Initiation of Anti-Circumvention Inquiries*, 83 Fed. Reg. 9,267, 9,267 (Int'l Trade Admin. Mar. 5, 2018). Commerce defined the "in-

quiry merchandise" as follows: "These inquiries cover *aluminum extrusions* that are made from aluminum previously extruded in China that meet the description of the *Orders and are exported from Vietnam*, regardless of producer, exporter or importer (inquiry merchandise)." *Issues and Decision Mem. for the Final Affirmative Determination of Circumvention Concerning Aluminum Extrusions from the People's Republic of China* at 5 (Int'l Trade Admin. July 31, 2019) ("*I&D Mem.*") (emphasis added) (footnote omitted);[8] *See Circumvention Determination*, 84 Fed. Reg. at 39,806, Appendix I (incorporating *I&D Mem.* by reference).

Commerce extended the scope of the Circumvention Determination to aluminum extrusions of Vietnamese producers other than Zhongwang but established a certification procedure allowing importers and exporters of the Vietnamese aluminum extrusions of such other producers (with certain exceptions) to certify that their aluminum extrusions completed in Vietnam do not contain aluminum previously extruded in China. *Circumvention Determination*, 84 Fed. Reg. at 39,806–07, Appendix II. To that end, the certifications were required to contain the following language:

> The[] aluminum extrusions completed (including extruded) in Vietnam do not contain aluminum previously extruded in China (including billets created from remelted Chinese extrusions), regardless of whether sourced directly from a Chinese producer or from a downstream supplier.

Id., 84 Fed. Reg. at 39,807–08, Appendices III [Importer Certification], IV [Exporter Certification]. The certifications plainly are limited to "aluminum extrusions" completed in Vietnam. Commerce neither extended the Circumvention Determination, nor structured the required certifications, to apply to products produced in, and exported from, Vietnam that are not aluminum extrusions but merely *contain* an aluminum extrusion as a component within an assembled good.

Defendant's brief could be read to imply that the Circumvention Determination Commerce issued in 2019, and another anti-circumvention determination Commerce issued in 2017, support the evasion determinations contested in this litigation. According to defendant, "[t]hese determinations, made years after the publication of the Orders, merely underscore that merchandise manufactured from Chinese-extruded aluminum and/or exported from Vietnam were subject to the Orders." Def.'s Resp. 16–17. This characterization is incor-

[8] The referenced Issues and Decision Memorandum, as issued by the International Trade Administration, U.S. Department of Commerce, is available at access.trade.gov (document barcode 3872841–01).

rect. As discussed above, the 2019 Circumvention Determination did not apply to assembled goods produced in Vietnam that were not themselves aluminum extrusions.

The 2017 anti-circumvention determination also is inapposite, applying only to imports into the United States of "heat-treated extruded aluminum products" from China. *See Aluminum Extrusions From the People's Republic of China: Affirmative Final Determination of Circumvention of the Antidumping and Countervailing Duty Orders and Recission of Minor Alterations Anti-Circumvention Inquiry*, 82 Fed. Reg. 34,630, 34,631 (Int'l Trade Admin. July 26, 2017). The 2017 anti-circumvention determination applied to "all imports *from the PRC* of heat-treated extruded aluminum products that meet the chemical specifications for 5050-grade aluminum alloy, regardless of producer, exporter, or importer." *Id*. (emphasis added).

The issue resolved in the 2017 anti-circumvention determination was whether the scope of the Orders should be expanded under section 781(d) of the Tariff Act, 19 U.S.C. § 1677j(d), to include, as "later-developed merchandise," aluminum extrusions made of 5050-grade alloy (not originally covered by the Orders) and heat treated. *See Aluminum Extrusions From the People's Republic of China: Initiation of Anti-Circumvention Inquiry,* 81 Fed. Reg. 15,039 (Mar. 21, 2016) ("*Initiation Notice*"); *Aluminum Extrusions From the People's Republic of China: Affirmative Preliminary Determination of Circumvention of the Antidumping and Countervailing Duty Orders and Intent To Rescind Minor Alterations Anti-Circumvention Inquiry*, 81 Fed. Reg. 79,444, 79,445 (Int'l Trade Admin. Nov. 14, 2016) (explaining that the petitioner sought an inquiry on such products exported by Zhongwang but that "[w]e also indicated in our *Initiation Notice* that we intended to consider whether the inquiry should apply to all such imports of extruded aluminum products, regardless of producer, exporter, or importer, *from the PRC*") (emphasis added). The Federal Register notices on this proceeding, of which the court also takes judicial notice, refute defendant's position that the proceeding was directed to imports of any type of merchandise produced in Vietnam.

Although Customs, in the Administrative Review Determination, correctly concluded that the Orders as issued did not apply to merchandise produced in a third country (such as here, Vietnam), it also presumed, erroneously, that in combination with the Circumvention Determination the Orders had the opposite effect, i.e., that the Circumvention Determination extended the scope of the Orders to pertain to merchandise assembled in a third country (here, Vietnam) that contained a Chinese-origin aluminum extrusion as a component part. *Admin. Review Determination* at 27.

The Administrative Review Determination also misconstrued the effect of the Scope Ruling. The scope inquiry Commerce conducted, and therefore the Scope Ruling as well, applied only to assembled door thresholds that were produced in, and that were imported from, China. *See, e.g., Aluminum Extrusions From the People's Republic of China: Notice of Court Decisions Not in Harmony With Final Scope Ruling and Notice of Amended Final Scope Rulings Pursuant to Court Decisions*, 87 Fed. Reg. 80,160, 80,161 (Int'l Trade Admin. Dec. 29, 2022) ("Commerce will instruct U.S. Customs and Border Protection (CBP) that, pending any appeals, the cash deposit rate will be zero percent for entries of . . . Columbia's door thresholds *produced in China*.") (emphasis added). Therefore, the Administrative Review Determination failed to recognize that the Scope Ruling lent no support to the agency decision, i.e., the Final Evasion Determination, upon which Customs was conducting a *de novo* review and which involved merchandise produced in Vietnam.

4. Columbia Has Demonstrated Its Right to Relief under USCIT Rule 56.2

In summary, Customs committed multiple errors, both of fact and of law, in concluding that the door thresholds Columbia imported from Vietnam were "covered merchandise" and that imports of this merchandise evaded the Orders. Columbia, therefore, has demonstrated that the Final Evasion Determination and the Administrative Review Determination cannot be sustained under the judicial standard of review and, therefore, must be set aside as contrary to law. *See* 19 U.S.C. § 1517(g)(2) (requiring the court to decide if "any determination, finding, or conclusion is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.").

Defendant opposes Columbia's Rule 56.2 motion. In its opposition, defendant argues that: (1) Customs properly initiated an investigation into Columbia following allegations of evasion made by Endura, Def.'s Resp. 2, 10–19; (2) CPB's determination of evasion is supported by substantial evidence, *id*. at 2, 19–26; and (3) CPB's conclusion by its Regulations & Rulings entity that Columbia's thresholds only became "covered merchandise" as of the date that Commerce issued the Scope Ruling is incorrect and should be set aside, *id*. at 2, 17–19.

The grounds upon which defendant opposes Columbia's Rule 56.2 motion are misguided. The record does not support a conclusion that the investigation, in the entirety, was properly initiated. Customs initiated the investigation on May 17, 2018 upon two allegations by Endura. The first allegation, which Customs described as having been made on January 11, 2018, was that "Columbia was importing extruded aluminum door thresholds—also referred to as door sills—

from China, and misclassifying the door thresholds . . . as plastic wall plates . . . to evade the payment of antidumping duties on aluminum extrusions from China." *Admin. Review Determination* at 2. The second allegation by Endura, made in a supplemental submission dated March 20, 2018, was "that Columbia was importing door thresholds assembled by Houztek Architectural Products Company, Limited ('Houztek') in Vietnam using Chinese-origin aluminum extrusions furnished by Shanghai Top Ranking Aluminum Products Co., Ltd. ('STR') of China, and exported from Vietnam, to evade the payment of antidumping duties on aluminum extrusions from China." *Id*.

The first allegation by Endura, were it proved to be correct, would have demonstrated evasion of the Orders. The second allegation by Endura was insufficient on its face. Even if presumed true as a factual matter, it would not have made out a *prima facie* allegation of evasion of the Orders, which, for the reasons the court has discussed, never applied to assembled door thresholds produced in a third country (here, Vietnam) using as components "aluminum extrusions" as defined in the Orders. Had Customs correctly interpreted the scope of the Orders at that time (rather than discovering its interpretive error only during the administrative appeal proceeding), it necessarily would have rejected Endura's March 20, 2018 allegation. For this reason, the court cannot agree with defendant's contention that the investigation, in the entirety, was properly initiated. Defendant maintains that it was sufficient for initiation that an allegation "'reasonably suggests that covered merchandise has been entered' to evade an AD or CVD order." Def.'s Resp. 10 (quoting 19 U.S.C. § 1517(b)(1)). This argument overlooks the point that CBP's initial misinterpretation of the scope of the Orders was an error of law, not of fact. Because the March 20, 2018 allegation, on its face, failed to allege facts under which it validly could be concluded that Columbia had entered covered merchandise, the investigation was *not* properly initiated with respect to it.

Customs issued the Final Evasion Determination on March 20, 2019, exactly one year after the second allegation from Endura. In that decision, Customs concluded as follows:

> CPB was unable to corroborate Endura's initial claim that Columbia misclassified subject merchandise as wall plates. However, substantial evidence demonstrates that Columbia transshipped Chinese-origin aluminum extrusions through Vietnam and falsely entered the merchandise into the customs territory of the United States as a product of Vietnam without requisite AD/CVD imposed under the orders.

Final Evasion Determination at 6. As discussed above, the agency's conclusions that "transshipment," and false entry as a "product of Vietnam," occurred were unsupported by record evidence. These conclusions, moreover, went well beyond Endura's second allegation, which was the one on which Customs chose to proceed. *See Admin. Review Determination* at 2.

Endura's second allegation was facially insufficient for the reasons the court discussed previously. At the unspecified time Customs found Endura's "plastic wall plates" allegation to be "uncorroborated," *id*., the investigation, then based only on Endura's invalid March 20, 2018 allegation, should have been terminated. At that time Customs also should have terminated the Interim Measures Customs first imposed in the May 17, 2018 Notice of Initiation and unlawfully continued after the unspecified date upon which Customs decided not to proceed upon Endura's allegation pertaining to plastic wall plates.

Defendant's second argument, which is that CBP's determination of evasion is supported by substantial evidence, Def.'s Resp. 2, 19–26, is also unavailing. Defendant describes this record evidence in detail, *id*. at 21–26, but defendant presents all of this evidence only to show that Customs permissibly could find that some of the extruded aluminum components used in the assembly of Columbia's door thresholds in Vietnam were of Chinese origin. For the reasons explained above, the possible presence of a Chinese-origin extruded aluminum component within one of the Columbia door thresholds assembled in Vietnam using that component, among other, non-aluminum-extrusion components, would not convert the finished door threshold into an item of "covered merchandise" under the Orders. Thus, even were the court to presume that defendant's "substantial evidence" argument is correct, defendant still would have failed to demonstrate that imports of Columbia's door thresholds from Vietnam could have evaded the Orders.

It follows that defendant's third argument also is incorrect. Defendant relies on the *en banc* decision of the Court of Appeals in *Sunpreme Inc. v. United States*, 945 F.3d 1367 (Fed. Cir. 2020), for the proposition that the Administrative Review Determination impermissibly limited the agency's determination of evasion to entries made on or after December 19, 2018. Def.'s Resp. 18. Defendant states that "[a]ccordingly, to the extent that the conclusions set forth in the R&R Review have been invalidated by the *en banc Sunpreme* decision, as a legal matter, we respectfully request that the Court set aside the R&R Review's conclusion that Columbia thresholds only became 'covered merchandise' as of December 19, 2018." *Id*. at 19. The court cannot accede to this request because both of CBP's determinations

wrongly concluded that Columbia's imports of door thresholds from Vietnam were "covered merchandise." As Columbia argues, the Administrative Review Determination concluded, correctly, that the Orders as issued did not "cover thresholds assembled in Vietnam allegedly using Chinese-origin extruded aluminum" and "[t]he *en banc* decision in *Sunpreme* thus has no bearing on the disposition of this action." Columbia's Reply 2 (citation omitted).

5. Defendant's Request to Stay the Entry of Judgment

A footnote in defendant's response to Columbia's Rule 56.2 motion states as follows: "Given the significant bearing that the outcome of the appeal in Court No. 19–13 may have on our defense of this action, we respectfully request that the Court stay any entry of final judgment in this action pending the finality of all proceedings in Court No. 19–13." Def.'s Resp. 19 n.4. The request is not a proper motion for a stay. Nevertheless, even were it a proper motion, the court would deny it. Defendant has failed to demonstrate that the appeal it cites is likely to have a bearing on its defense of this action.

In referring to "the appeal in Court No. 19–13," defendant is referring to litigation in this Court in which Columbia successfully contested the Scope Ruling and obtained a judgment from this Court sustaining a decision (the "Third Remand Redetermination") that Commerce, under protest, submitted to this Court in response to *Columbia Aluminum, LLC v. United States*, 46 CIT __, __, 607 F. Supp. 3d 1275, 1283 (2022) ("*Columbia IV*"). The Aluminum Extrusions Fair Trade Committee is pursuing an appeal of that judgment. Notice of Docketing, CAFC Appeal No. 2023–1534 (Feb. 24, 2023), Ct. No. 19–00013, ECF No. 95.

The Third Remand Redetermination determined under protest that door thresholds Columbia imported from China were excluded from the Orders under the "finished merchandise exclusion" in the scope language of the Orders, which, as discussed previously, excludes from the scope "finished merchandise containing aluminum extrusions as parts that are fully and permanently assembled and completed at the time of entry, such as finished windows with glass, doors with glass or vinyl, picture frames with glass pane and backing material, and solar panels." *AD Order*, 76 Fed. Reg. at 30,651; *CVD Order*, 76 Fed. Reg. at 30,654.

Even were the judgment in *Columbia IV* vacated upon appeal and the Orders ruled to apply to the aluminum extrusion components within the Chinese-origin door thresholds that were the subject of the Scope Ruling, it would not follow that the Final Evasion Determination or the Administrative Review Determination also would be sus-

tained as a result of any future appellate litigation involving this action. As the court explained above, the determinations Customs made under the EAPA contained multiple errors of fact and law, including the conclusion that the Scope Ruling provided support to a finding of evasion in the EAPA investigation.

6. The Court Orders Expeditious Submission of a Redetermination upon Remand that Responds to this Opinion and Order and Addresses the Interim Measures

While concluding that a stay of the entry of judgment is not warranted, the court also exercises its discretion to withhold entering judgment at this time. The court is directing that Customs, in response to a remand order, submit a new EAPA determination (a "Redetermination on Remand") for the consideration of this court and Columbia that is consistent with this Opinion and Order. The Redetermination on Remand must be submitted on an expedited basis and must address the actions Customs will take with respect to the Interim Measures it previously imposed.

III. CONCLUSION AND ORDER

For the reasons discussed in the forgoing, upon consideration of plaintiff's Rule 56.2 motion for judgment on the agency record and all papers and proceedings had herein, and upon due deliberation, it is hereby

ORDERED that plaintiff's Rule 56.2 motion be, and hereby is, granted; it is further

ORDERED that the Final Evasion Determination and the Administrative Review Determination be, and hereby are, set aside as contrary to law; it is further

ORDERED that Customs, within 30 days of the date of this Opinion and Order, shall submit to the court a Redetermination upon Remand that is consistent with this Opinion and Order and addresses the actions it will take with respect to the Interim Measures it previously imposed; it is further

ORDERED that plaintiff shall have 15 calendar days to submit comments on the Redetermination upon Remand; and it is further

ORDERED that defendant shall have 10 calendar days from the submission of plaintiff's comments to submit a response thereon.

Dated: January 16, 2024
New York, New York

/s/ Timothy C. Stanceu
TIMOTHY C. STANCEU
JUDGE

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