U.S. Customs and Border Protection

NOTICE OF REVOCATION OF ONE RULING LETTER AND REVOCATION OF TREATMENT RELATING TO THE TARIFF CLASSIFICATION OF INSULATED LUNCH BAGS

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

ACTION: Notice of revocation of one ruling letter and revocation of treatment relating to the tariff classification of insulated lunch bags.

SUMMARY: Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) is revoking New York Ruling Letter (NY) N251467, dated April 4, 2014, concerning the tariff classification of insulated lunch bags under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP is revoking any treatment previously accorded by CBP to substantially identical transactions. Notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 30 on August 3, 2022. One comment in favor of the revocation was received in response to that notice.

EFFECTIVE DATE: This action is effective for merchandise entered or withdrawn from warehouse for consumption on or after February 25, 2025.

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

SUPPLEMENTARY INFORMATION:

BACKGROUND

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and

related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), a notice was published in the *Customs Bulletin*, Vol. 56, No. 30, on August 3, 2022, modifying one ruling letter pertaining to the tariff classification of insulated lunch bags. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should have advised CBP during the comment period.

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

In NY N251467, dated April 4, 2014, CBP classified insulated lunch bags with an outer surface of thermoplastic olefin ("TPO") plastic sheeting and man-made textile material in heading 4202, HTSUS, specifically in subheading 4202.92.0807, HTSUSA (Annotated), which provides for insulated food and beverage bags, with outer surface of textile materials, other, of man-made fibers. CBP has reviewed NY N254167 and has determined the ruling letter to be partially in error. It is now CBP's position that the insulated lunch bags are properly classified in subheading 4202.92.10, HTSUS, which provides for "Trunks, suitcases... traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper: Other: With outer surface of sheeting of plastic or of textile materials: Insulated food or beverage bags: Other."

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is modifying NY N251467 and revoking or modifying any other ruling not specifically identified

to reflect the analysis contained in the proposed Headquarters Ruling Letter ("HQ") H264201, set forth as an attachment to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is revoking any treatment previously accorded by CBP to substantially identical transactions.

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

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

Attachments

HQ H264201
December 11, 2024
OT:RR:CTF:CPMMA H264201 CKG
CATEGORY: Classification
TARIFF NO.: 4202.92.10

MS. LYNN SCHAB
LISS GLOBAL, INC.
7746 DUNGAN ROAD
PHILADELPHIA, PA 19111

Re: Revocation of NY N251467; classification of insulated lunch bags

DEAR MS. SCHAB:

This is in reference to New York Ruling Letter ("NY") N251467, issued on April 2, 2014, by the U.S. Customs and Border Protection ("CBP") National Commodity Division ("NCSD") to Liss Global, Inc., regarding the classification under the Harmonized Tariff Schedule of the United States ("HTSUS") of insulated lunch bags.

We have reconsidered this decision and have determined that the classification of the containers in subheading 4202.92.08, HTSUS, as insulated food or beverage bags having an outer surface of textile, is incorrect. For the reasons set forth below, we hereby revoke NY N251467.

Pursuant to section 625(c)(1), Tariff Act of 1930 (19 U.S.C. §1625(c)(1)), as amended by section 623 of Title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), a notice of the proposed action was published in the *Customs Bulletin*, Vol. 56, No. 30, on August 3, 2022. One comment was received in support of this notice.

FACTS:

In NY N251467, the subject merchandise was described as follows:

> Item 159111, which you have described as the "BTS LUNCH BAG HOT BRIGHT IGLOO" is an insulated lunch bag constructed with an outer surface of thermoplastic olefin (TPO) plastic sheeting and man-made textile material. The front panel is wholly constructed with an outer surface of the textile material. The textile is bright pink, orange, white, and black. The black textile is a mesh which creates a textured appearance. The side panels are of approximately 60% textile that is the same bright pink as the front panel and 40% plain black TPO sheeting. The front of the bag also has a decorative textile strap that is used to secure the top opening. The bottom panel and back panel are made up of the TPO sheeting...
>
> The lunch bag is designed to provide storage, protection, organization, and portability to food and beverages during travel. It is also designed to maintain the temperature of food and beverages. The bag has one interior storage compartment with a plastic lining and a layer of foam plastic between the lining and the body of the bag. The lunch bag has a flap with a snap buckle closure and a carrying handle at the top. The front exterior of the bag has open mesh pocket. The bag measures approximately 7.75" (W) x 10.5" (H) x 4.25" (D).

In a submission to CBP, the item's manufacturer has provided photographs of the subject lunch bag models. The front panel of the lunch bags at issue feature an orange and white "Igloo" logo but are otherwise unadorned with patterns or graphic representations.

ISSUE:

Whether the subject insulated lunch bags should be classified under subheading 4202.92.08, HTSUS, as insulated food or beverage bags having an outer surface of man-made textile, or under subheading 4202.92.10, HTSUS, as insulated food or beverage bags having an outer surface other than textile.

LAW AND ANALYSIS:

Merchandise is classifiable under the HTSUS in accordance with the General Rules of Interpretation ("GRIs"). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the remaining GRIs 2 through 6. GRI 6, HTSUS, requires that the GRI's be applied at the subheading level on the understanding that only subheadings at the same level are comparable. The GRI's apply in the same manner when comparing subheadings within a heading.

The following HTSUS provisions are under consideration:

4202:	Trunks, suitcases, vanity cases, attache [sic] cases, briefcases, school satchels, spectacle cases, binocular cases, camera cases, musical instrument cases, gun cases, holsters and similar containers; traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper:
	Other:
4202.92:	With outer surface of sheeting of plastic or of textile materials:
	Insulated food or beverage bags:
	With outer surface of textile materials:
4202.92.04:	Beverage bags whose interior incorporates only a flexible plastic container of a kind for storing and dispensing potable beverages through attached flexible tubing. . .
4202.92.08:	Other
4202.92.10:	Other

* * * * *

There is no dispute that the instant lunch bags are classified in heading 4202, HTSUS, as insulated food or beverage bags. The issue arises at the 8-digit subheading level, which requires the application of GRI 6. GRI 6 requires that the GRI's be applied at the subheading level on the understanding that only subheadings at the same level are comparable.

At the 8-digit subheading level, the issue is whether the instant insulated lunch bags have an outer surface of textile or non-textile material. Because the instant bags have outer panels of both textile and plastic, classification is determined by application of GRI 3.

GRI 3 states:

> When by application of [GRI] 2(b) or for any other reason, goods are, prima facie, classifiable under two or more headings, classification shall be effected as follows:
>
> (a) The heading which provides the most specific description shall be preferred to headings providing a more general description. However, when two or more headings each refer to part only of the materials or substances contained in mixed or composite goods . . . , those headings are to be regarded as equally specific in relation to those goods, even if one of them gives a more complete or precise description of the goods.
>
> (b) Mixtures, composite goods consisting of different materials or made up of different components . . . which cannot be classified by reference to 3(a), shall be classified as if they consisted of the material or component which gives them their essential character, insofar as this criterion is applicable.
>
> (c) When goods cannot be classified by reference to 3(a) or 3(b), they shall be classified under the heading which occurs last in numerical order among those which equally merit consideration.

The headings covering the article refer only to part of the materials or components contained therein. Therefore, under GRI 3(a), the headings must be regarded as equally specific in relation to the article. We next consider whether the article can be classified based on the material which imparts the essential character, pursuant to GRI 3(b).

The "essential character" of an article is "that which is indispensable to the structure, core or condition of the article, i.e., what it is." *Structural Industries v. United States*, 360 F. Supp. 2d 1330, 1336 (Ct. Int'l Trade 2005). EN VIII to GRI 3(b) explains that:

> The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material or component, its bulk, quantity, weight or value, or by the role of the constituent material in relation to the use of the goods.

The classification of the instant cooler bags will thus turn on which component imparts the essential character to the whole.

CBP has consistently determined that the material comprising the bulk of the exterior surface area of a bag imparts the essential character, even where the front panel features a visually appealing design such as a cartoon character. *See e.g.*, NY M82559, dated May 2, 2006 (in which three bags with front panels of PVC sheeting featuring Dora the Explorer, Tinkerbell, and SpongeBob motifs were classified according to the majority textile outer surface area), and NY M84189, dated June 16, 2006 (in which two bags with PVC front panels depicting a Cars theme were classified on the basis of the textile outer surface area). *See also*, Headquarters Ruling Letter ("HQ") H025873, dated September 3, 2010 (classifying a cooler bag in accordance with the majority of the exterior surface area); HQ 962817, dated January 14, 2002 (four panels with an outer surface of plastic imparted the essential character of a bag because they comprised the bulk of the outer surface of the bag); NY K83596, dated March 3, 2004 (classifying a cooler bag with an exterior

surface of an equal quantity of plastic and textile material at GRI 3(c) in subheading 4202.92.10, HTSUS). Furthermore, in HQ H088427, dated May 29, 2015, CBP revoked several ruling letters in which it had determined that the essential character of various soft-sided coolers was imparted not by the bulk of the outer surface, but instead by which portion of the outer surface that imparted a more visually striking effect. In doing so, CBP reiterated, "a finding that the essential character is imparted by the bulk of the outer surface area is appropriate and consistent with past CBP rulings." *See* HQ H088427.

With respect to insulated coolers such as those subject to the present matter, CBP has nevertheless deferred to GRI 3(c) in narrow instances in which it is impossible to determine whether the "bulk of the surface" imparts an item's essential character. Again, in HQ H088427, CBP declined to use the "bulk of the surface" standard in classifying one style of cooler in which the "closer ratio of textile to plastic [the textile surface comprised roughly 40% of the surface area] and higher value of the textile" was in tension with the fact that "the greater surface of the bag is composed of plastic." *See* HQ H088427 (revoking NY N047035). Instead, because neither material could be said to impart the essential character, CBP determined the item's classification based on GRI 3(c), which holds that classification falls to the heading or subheading which occurs last in numerical order among those which equally merit consideration.

In the case of item 159111 and NY N251467, the ratio of textile to plastic is similar to that in NY N047035, which was revoked in HQ H088427. Accordingly, neither material can be said to impart the essential character of the item. Classification will thus be determined by GRI 3(c), which holds that classification falls to the heading or subheading which occurs last in numerical order among those which equally merit consideration. In the instant case, subheading 4202.92.10, HTSUS, occurs last in numerical order.

HOLDING:

By application of GRI 3(c), item 159111, at issue in NY N251467, is classified in heading 4202, HTSUS, specifically subheading 4202.92.10, HTSUS, which provides for "Trunks, suitcases... traveling bags, insulated food or beverage bags, toiletry bags, knapsacks and backpacks, handbags, shopping bags, wallets, purses, map cases, cigarette cases, tobacco pouches, tool bags, sports bags, bottle cases, jewelry boxes, powder cases, cutlery cases and similar containers, of leather or of composition leather, of sheeting of plastics, of textile materials, of vulcanized fiber or of paperboard, or wholly or mainly covered with such materials or with paper: Other: With outer surface of sheeting of plastic or of textile materials: Insulated food or beverage bags: Other." The 2024 column one, general rate of duty is 3.4% *ad valorem*.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided online at https://hts.usitc.gov/.

EFFECT ON OTHER RULINGS:

NY N251467, dated April 4, 2014, is hereby revoked.

Sincerely,

YULIYA A. GULIS,
Director
Commercial and Trade Facilitation Division

19 CFR CHAPTER I

TERMINATION OF ARRIVAL RESTRICTIONS APPLICABLE TO FLIGHTS CARRYING PERSONS WHO HAVE RECENTLY TRAVELED FROM OR WERE OTHERWISE PRESENT WITHIN RWANDA

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

ACTION: Announcement of termination of arrival restrictions.

SUMMARY: This document announces the decision of the Secretary of Homeland Security to terminate arrival restrictions applicable to flights to the United States carrying persons who have recently traveled from, or were otherwise present within, Rwanda. These restrictions directed such flights to arrive at one of the U.S. airports where the U.S. government had focused public health resources to implement enhanced public health measures.

DATES: The arrival restrictions applicable to flights to the United States carrying persons who have recently traveled from, or were otherwise present within, Rwanda are terminated for flights departing after 11:59 p.m. Eastern Standard Time on December 4, 2024.

FOR FURTHER INFORMATION CONTACT: Stephanie Watson, Office of Field Operations, U.S. Customs and Border Protection at 202–255–7018.

SUPPLEMENTARY INFORMATION:

Background

On October 15, 2024, the Secretary of Homeland Security announced arrival restrictions applicable to flights to the United States carrying persons who have recently traveled from, or were otherwise present within, Rwanda due to an outbreak of Marburg Virus Disease (MVD) in Rwanda. (89 FR 83620). These restrictions directed such flights to arrive at one of the U.S. airports where the U.S. government focused public health resources to implement enhanced public health measures. For purposes of that document, a person had recently traveled from Rwanda if that person had departed from, or was otherwise present within, Rwanda within 21 days of the date of the person's entry or attempted entry into the United States. Also, for purposes of that document, crew and flights carrying only cargo (*i.e.,* no passengers or non-crew) were excluded from those measures.

The Secretary has decided to terminate the above arrival restrictions. The last unlinked case of MVD was isolated in Rwanda on October 24, 2024, and 42 days (two 21-day incubation periods) will have passed by the time the termination takes effect. Additionally, since October 30, 2024, there have been no new confirmed MVD cases reported in Rwanda, no new chains of transmission, and no new districts reporting local case transmissions. Therefore, arrival restrictions are no longer required for flights to the United States carrying persons who have recently traveled from, or were otherwise present within, Rwanda.

Notice of Termination of Arrival Restrictions Applicable to All Flights Carrying Persons Who Have Recently Traveled From or Were Otherwise Present Within Rwanda

Pursuant to 6 U.S.C. 112(a), 19 U.S.C. 1433(c), and 19 CFR 122.32, for flights departing after 11:59 p.m. Eastern Standard Time on December 4, 2024, I hereby terminate the arrival restrictions applicable to flights to the United States carrying persons who have recently traveled from, or were otherwise present within, Rwanda announced in the Arrival Restrictions document published at 89 FR 83620 (Oct. 17, 2024).

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

U.S. Court of Appeals for the Federal Circuit

RISEN ENERGY CO., LTD., Plaintiff-Appellant TRINA SOLAR CO., LTD., et al., Plaintiffs CANADIAN SOLAR INC., CANADIAN SOLAR INTERNATIONAL LIMITED, CANADIAN SOLAR MANUFACTURING (CHANGSHU), INC., CANADIAN SOLAR MANUFACTURING (LUOYANG), INC., CSI CELLS CO., LTD., CANADIAN SOLAR (USA), INC., Plaintiffs-Appellees v. UNITED STATES Defendant-Appellee SUNPOWER MANUFACTURING OREGON, LLC, Defendant

Appeal No. 2023–1550

Appeal from the United States Court of International Trade in No. 1:20-cv-03743-CRK, Judge Claire R. Kelly.

Decided: December 9, 2024

ALEXANDRA H. SALZMAN, DeKieffer & Horgan, PLLC, Washington, DC, argued for plaintiff-appellant. Also represented by JAMES KEVIN HORGAN, GREGORY S. MENEGAZ.

ASHLEY AKERS, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for defendant-appellee. Also represented by REGINALD THOMAS BLADES, JR., BRIAN M. BOYNTON, PATRICIA M. MCCARTHY; BRISHAILAH BROWN, Office of the Chief Counsel for Trade Enforcement and Compliance, United States Department of Commerce, Washington, DC.

JONATHAN STOEL, Hogan Lovells US LLP, for plaintiffs-appellees. Also represented by LINDSAY BROWN, CRAIG A. LEWIS, NICHOLAS SPARKS.

Before DYK, STOLL, and STARK, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* DYK.

Opinion concurring-in-part and dissenting-in-part filed by *Circuit Judge* STARK.

DYK, *Circuit Judge*.

This appeal concerns the Sixth Administrative Review of an antidumping order concerning crystalline silicon photovoltaic cells (commonly referred to as "solar cells") from the People's Republic of China.

Appellant Risen Energy Co., Ltd. ("Risen") is a Chinese exporter of solar cells, whose products are subject to the antidumping order imposed by the Department of Commerce ("Commerce"). Risen was selected as a mandatory respondent for such review. Since China is a nonmarket economy to calculate a dumping margin, Commerce used surrogate values from Malaysia for computing normal values (home market price) for the Sixth Administrative Review. The Court of International Trade ("Trade Court") sustained Commerce's surrogate value calculations for Risen's physical inputs and its surrogate finan-

cial ratio calculations. *See Risen Energy Co. v. United* States, 569 F. Supp. 3d 1315, 1326 (Ct. Int'l Trade 2022) (*Risen I*); *Risen Energy Co. v. United States*, 611 F. Supp. 3d 1384, 1389–94 (Ct. Int'l Trade 2022) (*Risen II*). Risen appeals, challenging Commerce's surrogate value calculations for its backsheet and ethyl vinyl acetate ("EVA"), and Commerce's overhead ratio calculation. Because Commerce's selections of surrogate values for Risen's backsheet and EVA inputs were supported by substantial evidence, but Commerce's surrogate overhead ratio calculation was not, we affirm in part, vacate in part, and remand.

BACKGROUND

I

The government imposes antidumping duties on foreign merchandise sold "in the United States at less than its fair value." *Changzhou Trina Solar Energy Co. v. United States*, 975 F.3d 1318, 1321 (Fed. Cir. 2020) (quoting 19 U.S.C. § 1673(1)). To determine the duties, Commerce calculates a "dumping margin" for each entry of merchandise subject to review. 19 U.S.C. §1675(a)(2)(A)(ii). A dumping margin is "the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." *Id.* §1677(35)(A).

"Normal value" generally will be "the price at which the foreign like product is first sold . . . for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price[.]" *Id.* § 1677b(a)(1)(B)(i). However, if it is determined that "the subject merchandise is exported from a nonmarket economy" (such as China), and "available information does not permit the normal value of the subject merchandise to be determined" using the price of the product as first sold in the originating country, Commerce must calculate normal value by valuing the "factors of production utilized in producing the merchandise" in a comparable "market economy country or countries." *Id.* § 1677b(c)(1).

The factors of production that Commerce must value include, but are not limited to, "hours of labor required, quantities of raw materials employed, amounts of energy and other utilities consumed, and representative capital cost, including depreciation." *Id.* § 1677b(c)(3). Once Commerce identifies surrogate values for these factors of production, "an amount for general expenses and profit plus the cost of containers, coverings, and other expenses" is added to calculate normal value. *Id.* § 1677b(c)(1)(B). Commerce values these expenses "by using financial ratios derived from financial statements of producers

of comparable merchandise in the surrogate country." *Ad Hoc Shrimp Trade Action Comm. v. United States*, 618 F.3d 1316, 1319 (Fed. Cir. 2010).

By identifying a surrogate country and surrogate values for the factors of production, Commerce approximates "what a non-market economy manufacturer might pay in a market economy setting." *Shakeproof Assembly Components Div. of Ill. Tool Works v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001).

II

In March 2019, Commerce initiated this Sixth Administrative Review of an earlier antidumping order covering solar cells from China for a period of review from December 1, 2017, through November 30, 2018. *See* Initiation of Antidumping Duty and Countervailing Duty Administrative Reviews, 84 Fed. Reg. 9300 (Dep't of Com. Mar. 14, 2019). Risen was selected as a mandatory respondent. *See* Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Preliminary Results, 85 Fed. Reg. 7532 (Dep't of Com. Feb. 10, 2020); *see also* 19 U.S.C. §1677f-1(c)(2); 19 C.F.R. § 351.204(c)(2).[1]

China is a nonmarket economy, so Commerce was required to select a primary surrogate country and individual surrogate values for Risen's various inputs. *See* 19 U.S.C. § 1677b(c).

In October 2020, Commerce published the final results of its administrative review. *See* Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Final Results, 85 Fed. Reg. 62,275 (Dep't of Com. Oct. 2, 2020). Commerce selected Malaysia as the primary surrogate country, and it used import data from certain of the Malaysia Harmonized Tariff Schedule ("HTS") categories applicable to "plates and sheets" to value Risen's backsheet and EVA inputs,[2] rejecting Risen's position that Commerce should use the import data related to the HTS categories that apply to "film" instead. Commerce additionally used the 2018 financial statement from Malaysian solar cell producer Hanwha Q Cells Malaysia to calculate surrogate financial ratios, including overhead. Risen filed suit in the Trade Court, arguing that Commerce's determinations were not supported by substantial evidence. *See Risen I*, 569 F. Supp. 3d at 1320.

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[1] Trina Solar Co., Ltd. ("Trina") was also selected as a mandatory respondent and participated in the litigation below by challenging certain of Commerce's determinations. Trina did not join in Risen's appeal.

[2] Backsheet is a flexible plastic product used to protect the back of solar cells from water, sunlight, corrosion, and other environmental factors. EVA is a flexible plastic product used to encapsulate solar cells and protect them from ultraviolet aging and weathering.

The Trade Court initially agreed with Risen that Commerce's valuations of its backsheet and EVA inputs under the HTS categories it chose were "not supported by substantial evidence." *Id.* at 1327, 1331–32. The Trade Court agreed that Commerce had selected different HTS categories to value Risen's backsheet and EVA in a prior administrative review, and Commerce had not adequately explained its reasons for its change in practice. *Id.* at 1331–32. The Trade Court remanded the matter to Commerce for the agency to further "explain its departure from its historical treatment" of those inputs. *Id.* at 1332.

However, the Trade Court sustained Commerce's surrogate financial ratio calculation for overhead, despite its reservations about Commerce's rationale, finding "Commerce's reasoning could be clearer." *Id.* at 1332. Nonetheless, the court could "reasonably discern from Commerce's citation" to two notes within the 2018 Hanwha financial statement that Commerce's allocation methodology was compliant with a standard in the International Financial Reporting Standards ("IFRS") applicable to inventories. *Id.* at 1333–34.

On remand, Commerce reopened the record to further substantiate its choice of HTS categories for Risen's backsheet and EVA inputs. *See Risen II*, 611 F. Supp. 3d at 1391–93. Commerce placed on the record abstracts from two standards of the American Society for Testing and Materials ("ASTM"), ASTM D4801 and ASTM D6988, relating to film and sheet. *See id.* at 1392–93. Commerce continued to value Risen's backsheet and EVA with the HTS categories applicable to "sheet," as opposed to the "film" categories Risen wanted, because in Commerce's view, the ASTM standards define "sheet" as materials with a thickness greater than 0.25 mm, and both of Risen's inputs meet that definition. The Trade Court sustained Commerce's remand determinations, concluding that they were reasonable in light of the new definition provided by the ASTM standards. *See id.* at 1392–94.

Risen appeals. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(5).

DISCUSSION

We review Commerce's determinations using the same standard as the Trade Court—that is, whether those determinations are "unsupported by substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i); *see Changzhou Trina Solar Energy*, 975 F.3d at 1325.

I

We first address the issue of Commerce's classification of Risen's backsheet and EVA inputs under the Malaysia HTS categories applicable to "sheet" instead of "film."

In assessing factors of production, Commerce is obligated to use the "best available information" from the surrogate country to identify an exporter's inputs and assign surrogate values to them. *See Shakeproof Assembly Components*, 268 F.3d at 1381 (quoting 19 U.S.C.§ 1677b(c)(1)). Commerce "has broad discretion" to determine what information meets that standard because the tariff statute does not define what constitutes the "best available information." *Changzhou Trina Solar Energy*,975 F.3d at 1331 (quoting *QVD Food Co. v. United States*,658 F.3d 1318, 1323 (Fed. Cir. 2011)). In general, Commerce will select, "to the extent practicable, surrogate values that are publicly available, are product-specific, reflect a broad market average, and are contemporaneous with the period of review." *Id.* (quoting *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386 (Fed. Cir. 2014)).

Commerce frequently uses import data from HTS categories as the "best available information" to calculate a specific surrogate price by weight (or unit) for the input under the HTS category chosen. *See, e.g.*, *id.* at 1332–33 (holding that Commerce's "decision to value Trina's module glass using Thai imports of tempered glass classified under HTS Subheading 7007.19.900000" was supported by substantial evidence). In doing so, Commerce seeks to select the HTS category that most precisely corresponds to the particular input. *See SolarWorld Ams., Inc. v. United States*, 910 F.3d 1216, 1223 (Fed. Cir. 2018).

Risen agrees that valuation using import data from HTS categories is appropriate but objects to Commerce's choice of HTS "sheet" categories for its backsheet and EVA inputs, arguing that Commerce could not reasonably rely upon the ASTM standards because those standards do not bear a "reasonable relationship to the inputs in question or defin[e] film and sheet." Appellant Br. 16. Instead, Risen argues, Commerce should have used the product specifications and marketing materials Risen placed on the record to select HTS categories. We disagree.

We have recognized that, under the statute, industry standards are highly relevant to determining what merchandise is subject to an antidumping duty order. For example, in *ArcelorMittal Stainless Belgium N.V. v. United States*, 694 F.3d 82 (Fed. Cir. 2012), we stated that "[b]ecause the primary purpose of an antidumping order is to

place foreign exporters on notice of what merchandise is subject to duties, the terms of an order should be consistent, to the extent possible, with trade usage." *Id.* at 88. More recently, in *Saha Thai Steel Pipe Public Co. v. United States*, 101 F.4th 1310 (Fed. Cir. 2024), we affirmed Commerce's scope ruling in part because the fact that the exporter's merchandise was certified "in compliance with ASTM specifications" supported Commerce's reading of the plain language of the order to include the exporter's products. *Id.* at 1327. Moreover, Commerce's regulations specifically direct the agency to consult industry standards where the scope of an antidumping duty order is ambiguous. *See* 19 C.F.R. § 351.225(k). Given this practice, it was not unreasonable for Commerce to seek guidance from a familiar source—industry standards—to inform its choice of which HTS categories best apply to Risen's inputs.

The first standard relied upon by Commerce, ASTM D6988, is titled "Standard Guide for Determination of Thickness of Plastic Film Test Specimens," and "covers the determination of the thickness of plastic films where the thickness is used directly in determining the results of tests for various properties." J.A. 7417–18. The standard defines "film" as an "optional term for sheeting having a nominal thickness no greater than 0.25 mm[.]" J.A. 7418. The second standard, ASTM D4801, is titled "Standard Specification for Polyethylene Sheeting in Thickness of 0.25 mm (0.010 in.) and Greater," and "covers the requirements for extruded (cast or blown) and compression-molded sheeting made from low-, medium-, and high-density polyethylenes and copolymers[.]" J.A. 7421–22. Taken together, Commerce understood these standards as setting forth a distinction between polyethylene "sheet" and "film," which turned on the thickness of the material. The fact that the thickness of Risen's backsheet and EVA inputs fell within the "sheet" definition (and not the "film" definition) led Commerce to conclude that those inputs were more appropriately categorized under the HTS categories for "sheet" rather than "film."

Commerce's choices of the HTS categories applicable to "sheet" for Risen's backsheet and EVA inputs were supported by substantial evidence and not otherwise contrary to law.

Risen's arguments to the contrary are not persuasive. First, we reject Risen's argument that the ASTM standards should be disregarded because they do not mention Risen's inputs or the solar industry more generally. The standards cited by Commerce are not limited to particular products and appear to cover a broad array of plastic materials. Risen offers no alternative industry standards, and we conclude that it was reasonable for Commerce to determine that

the industry standards it introduced constituted the best available information to distinguish between "sheet" and "film."

As the Trade Court indicated, the product specifications and marketing materials submitted by Risen do not provide better information than the definitions found in the ASTM standards. *See Risen II*, 611 F. Supp. 3d at 1392–93. Beyond identifying backsheet and EVA as "film," the materials submitted by Risen do not demonstrate why those inputs are considered "film" or shed light on the distinction between "sheet" and "film." Further, at least as to EVA, these materials use the terms "sheet" and "film" interchangeably, such that the use of the term "film" in those materials is stripped of any definitional quality that it might otherwise hold.[3]

Nor are we persuaded that Commerce erred by selecting new HTS categories for Risen's inputs in this review. "Commerce may change its conclusions from one review to the next based on new information and arguments, as long as it does not act arbitrarily and it articulates a reasonable basis for the change." *Qingdao Sea-Line*, 766 F.3d at 1387. Here, Commerce provided sufficient explanation for why the HTS categories for "sheet" were preferable to the HTS categories for "film" in this Sixth Administrative Review.

Commerce explained that it chose the HTS category applicable to "sheet" for Risen's backsheet, but did not do so in prior reviews, because the ASTM standards were placed on the record here, whereas Commerce did not have the benefit of those standards in previous reviews. That is sufficient to sustain Commerce's determination, as Risen has not shown that "Commerce consistently followed a contrary practice in similar circumstances and provided no reasonable explanation for the change in practice." *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1007 (Fed. Cir. 2003).

We further agree with the Trade Court that Commerce's characterization of EVA as "sheet" as opposed to "film" was not inconsistent with Commerce's selection of HTS categories in prior administrative reviews where Thailand was selected as the surrogate country. *Risen II*, 611 F. Supp. 3d at 1393–94. In those proceedings, Commerce used an "other" Thai HTS category that covered "plates, sheets, film, foil and strips of polymers of ethylene." J.A. 19. Commerce explained that Thailand's tariff schedule did not distinguish between "sheet" and "film" of polyethylene, but instead grouped them together in a single category. Malaysia, by contrast, had separate categories for polyethylene "sheet" and "film." Using Malaysia's more precise HTS catego-

[3] Risen additionally argues that flexibility should have been the distinguishing characteristic to select between the "sheet" and "film" HTS categories for its backsheet and EVA inputs. However, all the HTS categories in dispute here cover materials that are non-rigid, so flexibility is not an appropriate means of distinguishing between them.

ries, Commerce determined that the category applicable to "sheet" more appropriately matched Risen's EVA input. But Commerce did not, as Risen contends, previously classify Risen's EVA input as a "film" rather than a "sheet."

We conclude that Commerce's classifications of Risen's backsheet and EVA inputs under the Malaysia HTS categories applicable to "sheet" were reasonable and supported by substantial evidence. We affirm the Trade Court on this point. We further reject Risen's alternative argument that Commerce should have calculated surrogate values by averaging the values applicable to the HTS categories for "sheet" and "film" for each of its inputs because we do not find the record ambiguous on this issue.

II

The second issue is whether Commerce properly characterized certain unidentified costs in the 2018 Hanwha financial statement as overhead.

Separate from physical inputs, Commerce must calculate surrogate financial ratios for manufacturing overhead, selling, general, and administrative expenses, and profit. *See* 19 U.S.C. § 1677b(c)(1)(B). Commerce often uses the financial statements of producers of comparable merchandise in a surrogate country as sources from which to derive its surrogate financial ratios. *See, e.g.*, *Ad Hoc Shrimp Trade Action Comm.*, 618 F.3d at 1319; *Qingdao Sea-Line*, 766 F.3d at 1387.

Although Commerce enjoys discretion in how it calculates surrogate financial ratios, *see Fujitsu Gen. v. United States*, 88 F.3d 1034, 1045 (Fed. Cir. 1996), including in how it "valu[es] the factors of production on which factory overhead is based[,]" *Magnesium Corp. of Am. v. United States*, 166 F.3d 1364, 1372 (Fed. Cir. 1999), "[a]n overriding purpose of Commerce's administration of the antidumping laws is to calculate dumping margins as accurately as possible." *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1379 (Fed. Cir. 2013) (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)). Commerce is required to demonstrate that its calculations are supported by "substantial evidence" and otherwise "in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i); *see, e.g., US Magnesium LLC v. United States*, 839 F.3d 1023, 1026 (Fed. Cir. 2016); *SolarWorld*, 910 F.3d at 1222. "This standard requires Commerce to examine the record and articulate a satisfactory explanation for its action." *Yangzhou Bestpak Gifts & Crafts*, 716 F.3d at 1378; *CS Wind Vietnam Co. v. United States*, 832 F.3d 1367, 1376 (Fed. Cir. 2016). Stated differently, Commerce bears

the burden of demonstrating that its conclusions are of a kind that a reasonable mind might accept as adequately supported when viewing the record as a whole. *See Downhole Pipe & Equip., L.P. v. United States*, 776 F.3d 1369, 1374 (Fed. Cir. 2015). Speculation and guesswork are not substitutes for substantial evidence. *See Yangzhou Bestpak Gifts & Crafts*, 716 F.3d at 1378; *Seah Steel Vina Corp. v. United States*, 950 F.3d 833, 847 (Fed. Cir. 2020).

Risen primarily argues that Commerce's surrogate overhead ratio calculation is not supported by substantial evidence because Commerce's calculation is not supported by the financial statement on which Commerce relies. The Trade Court observed that Commerce's explanation for why it determined that unidentified costs were allocable to overhead "could be clearer," but nonetheless sustained Commerce's determination. *Risen I*, 569 F. Supp. 3d at 1332. We think Commerce's approach is so unclear that it is insufficient.[4]

Commerce began calculating its overhead ratio by selecting the 2018 Hanwha financial statement as the best available information from which to derive its surrogate ratios. Risen does not object to Commerce's selection of this financial statement as the best available information. Using that statement, Commerce calculated a final overhead ratio of 21.70 percent for Risen by dividing what it deemed "overhead costs" by the costs for materials, labor, and energy ("MLE").[5]

Commerce began its analysis with Hanwha's costs of goods sold, which was 2,003,400 Malaysian ringgits.[6] From that total, Commerce sought to identify what proportion of the costs of goods sold represented MLE. Note 17 to the financial statement explained that, of the total costs of goods sold, 1,648,000 ringgits are attributable to "inventories." Commerce considered these inventory costs to be roughly synonymous with Hanwha's total MLE costs, based on Note 2.12 of the financial statement. That Note provided as follows:

---

[4] Contrary to the Dissent at 2, in holding that Commerce's explanation is insufficient, we are not going beyond the parties' arguments. We are simply holding that the explanation given was insufficient because it lacked substantial evidence (as argued by Risen) but that Commerce should be given a second opportunity to explain why it reached the correct result notwithstanding the lack of substantial evidence for its original theory. Risen explicitly sought a remand. In any event, we cannot review a decision that we cannot understand. "[T]he courts cannot exercise their duty of review unless they are advised of the considerations underlying the action under review . . . . [T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted b[e] clearly disclosed and adequately sustained."*SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943).

[5] The parties do not explain the impact that Commerce's ultimate overhead calculation had on the final dumping margin applied to Risen. We assume, based on the statutory scheme and the nature of the parties' dispute, that a larger overhead ratio correlates to an increase in normal value which, in turn, will lead to a higher dumping margin for an exporter. *See* 19 U.S.C. § 1677b(a).

[6] The financial statement specifies that these values are shown in the thousands of ringgits.

> Costs incurred in bringing the Inventories to their present location and condition are accounted for as follows: . . .
>
> Finished goods and work-in-progress: costs of direct materials and labour and a proportion of manufacturing overheads based on normal operating capacity.

J.A. 6666. Commerce concluded that Note 2.12's reference to a "proportion of manufacturing overheads based on normal operating capacity" was "a reference largely to energy costs" and not production overhead. J.A. 7165–66. Based on this assumption, after minor adjustments to account for the change in goods in inventory, Commerce determined that Hanwha's overhead expenses totaled essentially the difference between its costs of goods sold and inventory costs.

Commerce concluded that the difference had to be overhead (other than energy costs) because Commerce had already identified MLE costs (as included in inventories) and "the income statement explicitly identifies the sales, general, administrative, and interest costs . . . as separate line items." J.A. 7132. Stated differently, Commerce found that because Hanwha's financial statement "specifies that MLE costs are included in the 'Inventories' portion of the '[c]ost of sales,' . . . the remaining, unidentified costs of sales were not MLE but rather overhead." Appellee Br. 37.

Commerce's theory does not appear to be supported by the financial statement upon which it relies. The inclusion of MLE costs in "inventories" does not preclude the possibility that manufacturing overhead would also be included in inventory costs. In fact, it appears that this is precisely what occurred here, as stated in Note 2.12 to the financial statement.

Nonetheless, Commerce argues that its calculation is supported by substantial evidence because the Hanwha financial statement was composed in compliance with the IFRS standard applicable to inventories.[7] The standard does not support Commerce's approach. The standard explains that inventories should include "a systematic allocation of fixed and variable production overheads that are incurred in converting materials into finished goods." Int'l Fin. Rept. Standards Found., IAS 2 Inventories ¶ 12 (Mar. 2024) ("IAS 2").

[7] Risen suggests that Commerce's reliance on the IFRS standards is no more than post hoc rationalization for its overhead calculation, as Commerce first introduced the IFRS standards during oral argument before the Trade Court. "Agency action cannot be sustained on post hoc rationalizations supplied during judicial review." *Timken Co. v. United States*, 894 F.2d 385, 389 (Fed. Cir. 1990) (quoting *Tabor v. Joint Bd. for Enrollment of Actuaries*, 566 F.2d 705, 709–10 (D.C. Cir. 1977)). We need not decide the issue of whether Commerce impermissibly attempted to justify its actions after the fact because, for the reasons we explain, Commerce's explanation is inadequate, regardless of when it was first raised.

Given the similarity in language, we understand the standard's use of the term "production overheads" to be synonymous with the term "manufacturing overheads" in Note 2.12 of the Hanwha financial statement. As we have explained, and as Note 2.12 confirms, manufacturing overheads already were included in Hanwha's inventory costs. J.A. 6666.

We are not persuaded by Commerce's argument that it was reasonable to understand the phrase "a proportion of manufacturing overheads" in Note 2.12 to be "a reference largely to energy costs" included in inventories. J.A. 7165–66; Oral Arg. at 31:34–45. At no point has Commerce provided an adequate explanation or, indeed, any explanation for why it drew this conclusion. Further, nothing in the Hanwha financial statement or the IFRS standard can be read to suggest that proportional "production overheads" are coterminous with, or even largely made up by, a company's energy costs, as Commerce asks us to conclude.

Finally, Commerce suggests that under the IFRS standard, inventory costs do not include fixed overhead costs and that those fixed expenses would be allocable to overhead separately from inventories in the costs of goods sold. Appellee Br. 35. This is an incorrect interpretation of the standard, which requires "*fixed* and variable production overheads that are incurred in converting materials into finished goods" to be allocated on a systematic basis to the cost of inventories. IAS 2 ¶ 12 (emphasis added). To be sure, the standard states that "administrative overheads that do not contribute to bringing inventories to their present location and condition[,] and selling costs" are to be excluded from the inventories total. IAS 2 ¶ 16. But the fact that administrative overheads and selling costs are excluded from the inventories total does not mean that those costs are additional overhead included in the costs of goods sold, as Commerce suggests. Indeed, the Hanwha financial statement specifically identifies the company's "[s]elling and administrative expenses" separately from cost of goods sold, consistent with the standard. J.A. 6648.

On the present record, Commerce's allocation of the remaining 257,063 ringgits in unidentified costs to overhead appears to be based on nothing more than guesswork or speculation, not substantial evidence. Accordingly, we vacate the judgment of the Trade Court sustaining Commerce's determination and remand the matter back to

Commerce for further proceedings to give Commerce an opportunity to identify substantial evidence for its calculation.[8]

CONCLUSION

We sustain the Trade Court's affirmance of Commerce's categorization of Risen's backsheet and EVA inputs under the Malaysia HTS categories applicable to sheet. We vacate the Trade Court's decision sustaining Commerce's surrogate financial ratio calculation for overhead. We direct the Trade Court to remand the matter regarding the overhead issue to Commerce for further proceedings consistent with this opinion.

AFFIRMED IN PART, VACATED AND REMANDED IN PART

COSTS

No costs.

[8] Such a remand is particularly appropriate because Risen also has provided no valid explanation for the difference between costs of goods sold and inventories in the Hanwha financial statement. Risen's contention that the unidentified remaining costs should be considered additional MLE is unsupported. The IFRS standard provides that the cost of inventories shall include "*all* costs of purchase, costs of conversion . . . and other costs incurred in bringing the inventories to their present location and condition," IAS 2 ¶ 10 (emphasis added), and nothing in the Hanwha financial statement suggests that the company deviated from that requirement.

RISEN ENERGY CO., LTD., Plaintiff-Appellant TRINA SOLAR CO., LTD., et al., Plaintiffs CANADIAN SOLAR INC., CANADIAN SOLAR INTERNATIONAL LIMITED, CANADIAN SOLAR MANUFACTURING (CHANGSHU), INC., CANADIAN SOLAR MANUFACTURING (LUOYANG), INC., CSI CELLS CO., LTD., CANADIAN SOLAR (USA), INC., Plaintiffs-Appellees v. UNITED STATES Defendant-Appellee SUNPOWER MANUFACTURING OREGON, LLC, Defendant

Appeal No. 2023–1550

Appeal from the United States Court of International Trade in No. 1:20-cv-03743-CRK, Judge Claire R. Kelly.

STARK, *Circuit Judge*, concurring-in-part and dissenting-in-part.

I agree with the majority that Commerce's surrogate values for Risen's backsheet and EVA inputs are supported by substantial evidence. Accordingly, I join in that portion of the majority opinion. *See* Maj. at 7–12. However, I believe that Commerce's surrogate financial ratio calculations are also supported by substantial evidence. Therefore, I would affirm the judgment of the Court of International Trade ("Trade Court"), which reached this same conclusion, in its entirety.

I

As an initial matter, I choose not to join the majority on the surrogate financial ratios issue because the majority faults Commerce on grounds that the appellant, Risen, has not raised. And it provides relief, a remand, that Risen never requested.

A

The majority is vacating and remanding because "Commerce's approach is so unclear that it is insufficient." Maj. at 13; *see also id.* at 16 n.7 ("Commerce's explanation is inadequate, regardless of when it was first raised."). Yet at no point, at either the Trade Court or here, has Risen, the party that brings this case to us, argued that Commerce's approach is unclear.

Risen understands what Commerce did in calculating the surrogate financial ratios and why it did so. It just disagrees with Commerce – and, before us, insists that Commerce's determination is not supported by substantial evidence. As Risen accurately summarizes, "Commerce *explained* that it understood that labor and energy were already included in the [materials labor and energy ("MLE")] denominator because the 'Inventories' line item [in the Hanwha Q Cells Malaysia ("Hanwha") financial statement] included these expenses." Open. Br. at 22 (emphasis added). The sole issue Risen presses has nothing to do with the quality or content of Commerce's explanation.

Instead, it is only whether the decision by Commerce is "contrary to the evidence in Hanwha's financial statement and contrary to basic accounting" and, as a result, unsupported by substantial evidence. Open. Br. at 22.

The majority claims that it is "not going beyond the parties' arguments" and is "simply holding that the explanation given was insufficient *because* it lacked substantial evidence." Maj. at 13 n.4 (emphasis added). But the majority points to nowhere that Risen actually argued either that Commerce's explanation was insufficient or that the purported lack of substantial evidence has anything to do with the clarity of Commerce's explanation. Risen's briefing makes clear it did not raise either of these points. *See, e.g.*, Open. Br. at 6 ("Commerce calculated the surrogate financial ratios in a manner unsupported by the record. . . .The resulting calculation significantly overstated the overhead costs [and was] [c]ontrary to accounting principles, Commerce's usual understanding of ratio calculations, and the information in the financial statement itself."); *id.* at 20 ("Commerce's calculation of the financial ratios are inaccurate [and] does not reasonably interpret the record information in the financial statement . . . ."); *id.* at 21–22 ("[Commerce's allocation of remaining costs to overhead, instead of MLE,] is contrary to Commerce's practice and contrary to the notes of the [Hanwha] statement."); Reply Br. at 7 ("[Commerce's] allocation is contrary to the notes of the statement and accounting principles."); *id.* at 11 ("Commerce has calculated inaccurate ratios not based on substantial evidence . . . .").

While "Commerce is required to demonstrate that its calculations are supported by 'substantial evidence,'" Maj. at 12 (citing 19 U.S.C. § 1516a(b)(1)(B)(i)), and as the Trade Court noted, "Commerce's reasoning could be clearer," J.A. 51, there is still, in my view, a crucial distinction between an appeal challenging the substantiality of record evidence – asking us to reverse a trial court – and an appeal challenging the adequacy of an explanation – and seeking, as an alternative to reversal, remand for the trial court (or originating agency) to "articulate a satisfactory explanation," *Yangzhou Bestpak Gifts & Crafts Co. v. United States*, 716 F.3d 1370, 1378 (Fed. Cir. 2013). When, as here, an appeal presents only the first type of challenge, we should focus our review on whether there is substantial evidence, rather than imposing a remand sought by neither party.

"In our adversary system . . . we follow the principle of party presentation," which instructs us to "rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of

matters the parties present." *Greenlaw v. United States*, 554 U.S. 237, 243 (2008). Hence, the Supreme Court has been clear that, with rare exceptions, "in both civil and criminal cases, in the first instance and on appeal," *id.*, we should "decide only questions presented by the parties," *United States v. Sineneng-Smith*, 590 U.S. 371, 376 (2020). We have ourselves on multiple occasions recognized this constraint on our review, including very recently in *Astellas Pharma, Inc. v. Sandoz Inc.*, 117 F.4th 1371, 1377 (Fed. Cir. 2024),where we vacated a judgment of patent invalidity because "the district court disregarded the long standing principle of party presentation and, in doing so, abused its discretion."

The majority does not attempt to show the presence of circumstances that could make it "appropriate" for us "to take a 'modest initiating role' in the shape of the litigation." *Astellas*, 117 F.4th at 1377 (quoting *Sineneng-Smith*, 590 U.S. at 376). In my view, then, we should limit our review to considering whether or not there is substantial evidence to support Commerce's calculation of the surrogate financial ratios.

B

The majority says that Risen "explicitly sought a remand." Maj. Op. at 13 n.4. I disagree.

The only reference Risen has made to a possible remand is an aside in the middle of its *reply* brief, which is untimely. *See In re Cygnus Telecomms. Tech., LLC Patent Litig.*, 536 F.3d 1343, 1356 (Fed. Cir. 2008) (holding appellant forfeited argument for reversal of summary judgment by failing to raise request in opening brief); *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1320 (Fed. Cir. 2006) ("Our law is well established that arguments not raised in the opening brief are waived."). In any event, even the tangential, belated reference to a remand cannot fairly be read as an actual request. Instead, in the course of complaining that the IFRS standards only first came up at the Trade Court, Risen observes that "[t]his has made briefing at the Court more cumbersome" and then adds: "This alone should require remand to Commerce to consider as it is an agency role to do in the first instance on all issues." Reply Br. at 7. But Risen never *asks* for such a remand – and most certainly not on the grounds of a purportedly unclear explanation by Commerce.

Rather, Risen is consistent and explicit about its sole goal on appeal, which is reversal of the Trade Court's entry of judgment for the government. In both its Opening and Reply Briefs, under sections headed "Conclusion and Statement of Relief Sought," it writes a single, identical sentence:

> In light of the foregoing, Plaintiff-Appellant requests that this Court enter judgment in its favor and find Commerce's determination of the best available information for backsheet and EVA and Commerce's financial ratio calculation are not supported by substantial evidence.

Open. Br. at 27; Reply Br. at 12 (same).

Therefore, I would limit our review to deciding whether to reverse or affirm the Trade Court's judgment, which I will turn to now.

II

The question actually presented in this appeal is far easier to state than it is to answer. As context, it is undisputed that because Risen is a Chinese company, and China has a nonmarket economy, Commerce had to calculate a dumping margin by using surrogate values – here, from Malaysia – to estimate the "normal value" at which Risen would sell its products in its home market (China). There is no challenge before us to Commerce's decision to use the financial statement of a Malaysian manufacturer of solar cells, Hanwha, as the best available information from which to calculate the necessary surrogate financial ratios, such as overhead ratio. There is also no disagreement between the parties that what Commerce did, as pertinent to this appeal, was to start with Hanwha's reported "cost of sales," RM2,003,400 (Malaysian ringgits), subtract certain costs appearing on other lines in Hanwha's statement – including inventories, which note 17 of the Hanwha financial statement reports as RM1,648,000 for 2018, adjusted to RM1,646,244 for the change in finished goods[1] – and end up with RM257,063 of unidentified costs. J.A. 7149; *see also* Open. Br. at 22; Gov't Br. at 32–33. The only point of contention concerns the proper treatment of this unidentified amount: Commerce allocated it to overhead, putting the RM257,063 in the numerator of the particular ratios, while Risen prefers to allocate it to MLE – that is, materials, labor, and energy – which would put it in the denominator of the ratios.

In my view, Commerce had substantial evidence for its decision to allocate the unidentified costs to overhead. That becomes clear when looking more closely at what Commerce did and why.

The issue of how to allocate the unidentified costs was first addressed by Commerce in its Preliminary Results issued in January 2020. *See* J.A. 6838–39 (calculating 6.29% overhead ratio). In those Preliminary Results, Commerce used a "constructed MLE" for Han-

[1] The other costs subtracted from the cost of sales are RM6,767 for "depreciation property" and RM93,326 for "depreciation of plant and equipment." J.A. 7149.

wha. J.A. 7131. Both the petitioner in the administrative review (SolarWorld Americas Inc.) and Risen sought adjustments to the Preliminary Results and, consequently, Commerce, having not done so before, considered two notes in the Hanwha financial statement: note 2.12, describing what Hanwha included in its reported "Inventories," and note 17, reporting figures for 2017 and 2018 "Inventories." J.A. 6666, 6688. Commerce found that these notes, which I describe in more detail below, "specifically identified direct product costs," making the reported Inventories figure "a more appropriate reflection of MLE" than the constructed figure on which Commerce had earlier relied. J.A. 7131. Based on this new insight, in its Final Results, issued in October 2020, Commerce decided to "treat[] the difference between the total manufacturing costs and MLE" – that is, the unidentified costs – "as overhead costs." J.A. 7132; *see also* J.A. 7133 ("[B]ased on the information contained in the [Hanwha] financial statements, we have concluded that the remaining unidentified costs are overhead costs."); *id.* (calculating 21.70% overhead ratio).[2] Risen disagreed with Commerce, insisting "it is Commerce practice to classify unidentified costs in financial statements as [MLE] costs" and not overhead. J.A. 7133. Commerce responded that it was "unaware of any such practice." *Id.*

Thereafter, in a November 2, 2020 memo responding to allegations of ministerial errors in the Final Results, Commerce stated that it had calculated the surrogate financial ratios based "solely on the financial statements of Hanwha." J.A. 7165. Commerce explained:

> In doing so, we determined that labor and energy, as well as material costs, were included in the category identified as "inventories recognized as an expense in cost of sales." We made this conclusion based in part on the statement from the financial statements that "inventories" include "costs of direct materials and [labor] and a proportion of manufacturing overheads based on normal operating capacity." We believed the "proportion of manufacturing overheads based on normal operating capacity" to be a reference largely to energy costs.

J.A. 7165.

In other words, Commerce read Hanwha's financial statement as disclosing that all MLE costs were already included in "Inventories," which, in turn, meant that the unidentified costs must be overhead,

[2] As the government notes, "Risen does not challenge Commerce's determination to move from a constructed value to a calculated value for MLE between the preliminary and final results." Gov't Br. at 33–34 n.7.

because if any of the unidentified costs were actually materials, labor, or energy then those costs would have already been included in Inventories. *See* J.A. 7166 ("[W]e treated the 'Inventories' expense [in Hanwha's financial statement] as materials, labor, and energy expenses which we included in the denominator of the surrogate financial ratios."). In making this factual determination, Commerce again rejected Risen's contention that Commerce was departing from past practice, as its decision was based on the "specific statement in the [Hanwha] financial statements indicating" that "labor and energy were included in the 'Inventories.'" *Id.*; *see also id.* (Commerce stating it "made a methodological decision based on record information").[3]

Commerce's reading of the Hanwha financial statement – that Hanwha's reported inventories included all MLE, so the unidentified costs cannot also be MLE but instead should be allocated to overhead – was reasonable and supported by substantial evidence. Commerce based its conclusion primarily on note 2.12 of Hanwha's statement. Note 2.12, entitled "Inventories," begins by referencing "Costs incurred in bringing the inventories to their present location and condition," J.A. 6666, which Commerce reasonably understood to be a category of costs that includes the cost of *energy* to make and move the items found in inventory. The note then continues:

> [These costs] are accounted for as follows:
>
> *Raw materials*: purchase costs are derived by using the weighted average cost method.
>
> Finished goods and work-in-progress: costs of direct *materials and labour* and a proportion of manufacturing overheads based on normal operating capacity.[4] These costs are assigned by using the weighted average cost method.

J.A. 6666 (emphasis added). In sum, then, as can be seen, the note expressly references materials and labor, and implicitly describes energy.

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[3] Commerce also relied on note 17, also entitled "Inventories," which includes this text: "During the year [2018], the amount of inventories recognised as an expense in cost of sales of the Group and of the Company were RM1,648 million (2017: RM2,142 million)." J.A. 6688.

[4] As government counsel explained at oral argument, "Commerce, knowing how to interpret financial statements, knows that that [i.e., 'manufacturing overheads based on normal operating capacity'] means energy." Oral Arg. at 23:40–50, available at https://oralarguments.cafc.uscourts.gov/default.aspx?fl=23–1550_09032024.mp3; *see also* J.A. 7165–66 (Commerce considering, and rejecting, Risen's contention that "energy expenses are not specifically identified in the financial statements"). Risen identifies no persuasive reason to doubt Commerce's understanding, although it would have been better practice for Commerce to have provided more detail as to its reasoning.

Thus, I agree with the Trade Court that it was "reasonable" for Commerce to have "relied in part" on note 2.12 "as evidence that labor and energy costs are included in the valuation of" Hanwha's inventories. J.A. 53–54. I further agree with the Trade Court that this understanding of the Hanwha statement gains further support from the fact that the statement was prepared in accordance with the IFRS. J.A. 54; *see also* J.A. 6653 ("The financial statements of the [Hanwha] Group and of the Company have been prepared in accordance with . . . [the IFRS]."). IFRS Standard IAS2, which "provid[es] guidance for determining the cost of inventories and the subsequent recognition of the cost as an expense," requires that "financial statements expense all variable costs in the cost of inventory." J.A. 54 & n.30. There is no dispute that materials, labor, and energy are variable costs. Hence, as the Trade Court concluded, we "can reasonably discern from Commerce's citation to both Notes 2.12 and 17 that Commerce believes that because Hanwha's financial statement is compliant with IFRS, it must include labor and energy costs in inventories cost." J.A. 54–55. And "[h]aving accounted for MLE, depreciation, and the change in finished goods balance, Commerce reasonably allocated the remaining amount of the cost of sales balance to overhead." J.A. 55.

I agree with this analysis of the Trade Court, which (along with what I have set out here) describes the substantial evidence basis for Commerce's decision. While, of course, Commerce could have done a better job explaining itself, it does not follow that, as my colleagues conclude, Commerce's decision was "based on nothing more than guesswork or speculation." Maj. at 17. Commerce's finding was grounded in the record evidence and its explanation of its reasoning was adequate to enable appellate review. The Trade Court was right to affirm.

III

Commerce confronted a complicated, case-specific fact question, calling on its expertise and experience with financial statements and accounting standards. It was a question that the government candidly acknowledges (as do I) has no "black-and-white answer." Oral Arg. at 26:11–22. Reasonable minds could well differ as to whether the unidentified costs in the Hanwha financial statement should be allocated to MLE or to overhead. But "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966). At best for Risen, that is the situation presented by this appeal.

Accordingly, we should affirm the Trade Court's affirmance of Commerce's determination of the surrogate financial ratios. Thus, I respectfully dissent from the majority's decision to remand this issue for further proceedings.

U.S. Court of International Trade

Slip Op. 24–133

TENARIS BAY CITY, INC. et al., Plaintiffs, v. UNITED STATES, Defendant, and UNITED STATES STEEL CORPORATION, et al. Defendant-Intervenors.

Before: Claire R. Kelly, Judge
Court No. 22–00343
PUBLIC VERSION

[Sustaining the Department of Commerce's Remand Redetermination.]

Dated: December 2, 2024

Gregory J. Spak, *Frank J. Schweitzer*, *Kristina Zissis*, *Matthew W. Solomon*, and *Colin Alejandro Dilley*, White & Case LLP, of Washington D.C., argued for plaintiffs Tenaris Bay City, Inc., Maverick Tube Corporation, IPSCO Tubulars Inc., Tenaris Global Services (U.S.A.) Inc., and Siderca S.A.I.C.

Hardeep K. Josan, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, argued for defendant United States. Of counsel was Ian *Andrew McInerney*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, United States Department of Commerce.

Thomas M. Beline, *Myles S. Getlan*, and *James E. Ransdell*, *Cassidy Levy Kent* (USA) LLP, of Washington D.C., argued for defendant-intervenor United States Steel Corporation.

Roger B. Schagrin, *Alessandra A. Palazzolo*, *Christopher T. Cloutier*, *Elizabeth J. Drake*, *Jeffrey D. Gerrish*, *Justin M. Neuman*, *Luke A. Meisner*, *Michelle R. Avrutin*, *Nicholas J. Birch*, *Saad Y. Chalchal*, and *William A. Fennell*, Schagrin Associates, of Washington D.C., argued for defendant-intervenors Borusan Mannesmann Pipe U.S. Inc., PTC Liberty Tubulars LLC, United States Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC, and Welded Tube.

OPINION

Kelly, Judge:

Before the Court is the U.S. Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand ("Remand Results"), Jun. 26, 2024, ECF No. 74, in the antidumping ("AD") and countervailing duties ("CVD") investigation of Oil Country Tubular Goods ("OCTG") from Argentina (AD), Mexico (AD), Korea (CVD), and Russia (AD/CVD), made in accordance with the mandate of this Court in *Tenaris Bay City, Inc. v. United States*, 693 F.Supp.3d 1314 (Ct. Int'l Trade 2024) ("*Tenaris I*"). For the following reasons, Commerce's remand redetermination is sustained.

BACKGROUND

The Court presumes familiarity with the facts as set forth in *Tenaris I* and will only recount those pertinent to the instant matter. *See generally Tenaris I*, 693 F.Supp.3d 1314. On October 6, 2021, Petitioners Borusan Mannesmann Pipe U.S. Inc, PTC Liberty Tubulars LLC, U.S. Steel Tubular Products, Inc., the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO, CLC ("USW"), and Welded Tube USA Inc. ("Petitioners") filed a petition for an imposition of antidumping and countervailing duties on OCTG from Argentina (AD), Mexico (AD), Korea (CVD), and Russia (AD/CVD). *See generally* Petitions for the Imposition of Antidumping and Countervailing Duties: Oil Country Tubular Goods from Argentina, Mexico, the Republic of Korea, and Russia ("Petitioner's Letter"), PDs 1–6, CDs 1–6 bar codes 4168004–01–06 (Oct. 6, 2021).[1]

On October 26, 2021, Commerce, after seeking and receiving additional information and comments from petitioners, initiated the antidumping investigation in accordance with the 20-day statutory deadline provided by 19 U.S.C. § 1673a(c)(1)(A). *See generally* Letter from White & Case LLP to Sec. Commerce, re: Oil Country Tubular Goods from Argentina, Mexico, the Republic of Korea, and Russia: Factual Errors in Petitions ("Factual Error Cmts."), PD 15, CD 9, bar code 4169951–01 (Oct. 8, 2021); *see also* Letter Cassidy Levy Kent & Schagrin Assoc. to Sec. Commerce & Sec. Int'l Trade Comm. Pertaining Oil Country Tubular Goods from Argentina, Mexico, the Republic of Korea, and Russia: Response to General Issues Questionnaire ("Resp. to General Questionnaire"), PD 19, CD 10 bar code 4170756–01 (Oct. 12, 2021); *see also* Letter from White & Case LLP to Sec. Commerce, re: Oil Country Tubular Goods from Argentina, Mexico, the Republic of Korea, and Russia: Comments on Petitioners' Standing ("Cmts. re Petitioners' Standing"), PDs 22–28, CDs 12–18, bar codes 4172063–01–05 (Oct. 15, 2021); *see also* Petitioners' Letter, "Response to Tenaris Submission Concerning Petitioners' Standing" ("Rebuttal Cmts. on Standing), PD 29, CD 19, bar code 4172946–01 (Oct. 18, 2021); *see also* Letter from White & Case LLP to Sec. Commerce, re: Oil Country Tubular Goods from Mexico: Reply Comments on Petitioners' Standing ("Reply Cmts. on Standing"), PD 31, CD 22, bar code 4173963–01 (Oct. 20, 2021); *see also* Letter from White & Case LLP to Sec. Commerce, re: Oil Country Tubular Goods from Argentina, Mexico, the Republic of Korea, and Russia: Com-

[1] Citations to administrative record documents in this opinion are to the numbers Commerce assigned to such documents in the indices, and all references to such documents are preceded by "PD" or "RPD" and "CD" or "RCD" to denote public or confidential documents.

ments on Petitioners' Second General Issues Questionnaire Response ("Cmts. re Petitioners' Second GIQ Resp."), PD 35, CD 25, bar code 4174685–01 (Oct. 22, 2021); *see also* Commerce Initiation Checklist ("Initiation Checklist"), PD 40, CD 26, bar code 4176347–01 (Oct. 26, 2021); *see also Oil Country Tubular Goods from Argentina, Mexico, and the Russian Federation: Initiation of Less-Than-Fair-Value Investigations* ("Initiation Notice"), 86 Fed. Reg. 60,205 (Dep't Commerce Nov. 1, 2021).

In its Initiation Checklist for the antidumping investigation, Commerce identified reliance upon "industry support data contained in the [p]etitions" and explained that the petitions satisfied statutory requirements. *See* Initiation Checklist at 4. Commerce accepted Petitioners' October 21 revised calculations and also conducted its own calculations with "a conservative, alternative methodology." *Id.* at 5. Under both methodologies, Commerce found that the petitions satisfied the requirements of 19 U.S.C. § 1673a(c)(4)(A)(i) by exhibiting support from domestic producers or workers accounting for "at least 25 percent of the total production of the domestic like product." *Id.* at 6. However, neither methodology demonstrated that the domestic producers supporting the petition accounted for over 50 percent of the production of the domestic like product, as required by 19 U.S.C. § 1673a(c)(4)(A)(ii). *Id.* at 6–7.

Consequently, Commerce chose to "rely on other information," and determined the petitions were adequately supported by declarations from domestic producers contained on the agency record.[2] Initiation Checklist, Attach II. at 6–7. Additionally, Commerce concluded that the October 1, 2020, through September 30, 2021, period of investigation ("POI") was proper under 19 C.F.R. § 351.204, despite Plaintiffs' characterization that it was anomalous, as it represented "the four most recently completed fiscal quarters since the month preceding the filing date." *Initiation Notice* at 60,205. Commerce also rejected Plaintiffs' concern that finishing operations were improperly included twice when Petitioners calculated industry support, stating

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[2] Commerce used declarations of support from non-petitioning domestic producers and [[ ]]. Initiation Checklist, Attach. II at 6; Def. Int. Resp. at 9. Furthermore,

> Commerce noted that despite Plaintiffs' opposition to the petition, [Plaintiff] has not provided any production data for Commerce to include in the industry support calculation. Accordingly, because [[
>
>]] Petitions, [Commerce] find[s] that the supporters of the Petitions account for [[ ]] percent of the total U.S. production of those parties expressing an opinion on the Petitions for which we have production data.

Initiation Checklist, Attach II. at 6–7 (footnotes omitted).

that "[t]he scope and domestic like product of [AD] investigations includes OCTG 'whether finished . . . or unfinished.'" Initiation Checklist, Attach. II at 14.

On May 11, 2022, Commerce issued its preliminary determination, finding that during the POI, OCTG from Argentina is being, or likely to be, sold in the United States at less than fair value ("LTFV"). *See Oil Country Tubular Goods from Argentina: Preliminary Affirmative Determinations of Sales at Less Than Fair Value and Critical Circumstances, Postponement of Final Determination, and Extension of Provisional Measures* ("Prelim. Determination"), 87 Fed. Reg. 28,801 (Dep't Commerce May 11, 2022); *see also Decision Memorandum for the Preliminary Affirmative Determinations of Sales at less Than Fair Value and Critical Circumstances in the Investigation of Oil Country Tubular Goods from Argentina* ("Prelim. Issues and Decision Memo."), 87 ITADOC 28,801 (Dept. Commerce May 11, 2022). On September 29, 2022, Commerce published its final results and, mirroring its previous conclusions, determined that OCTG from Argentina is being, or likely to be, sold in the United States for LTFV. *See Oil Country Tubular Goods from Argentina: Final Affirmative Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances* ("Final Determination"), 87 Fed Reg. 59,054–01 (Dep't Commerce Sept. 29, 2022); *see also Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Oil Country Tubular Goods from Argentina, and Final Negative Determination of Critical Circumstances* ("Final Issues and Decision Memo."), 87 ITADOC 59,054 (Dep't Commerce Sept. 29, 2022).

On January 13, 2023, Plaintiffs initiated this action. *See generally* Compl., Jan. 13, 2023, ECF No. 16. On June 26, 2023, Plaintiffs moved for judgment on the agency record. *See generally* Pls. Mot. Judgment Agency Record ("Pl. 56.2 Mot."), Jun. 26, 2023, ECF No. 40. Plaintiffs specifically challenged Commerce's determination that the petitions were filed "by or on behalf of the industry," and its decision not to poll the domestic industry and seek actual production data for the 12 months immediately preceding the filing of the petitions to determine industry support. *Id.* at 14–41.

On March 14, 2024, the Court sustained Commerce's determination to rely on "other information" rather than poll the industry to calculate industry support for the antidumping investigation petition for OCTG from Argentina and remanded the Final Determination for Commerce to further explain or reconsider its determination that the data relied upon accurately reflected industry support, including

whether finishing operations were counted twice. *Tenaris I*, 693 F.Supp.3d at 1328. On May 28, 2024, Commerce released its draft remand redetermination. *See generally* Draft Results of Redetermination Pursuant to Court Remand, *Tenaris Bay City, Inc. et al. v. United States*, Court No. 22–00343, Slip Op. 24–31 (CIT March 14, 2024) ("Draft Remand Results"), RPD 1, bar code 4565870–01 (May 28, 2024). On June 4, 2024, in response to the Draft Remand Results, both Plaintiffs and Defendant-Intervenors submitted comments. *See* Tenaris Comments on Draft Remand Determination, RPD 3, RCD 1, bar code 4571563–01 (Jun 4, 2024); *see also* Defendant-Intervenors Comments on Draft Remand Redetermination, RPD 2, bar code 4570681–01 (Jun. 4, 2024). On June 7, 2024, Commerce rejected Plaintiffs' submission because it contained untimely new factual information. *See* Letter from Yang Jin Chun to White & Case LLP, re: Slip Op. 24–31, Oil Country Tubular Goods from Argentina: Rejection of Tenaris's Comments on Draft Results of Redetermination, RPDs 4–5, bar code 4573606–01 (Jun. 7, 2024). On June 10, 2024, Plaintiffs resubmitted their comments, redacting references to the new factual information. *See* Tenaris Resubmission of Comments on Draft Remand Determination, RPD 6, RCD 2, bar code 4575101–01 (Jun. 10, 2024).

On June 26, 2024, Commerce filed its Remand Results. *See generally* Remand Results. On July 26, 2024, Plaintiffs filed their comments on the Remand Results. *See generally* Comments of Plaintiffs Tenaris Bay City, Inc., Maverick Tube Corporation, Ipsco Tubulars Inc., Tenaris Global Services (U.S.A.), Corporation, And Siderca S.A.I.C. on Commerce's Final Remand Determination ("Pl. Cmts."), Jul. 26, 2024, ECF No. 78. On August 26, 2024, Defendant and Defendant-Intervenors filed their replies to Plaintiff's comments. *See generally* Defendant's Reply to Comments on the Remand Redetermination ("Def. Reply Cmts."), Aug. 26, 2024, ECF No. 82; *see also* Defendant-Intervenors' Reply to Plaintiffs' Comments on the Remand Redetermination ("Def. Int. Reply Cmts."), Aug. 26, 2024, ECF No. 80. On Sept. 16, 2024, the Court granted Plaintiffs' unopposed motion for oral argument. *See* Order Granting Unopposed Motion for Oral Argument, Sept. 16, 2024, ECF No. 87. On October 22, 2024, oral argument was held. *See* Oral Argument, Oct. 22, 2024, ECF No. 91.

JURISDICTION AND STANDARD OF REVIEW

Pursuant to Section 516A of the Tariff Act of 1930,[3] as amended, 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c) (2018),[4] this Court is granted the authority to review actions contesting the final determination in an antidumping duty order. The Court will uphold Commerce's determination unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). "Substantial evidence is 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Huaiyin Foreign Trade Corp. (30) v. United States,* 322 F.3d 1369, 1374 (Fed. Cir. 2003) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). The Court determines whether substantial evidence exists by considering the record as a whole, including any evidence that supports or fairly detracts from the substantiality of the evidence. *Huaiyin Foreign Trade Corp. (30)*, 322 F.3d at 1374 (quoting *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984)). The possibility that two inconsistent conclusions may be drawn from the evidence does not prevent an agency's determination from being supported by substantial evidence. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966) (citing *N.L.R.B. v. Nevada Consol. Copper Corp.*, 316 U.S. 105, 106 (1942)).

DISCUSSION

I. Exhaustion of Administrative Remedies

Defendant argues that Plaintiffs failed to raise arguments with respect to (1) potential undercounting in Commerce's calculations, (2) whether Commerce's calculations include only processing that involves heat treatment as opposed to threading, and (3) the completeness of the industry source data ("Industry Source")[5] used by Commerce. Def. Reply Cmts. at 8–9, 13–14 (citing 19 U.S.C. § 1673a(c)(4)(E)). Defendant-Intervenors echo Defendant's position. Def. Int. Cmts. at 25, n.4. Plaintiffs claim they have exhausted arguments that Commerce's determination (1) allows for undercounting in its calculations, Pl. Cmts at 4, (2) fails to confirm that the production by processors reflects only processing that involves heat treatment as opposed to threading, *id.* at 10–11, and (3) fails to confirm that

[3] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2018 edition.

[4] Further citations to Title 28 of the U.S. Code and Code of Federal Regulations are to the 2018 edition.

[5] The Industry Source that Commerce used in its determination is the [[
]].

Industry Source data is complete. *Id.* at 18. Specifically, they state they have "repeatedly argued that the comingling of production and processing data had implications for the accuracy of the industry support calculation and therefore requested that Commerce solicit disaggregated data." *Id.* at 23. Likewise, they point out that they argued to Commerce that the relationship between formation and finishing "has implications for any assessment" of support. *Id.* at 4 (quoting Reply Cmts. on Standing at 8).

Generally, parties must exhaust their administrative remedies to obtain judicial review. *McKart v. United States*, 395 U.S. 185, 193 (1969) (internal quotations omitted) (quoting *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 50–51 (1938)). Requiring exhaustion acknowledges agency expertise, allows agencies to correct mistakes, and promotes efficiency. *Woodford v. Ngo*, 548 U.S. 81, 89 (2006). A plaintiff must show that it exhausted its administrative remedies, or that it qualifies for an exception to the exhaustion doctrine. *Consol. Bearings Co. v. United States*, 348 F.3d 997, 1003 (Fed. Cir. 2003) (citing 28 U.S.C. § 2637(d)).[6]

Plaintiffs are correct that they questioned the completeness of the Industry Source data before Commerce; however, both Commerce and this Court addressed that challenge. Commerce acknowledged the imperfect nature of the Industry Source data in its Initiation Checklist when it explained "neither the statute nor regulations prevent the petitioners from estimating the production of the non-petitioning companies." *See* Initiation Checklist at 16. It also noted no party, including Plaintiffs, had "offered any alternative sources for production estimates that would, in their view, be more reliable." *Id.* Consequently, Commerce determined that the use of an estimate did not require it to poll the industry. *Id.* Commerce's explanation is reasonable on this the record, as it is the parties' burden to populate the record. *See BMW of N. Am. LLC v. United States*, 926 F.3d 1291, 1295 (Fed. Cir. 2019); *Qingdao Sea-Line Trading Co. v. United States*, 766 F.3d 1378, 1386–87 (Fed. Cir. 2014); *QVD Food Co., Ltd. v. United States*, 658 F.3d 1318, 1324 (Fed. Cir. 2011). Commerce was not required to use perfect data so long as it explains why its choice was reasonable on the record, which it did. *See e.g. PT Pindo Deli Pulp and Paper Mills v. United States*, 825 F.Supp.2d 1310, 1327–28 (Ct. Int'l Trade 2012) Finally, *Tenaris I* sustained Commerce's methodology and use of the Industry Source data as a reasonable estimate. *Tenaris I*, 693 F.Supp.3d at 1324.

[6] The time in which a party must exhaust its arguments with respect to industry support calculations, is the 20-day window which Congress has provided for Commerce to make its industry support determination. 19 U.S.C. § 1673a(c)(4)(E).

Although Commerce and this Court have already addressed Plaintiffs' challenge to the completeness of the Industry Source data, Plaintiffs now spin out two new arguments based upon their prior complaint. Specifically, Plaintiffs theorize that the incompleteness of the Industry Source data led to undercounting and improper comingling of OCTG producers and processors, distorting Commerce's calculations. Pl. Cmts at 4, 10. Plaintiffs did not raise these arguments within the 20-day comment period provided by 19 U.S.C. § 1673a(c)(1)(A). *See generally* Factual Error Cmts.; Cmts. re Petitioners' Standing; Reply Cmts. on Standing; Cmts. re Petitioners' Second GIQ Resp. Plaintiffs did, however, complain to Commerce of the "implications" of including both producers and processors in the industry support calculation,[7] specifically arguing that Borusan U.S. ("Borusan") and PTC Liberty ("PTC") "appear to have potentially significant finishing relative to their actual OCTG production." Reply Cmts. on Standing at 8. Plaintiffs ask too much of the word "implications." At best this argument would have raised to Commerce the challenge that either (1) processors should not be included in the calculation, or (2) the inclusion of processors might lead to double counting, both of which Commerce addressed in its Remand Results. Remand Results at 10–11. Plaintiffs cannot now rely on the word "implications" to fashion more specific arguments about potential undercounting or distinctions between processing that involves heat treatment as opposed to threading operations. Plaintiffs' specific arguments of undercounting, and comingling of the producers and processors, are not exhausted, and therefore not reviewable by this Court.

II. Industry Support Calculation

Plaintiffs argue that Commerce fails to comply with this Court's remand order by failing to prove the accuracy of the industry support calculation and failing to address whether domestically produced OCTG may have been double counted. Pl. Cmts. at 9, 13–23. Plaintiffs contend, because the Industry Source did not disaggregate its data, Commerce cannot confirm the accuracy of its industry support calculations. *Id.* at 11–14. Defendant asserts that Commerce complied with the Court's remand order and its determination is reasonable on this record. Def. Reply Cmts. at 4–8. Defendant-Intervenors concur

[7] Reply Cmts. on Standing at 8 ("The relationship of pipe formation and pipe finishing has implications for any assessment of a domestic OCTG industry given that the percentage of green pipe and plain end imports of OCTG into the United States will vary year to year and may constitute the majority of imports in any given year").

with Defendant's assertions. Def. Int. Reply Cmts. at 10–17. For the reasons that follow, Commerce's industry support calculation is sustained.

An interested party[8] may petition Commerce to commence an antidumping investigation on behalf of the industry. 19 U.S.C. § 1673a(b)(1). Commerce generally has 20 days to determine whether, inter alia, the petition was filed "by or on behalf of the industry."[9] 19 U.S.C. § 1673a(c)(1)(A).

> Commerce considers a petition to be filed "by or on behalf of the industry" if
>
> (i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and
>
> (ii) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition.

19 U.S.C. § 1673a(c)(4)(A).[10] Where the petition satisfies the 25 percent domestic industry support requirement, but does not establish the latter 50 percent requirement, Commerce "shall[] poll the industry or rely on other information in order to determine if there is

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[8] An "interested party," for the purposes of initiating an antidumping investigation by petition, includes:

> (C) a manufacturer, producer, or wholesaler in the United States of a domestic like product,
> (D) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product,
> (E) a trade or business association a majority of whose members manufacture, produce, or wholesale a domestic like product in the United States,
> (F) an association, a majority of whose members is composed of interested parties described in subparagraph (C), (D), or (E) with respect to a domestic like product[.]

19 U.S.C. § 1677(9)(C)–(F).

[9] If warranted by "exceptional circumstances" at its discretion, Commerce can extend the 20-day initial determination timeline for a maximum of 40 days. *See* 19 U.S.C. § 1673a(c)(1)(B); 19 U.S.C. § 1673a(c)(4)(D). Here, Commerce did not extend the 20-day initial timeline, publishing its Initiation Checklist on October 26, 2021, 20 days after the Petitions were filed. See Initiation Checklist.

[10] Commerce (1) "shall disregard the position of domestic producers who oppose the petition," if they are related to foreign producers, unless they can show their interests "would be adversely affected by the imposition of an antidumping duty order;" and (2) "may disregard the position of domestic producers of a domestic like product who are importers of the subject merchandise." 19 U.S.C. § 1673a(c)(4)(B).

support for the petition" before proceeding with formal initiation of the antidumping investigation.[11] 19 U.S.C. § 1673a(c)(4)(D)(i).

A petition to initiate an antidumping proceeding must be accompanied by information "reasonably available" to the petitioner. 19 U.S.C. §1673a(b)(1). When determining industry support for an antidumping petition, Commerce will "normally" measure production, based on either value or volume, "over a twelve-month period, as specified by the Secretary." 19 C.F.R. § 351.203(e)(1). However, if an interested party demonstrates the unavailability of production data for the specified period, then Commerce may establish production levels "by reference to alternative data that [Commerce] determines to be indicative of production levels." *Id.*

In *Tenaris I*, this Court sustained Commerce's decision to rely on other information to calculate industry support for the purposes of initiating the OCTG antidumping investigation at issue but ordered Commerce to "either reconsider or further explain its use of data from the 2020 market period, and specifically to ensure that finishing operations data were not double counted." *Tenaris I*, 693 F.Supp.3d at 1320. In particular, the Court took note of record evidence that might suggest finished pipe may have been counted twice in Commerce's calculations. *Id.* at 1326 (noting "certain domestic companies both produce and finish OCTG, leading to the inference that some domestic pipe may have been double counted in the industry support calculations"). Thus, the Court remanded for Commerce to reconsider or further explain its determination that the record "accurately reflected industry support, including whether finishing operations were counted twice." *Id.* at 1328.

On remand, Commerce considered the record evidence, including that which the Court noted might detract from Commerce's prior conclusion. Remand Results at 14–17. Commerce continues to use the Industry Source data to calculate industry support. *Id.* at 11. In reviewing the Industry Source data, Commerce continues to include both OCTG producers as well as processors who heat treat green tube as part of the domestic industry.[12] *Id.* at 12–13. Commerce reconsidered its determination, particularly in light of record evidence regard-

[11] If Commerce decides to poll the industry it can "determine industry support for the petition by using any statistically valid sampling method[.]" 19 U.S.C. § 1673a(c)(4)(D)(ii).

[12] Here, Commerce defines the domestic like product as OCTG, which includes green tube. Remand Results at 8–9. Commerce defines the domestic industry as "producers and workers who produce the domestic like product." Remand Results at 7–8. As instructed, Commerce reexamined the record, determining that OCTG green tube "finishing operations (i.e. heat treatment) should be a part of the domestic industry." Remand Results at 9. Commerce finds no evidence to suggest that OCTG processors who provide heat treatment should not be included in the domestic industry calculation. Remand Results at 10.

ing Petitioners Borusan and PTC. *Id.* at 14. It examined the record evidence submitted by Plaintiffs, showing screenshots of both Borusan and PTC's websites, determining that PTC is "first and foremost" a producer of OCTG with processing capabilities, and Borusan primarily manufactures OCTG casing while processing imported tubing from its facility in Türkiye. *Id.* at 15–16. Plaintiffs complain that Commerce, although addressing the record evidence regarding these two companies, did not assess the accuracy and completeness of the data more generally. Pl. Cmts. at 13–19. However, after finding that no evidence undermined the Industry Source data, Commerce concluded:

> the record supports Commerce's conclusion that the shipment data from this source account for all domestic shipments of the domestic like product (including the appropriate green tube finishing operations) and that, after accounting for the domestic industry's export shipments derived from reasonably available information (including industry-wide data from the ITC's India et al. OCTG 2020 Review), the resulting denominator used in the industry support calculation appropriately reflects the entire universe of production of the domestic like product in calendar year 2020.

Remand Results at 12.

Plaintiffs further complain that because the data was not disaggregated it was incomplete and therefore inaccurate. Plaintiffs argue:

> Commerce did not demonstrate the data "accurately reflected industry support" because the record evidence does not support Commerce's conclusion that the denominator of the industry support calculation includes total U.S. production of the domestic like product, including imported green pipe that has been processed by a U.S. processor. Commerce failed to confirm the completeness of the shipment data from the industry source provided by Petitioners and relied upon by Commerce as the starting point of the industry support calculations.

Pl. Cmts. at 8. However, in *Tenaris I* the Court did not order Commerce to confirm the completeness or the accuracy of the shipment data. Rather, it ordered Commerce to "reconsider or further explain" its determination that the record accurately reflected industry support, including whether finishing operations were counted twice. *See Tenaris I*, 693 F.Supp.3d at 1328. Thus, Commerce's industry support determination is reasonable, supported by substantial evidence, and therefore sustained.

CONCLUSION

For the reasons discussed above, Commerce's industry support determination is sustained. Judgment will enter accordingly.

Dated: December 2, 2024
New York, New York

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

Slip Op. 24–134

SEAH STEEL VINA CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and BULL MOOSE TUBE COMPANY; MARUICHI AMERICAN CORPORATION; WHEATLAND TUBE COMPANY; THE UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC; NUCOR TUBULAR PRODUCTS INC., Defendant-Intervenors.

Before: Stephen Alexander Vaden, Judge
Court Nos. 1:23-cv-00256, 1:23-cv-00257, 1:23-cv-00258 (SAV)

[Granting Defendant's Motion to Complete the Administrative Record.]

Dated: December 5, 2024

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OPINION

Vaden, Judge:

The U.S. Department of Commerce (Commerce) moves this Court to grant its Partial Consent Motion to Complete the Administrative Record. Commerce seeks to complete the record by including a 2012 Analysis Memorandum from a prior antidumping determination. Commerce considered this Memorandum in the current proceeding, but neither party formally placed it in the administrative record. Plaintiff SeAH Steel VINA Corporation (SeAH Steel) opposes the Motion. For the reasons below, Commerce's Motion to Complete the Administrative Record is **GRANTED**.

BACKGROUND

I. The Prior 2012 Proceeding

On October 26, 2011, Commerce received petitions from domestic producers concerning imports of circular welded carbon-quality steel pipe from, among other countries, the Socialist Republic of Vietnam (Vietnam). *Circular Welded Carbon-Quality Steel Pipe from India, the Sultanate of Oman, the United Arab Emirates, and the Socialist Republic of Vietnam: Initiation of Antidumping Duty Investigations*, 76 Fed. Reg. 72,164 (Dep't of Com. Nov. 22, 2011). Commerce selected SeAH Steel, a Vietnamese producer and exporter of circular welded non-alloy steel pipe, as a mandatory respondent. *See Circular Welded Carbon-Quality Steel Pipe from the Socialist Republic of Vietnam: Notice of Final Determination of Sales at Less Than Fair Value*, 77 Fed. Reg. 64,483 (Dep't of Com. Oct. 22, 2012); *Circular Welded Carbon-Quality Steel Pipe from the Socialist Republic of Vietnam: Final Negative Countervailing Duty Determination*, 77 Fed. Reg. 64,471 (Dep't of Com. Oct. 22, 2012); Compl. ¶ 3, ECF No. 9.[1]

During its investigation, Commerce wrote a memorandum on May 23, 2012. Analysis for the Preliminary Determination of the Antidumping Duty Investigation of Circular Welded Carbon-Quality Steel Pipe from the Socialist Republic of Vietnam: SeAH Steel VINA Corporation, ECF No. 40–1 (2012 Analysis Memorandum). The 2012 Analysis Memorandum calculated SeAH Steel's preliminary dumping margin, and it treated SeAH Steel's pipe as originating from Vietnam. *Id.* Commerce used the 2012 Analysis Memorandum in its preliminary determination to calculate a *de minimis* dumping margin for SeAH Steel. *Circular Welded Carbon-Quality Steel Pipe from the Socialist Republic of Vietnam: Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination*, 77 Fed. Reg. 32,552, 32,560 (Dep't of Com. June 1, 2012). However, in its final determination, Commerce changed its calculation and found that SeAH Steel's dumping margin was 3.96 percent. *Circular Welded Carbon-Quality Steel Pipe from the Socialist Republic of Vietnam: Notice of Final Determination of Sales at Less Than Fair Value*, 77 Fed. Reg. 64,483, 64,486 (Dep't of Com. Oct. 22, 2012). Before SeAH Steel appealed Commerce's finding, the International Trade Commission made a negative injury determination, which terminated the

[1] Unless otherwise indicated, all ECF Numbers refer to Case Number 23–256. The Court joined for purposes of briefing and argument Case Numbers 23–256, 23–257, and 23–258 on April 9, 2024. *See* Order Regarding Mot. to Consolidate Cases and Scheduling Order, ECF No. 35.

investigation and Commerce's ability to impose import duties. *Circular Welded Carbon-Quality Steel Pipe from India, Oman, the United Arab Emirates, and Vietnam*, Inv. Nos. 701-TA-482–484, 731-TA-1191–1194, USITC Pub. 4362 (Dec. 11, 2012) (Final); *see* 19 U.S.C. § 1673 (stating that Commerce may only impose antidumping duties when the International Trade Commission makes an affirmative injury determination).

II. The Current Proceeding

On May 17, 2022, domestic producers filed a request for a country-wide investigation of whether Vietnam was circumventing antidumping duty orders regarding pipes and tubes from India and circular welded pipe from Korea. *See Antidumping Duty Order: Certain Welded Carbon Steel Standard Pipes and Tubes from India*, 51 Fed. Reg. 17,384 (Dep't of Com. May 12, 1986) (India Order); *Notice of Antidumping Duty Orders: Certain Circular Welded Non-Alloy Steel Pipe from Brazil, the Republic of Korea, Mexico, and Venezuela, and Amendment to the Final Determination of Sales at Less Than Fair Value: Certain Circular Welded Non-Alloy Steel Pipe from Korea*, 57 Fed. Reg. 49,453 (Dep't of Com. Nov. 2, 1992) (Korea Order). The domestic producers also requested an investigation of whether Vietnam was circumventing antidumping or countervailing duty orders regarding circular welded pipe from China. *Notice of Antidumping Duty Order: Circular Welded Carbon Quality Steel Pipe from the People's Republic of China*, 73 Fed. Reg. 42,547 (Dep't of Com. July 22, 2008); *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Notice of Amended Final Affirmative Countervailing Duty Determination and Notice of Countervailing Duty Order*, 73 Fed. Reg. 42,545 (Dep't of Com. July 22, 2008) (collectively, China Orders).

Commerce named SeAH Steel a mandatory respondent in these inquiries, and Commerce concluded that Vietnam circumvented the Korea Order, the India Order, and the China Orders. *Certain Circular Welded Non-Alloy Steel Pipe from the Republic of Korea: Final Affirmative Determination of Circumvention of the Antidumping Duty Order*, 88 Fed. Reg. 77,270, 77,271–72 (Dep't of Com. Nov. 9, 2023); *Certain Welded Carbon Steel Standard Pipes and Tubes from India: Final Affirmative Determination of Circumvention of the Antidumping Duty Order*, 88 Fed. Reg. 77,279, 77,279–80 (Dep't of Com. Nov. 9, 2023); *Circular Welded Carbon Quality Steel Pipe from the People's Republic of China: Final Affirmative Determination of Circumvention of the Antidumping Duty and Countervailing Duty Orders*, 88 Fed. Reg. 77,287, 77,287–88 (Dep't of Com. Nov. 9, 2023). On January 5,

2024, SeAH Steel filed a complaint in this Court arguing that Commerce's determinations in these inquiries were arbitrary, capricious, lacked substantial evidence, or were otherwise not in accordance with the law. *See, e.g.*, Compl. ¶¶ 1–14, ECF No. 9.

III. The Present Dispute

After submission of the administrative record, Plaintiff filed its Motion for Judgment on the Agency Record. Mot. for J. on Agency R., ECF No. 38. Believing the record was incomplete, Commerce filed a Partial Consent Motion to Complete the Administrative Record. Def.'s Partial Consent Mot. to Complete Admin. R. (Def.'s Mot.), ECF No. 40. Commerce's Motion claims that the record is incomplete because, although both Plaintiff and Commerce referred to the 2012 Analysis Memorandum in the current proceedings, the parties did not actually include that Memorandum in the administrative record. *Id.* at 2; Pl.'s Resp. to Def.'s Mot. to Suppl. Admin. R. (Pl.'s Resp.) at 1, ECF No. 43. Commerce now seeks to supplement the record with the 2012 Analysis Memorandum. Def.'s Mot. at 1, ECF No. 40. Defendant-Intervenors consented to the Government's Motion. *Id.* SeAH Steel did not. Pl.'s Resp. at 1, ECF No. 43.

SeAH Steel argues that the Court should consider the analysis memorandum — which Commerce says cannot be cited unless it is in the administrative record — as no different than an issues and decision memorandum — which Commerce allows to be cited even if it is not formally included in the administrative record. Pl.'s Resp. at 2–3, ECF No. 43. Plaintiff makes two claims. First, there should be no difference in a party's ability to cite to the two memoranda because both are "prior determinations" of Commerce. *Id.* at 1. As both an analysis memorandum and an issues and decision memorandum "reflect conclusions based on the facts unique to the segment of the proceeding in which they were issued," SeAH Steel argues that Commerce's distinction between the two has no legal basis. *Id.* at 3 (quoting *Regulations Improving and Strengthening the Enforcement of Trade Remedies Through the Administration of the Antidumping and Countervailing Duty Laws*, 89 Fed. Reg. 20,766, 20,772 (Mar. 24, 2024)). Second, requiring a party to file all applicable memoranda in an administrative proceeding would unreasonably require a party to predict all possible issues that may arise. Pl.'s Resp. at 3–4, ECF No. 43. This is because the deadline to file materials for the record closes before Commerce issues its preliminary determination and the parties file their briefs in response. *See* 19 C.F.R. § 351.301(c).

Commerce disagrees. It argues that SeAH Steel's claim is "an unsupported disagreement with Commerce's understanding of its own

historical practice" and that SeAH Steel "failed to establish a practice of [Commerce] accepting [an analysis memorandum] to the file." Def.'s Reply at 2, ECF No. 46. However, Commerce notes that its disagreement with SeAH Steel is irrelevant. Because the agency considered the 2012 Analysis Memorandum when making its decision, the Memorandum is part of the administrative record; and the current record should "reflect[] that reality[.]" Reply in Support of Mot. to Suppl. the Administrative R. (Def.'s Reply) at 2–3, ECF No. 46 (citing *NEXTEEL Co. v. United States*, 47 CIT__, 633 F. Supp. 3d 1190, 1203 (2023)); *see* Issues and Decision Mem. for the Final Affirmative Determination of Circumvention of the Antidumping Duty Order on Certain Circular Welded Non-Alloy Steel Pipe from the Republic of Korea (Nov. 3, 2023) at 14–15, Case No. 23–256, ECF No. 28 (Korea IDM); Issues and Decision Mem. for the Circumvention Inquiry of the Antidumping Duty Order on Certain Welded Carbon Steel Standard Pipes and Tubes from India (Nov. 3, 2023) at 14–15, Case No. 23–257, ECF No. 28 (India IDM); Issues and Decision Mem. for the Circumvention Inquiry of the Antidumping and Countervailing Duty Orders on Circular Welded Carbon-Quality Steel Pipe from the People's Republic of China (Nov. 3, 2023) at 14–15, Case No. 23–258, ECF No. 30 (China IDM).

Although both Commerce and SeAH Steel allude to Commerce's recently amended regulation allowing certain documents to be cited without inclusion in the administrative record, 19 C.F.R. § 351.104(a)(6), the parties agree that the new regulation does not apply here. Def.'s Mot. at 2 n.1, ECF No. 40; Def.'s Reply at 2 n.1, ECF No. 46; Pl.'s Resp. at 2–3, ECF No. 43. Both parties also agree that the Court should consider the 2012 Analysis Memorandum. *See* Def.'s Mot. at 2, ECF No. 40; Pl.'s Resp. at 1, ECF No. 43; Def.'s Reply at 1–2, ECF No. 46. They just cannot agree on whether the document must be formally part of the administrative record for the Court to consider its contents.

STANDARD OF REVIEW AND JURISDICTION

The Court has exclusive jurisdiction over Commerce's Motion under 19 U.S.C. § 1516a(a)(2)(B)(i) and 28 U.S.C. § 1581(c), which grant the Court authority to review actions contesting final affirmative determinations in an antidumping order. Because the Court has jurisdiction over the underlying action, it has jurisdiction over Commerce's Motion.

In antidumping cases, the Court reviews Commerce's decision to determine whether it is "unsupported by substantial evidence on the record[.]" 19 U.S.C. § 1516a(b)(1)(B)(i). The record is defined as a

"copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case ...." 19 U.S.C. § 1516a(b)(2)(A)(i). United States Court of International Trade Rule 73.2 mirrors the language of the statutory definition and the language found in Commerce's regulations by confirming that the record includes "[a] copy of all information presented to or obtained by the administering authority or the Commission during the course of the administrative proceedings." USCIT Rule 73.2(a)(1); *accord* 19 U.S.C. § 1516a(b)(2)(A)(i); 19 C.F.R. § 351.104(a)(1).

DISCUSSION

Both parties agree that the Court should consider the 2012 Analysis Memorandum. No party has argued that Commerce acted in bad faith. The only issue is whether the parties may cite to the 2012 Analysis Memorandum without its inclusion in the current administrative record. SeAH Steel argues that Commerce's Motion is moot because parties should be able to cite to an analysis memorandum without its inclusion in the administrative record. Pl.'s Resp. at 1, ECF No. 43. Conversely, Commerce argues that SeAH Steel misunderstands Commerce's practice, and the 2012 Analysis Memorandum should be included in the administrative record because Commerce considered it in the current proceeding. Def.'s Reply at 3, ECF No. 46. The Court finds that this pedantic dispute is irrelevant here because the document is properly part of the administrative record and may therefore be considered.

The record for judicial review consists of a "copy of all information presented to or obtained by the Secretary, the administering authority, or the Commission during the course of the administrative proceeding, including all governmental memoranda pertaining to the case ...." 19 U.S.C. § 1516a(b)(2)(A)(i); *accord* 19 C.F.R. § 351.104(a)(1); USCIT Rule 73.2(a)(1). "The administrative record is not necessarily 'those documents that the agency has compiled and submitted as "the" administrative record'" but rather "consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency's position." *Hyundai Elec. & Energy Sys. Co. v. United States*, 44 CIT__, 477 F. Supp. 3d 1324, 1329 (2020) (quoting *F. Lli De Cecco di Filippo Fara San Martino S.p.A. v. United States*, 21 CIT 1124,1128–29 (1997)).

The Court "consider[s] matters outside of the administrative record submitted by the agency" when "there is a *reasonable basis* to believe the administrative record is incomplete." *Id.* (emphasis in original)

(quoting *F. Lli De Cecco*, 21 CIT at 1126). Indeed, "a court may order completion or supplementation of the record in light of clear evidence that the record was not properly designated or the identification of reasonable grounds that documents considered by the agency were not included in the record." *JSW Steel (USA) Inc. v. United States*, 44 CIT__, 466 F. Supp. 3d 1320, 1328–29 (2020). This is especially so when an "agency expressly incorporated such information into the proceeding at issue[.]" *Floral Trade Council v. United States*, 13 CIT 242, 243 (1989) (noting that, when an agency considers relevant documents outside the record, those documents are "before the agency for the purpose of the current decision."). In other words, when the omitted information is "sufficiently intertwined with the relevant inquiry" so that "the decision can[not] be reviewed properly without" it, then the Court should supplement the record if it would not unduly prejudice any party. *See id.*

Here, the 2012 Analysis Memorandum is properly part of the administrative record, and its inclusion does not prejudice SeAH Steel. There is clear evidence that the record is incomplete. First, Commerce considered the missing 2012 Analysis Memorandum as part of its final decision in these inquiries. *See* Korea IDM at 14–15, Case No. 23–256, ECF No. 28; India IDM at 14–15, Case No. 23–257, ECF No. 28; China IDM at 14–15, Case No. 23–258, ECF No. 30. Second, both Plaintiff and Commerce referenced the missing 2012 Analysis Memorandum during proceedings before the agency. *See, e.g.*, Def.'s Mot. at 2, ECF No. 40; Pl.'s Resp. at 1, ECF No. 43; China IDM at 15, Case No. 23–258, ECF No. 30. The administrative record "consists of all documents and materials directly or indirectly considered by agency decision-makers[.]" *Hyundai Elec. & Energy Sys. Co.*, 44 CIT__, 477 F. Supp. 3d at 1329 (quoting *F. Lli De Cecco*, 21 CIT at 1128). It is undisputed Commerce directly considered the memorandum. *See* China IDM at 15, Case No. 23–258, ECF No. 30 ("SeAH [Steel] asserts [its merchandise production] cannot be covered by the *Orders* because Commerce treated SeAH [Steel]'s pipe ... as Vietnamese in origin in prior investigations. As support, SeAH [Steel] cites the preliminary analysis memorandum from [Commerce's] investigation in 2012 .... [T]hese documents do not demonstrate that Commerce expressly examined the country of origin ...."); Korea IDM at 15, Case No. 23–256, ECF No. 28 (describing Commerce's use of the 2012 Analysis Memorandum in almost identical language); India IDM at 15, Case No. 23–257, ECF No. 28 (same). Therefore, the 2012 Analysis Memorandum is part of the administrative record. *Hyundai Elec. & Energy Sys. Co.*, 44 CIT__, 477 F. Supp. 3d at 1329. The Court cannot properly review Commerce's determination without consider-

ing the memo. *Floral Trade Council*, 13 CIT at 242–43.

Including the 2012 Analysis Memorandum does not prejudice SeAH Steel. A party is prejudiced when "it was harmed as a result of the error." *SolarWorld Ams., Inc. v. United States*, 962 F.3d 1351, 1359 (Fed. Cir. 2020) (citing *Suntec Indus. Co. v. United States*, 857 F.3d 1363, 1372 (Fed. Cir. 2017)); *see also Grupo Acerero S.A. de C.V. v. United States*, 47 CIT__, 615 F. Supp. 3d 1339, 1349 (2023) (applying *SolarWorld*'s prejudice analysis to a motion to correct the record). Here, SeAH Steel has not shown or even argued that it will suffer any harm from the proposed inclusion; it only states that a party should be able to cite to an analysis memorandum as it would an issues and decision memorandum. Pl.'s Resp. at 2–3, ECF No. 43. The 2012 Analysis Memorandum is not new information to the Plaintiff because SeAH Steel referenced it in the current proceeding. *See, e.g.*, China IDM at 15, Case No. 23–258, ECF No. 30 ("SeAH [Steel] asserts that its production of inquiry merchandise cannot be covered ... because Commerce treated SeAH [Steel's] pipe ... as Vietnamese in origin in prior investigations."). Because SeAH Steel has not shown that it will suffer any harm from the inclusion of the 2012 Analysis Memorandum, there is no reason the document should not be part of the administrative record.

Even if SeAH Steel's argument is correct that one should not have to place an analysis memorandum in the record to cite it, it is an irrelevant distinction here. However Commerce classifies the analysis memorandum, Commerce considered it during the current proceeding. It thus made the 2012 Analysis Memorandum part of the administrative record the moment it considered the Memorandum in its decision-making process. *See Hyundai Elec. & Energy Sys. Co.*, 44 CIT__, 477 F. Supp. 3d at 1329. The 2012 Analysis Memorandum is properly part of the administrative record, and it would be improper for the Court to issue an advisory opinion answering SeAH Steel's hypothetical legal question. That question will have to await a case in which an analysis memorandum is not part of the record for its resolution. *See* U.S. Const. art. III, § 2, cl. 1 (limiting "The judicial power ... to all Cases ... [and] Controversies[.]"); *Trump v. New York*, 592 U.S. 125, 131 (2020) (per curiam) ("[T]he case-or-controversy requirement of Article III" requires that "the case must be 'ripe'–not dependent on 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'") (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).

CONCLUSION

The 2012 Analysis Memorandum is properly part of the current administrative record, and the record should be supplemented to include it. The Court therefore **GRANTS** Commerce's Partial Consent Motion to Complete the Administrative Record, **ORDERS** the inclusion of the 2012 Analysis Memorandum as part of the record, and **DENIES** SeAH Steel's request for an advisory opinion.

Dated: December 5, 2024
New York, New York

/s/ Stephen Alexander Vaden
STEPHEN ALEXANDER VADEN, JUDGE

Slip Op. 24–136

FEDMET RESOURCES CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and MAGNESIA CARBON BRICKS FAIR TRADE COMMITTEE, Defendant-Intervenor.

Before: M. Miller Baker, Judge
Court No. 23–00117

[The court remands to Commerce for further proceedings.]

Dated: December 12, 2024

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J. Michael Taylor and *Daniel L. Schneiderman*, King & Spalding LLP, Washington, DC, on the briefs for Defendant-Intervenor.

OPINION

***Baker*, Judge:**

An importer of refractory bricks—heat-resistant masonry used to line blast furnace walls—challenges the Department of Commerce's determination that certain of its blocks fall within antidumping and countervailing duty orders. The court holds that the agency erred as a matter of law and remands for reconsideration under the correct legal standard.

I

The Enforce and Protect Act (EAPA), 19 U.S.C. § 1517, directs U.S. Customs and Border Protection to open an investigation after receiving an allegation that "reasonably suggests" an importer has "eva[ded]" an antidumping or countervailing duty order. *See id.* § 1517(a)(3), (b)(1)–(2). The statute defines "evasion" as the entry of goods through any material false statement or omission that reduces or avoids such duties. *See id*. § 1517(a)(5)(A).

If Customs "is unable to determine whether the merchandise at issue is covered" by the order, it must refer that question to Commerce. *Id.* § 1517(b)(4)(A)(i). The latter, in turn, "shall" make such a determination and communicate the results to the former. *Id.* § 1517(b)(4)(B). As relevant here, the Department may conduct this inquiry by applying the same regime it uses in making a scope ruling.

See 19 C.F.R. § 351.227(f).

What is that? "Given the realities in the marketplace and ever-changing varieties of merchandise, questions frequently arise as to whether a particular product is subject to or falls within the scope" of an antidumping or countervailing duty order. *Saha Thai Steel Pipe Pub. Co. v. United States*, 101 F.4th 1310, 1315 (Fed. Cir. 2024) (citing 19 C.F.R. § 351.225(a)). By regulation—the statute provides no such mechanism—a producer, importer, or other interested party uncertain whether an order covers a commodity may ask Commerce for a ruling to clarify the decree's terms. *See* 19 C.F.R. § 351.225(c)(1).[1]

Upon receiving such a request, the Department will open a "scope inquiry." 19 C.F.R. § 351.225(a).[2] If it finds that the order's relevant language, "including the descriptions of merchandise expressly excluded . . . , is dispositive," it "may make its determination" based on that wording alone. *Id*. § 351.225(k)(1). In the agency's "discretion," it "may" also consider four "primary interpretive sources." *Id*. § 351.225(k)(1)(i). Those are "descriptions" of the product in the petition and investigation giving rise to the order, *see id*. § 351.225(k)(1)(i)(A), (B); its "previous or concurrent determinations . . . including prior scope rulings" bearing on the order or "other orders with same or similar language," *id*. § 351.225(k)(1)(i)(C); and International Trade Commission decisions "pertaining to the order," *id*. § 351.225(k)(1)(i)(D).[3]

II

A

In 2009, Resco Products, Inc., a domestic producer, petitioned Commerce to open antidumping and countervailing duty investigations of "imports of certain magnesia carbon bricks" (MCBs) from China and Mexico. *Fedmet Res. Corp. v. United States*, 755 F.3d 912, 914 (Fed. Cir. 2014) (*Fedmet I*). In due course, the Department imposed such duties. *See* 75 Fed. Reg. 57,257 (antidumping); 75 Fed. Reg. 57,442 (countervailing) (collectively, the orders).

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[1] This device is roughly analogous to the procedure by which a party uncertain of its rights or obligations may seek a declaratory judgment in federal court. *See* 28 U.S.C. § 2201.

[2] It may also self-initiate such an inquiry. *See id.* § 351.225(b).

[3] In fixing the scope of an order, Commerce "may also consider [certain] secondary interpretive sources"—materials not identified in subparagraph (k)(1)(i) of the regulation. *Id*. § 351.225(k)(1)(ii). "[I]n the event of a conflict between these secondary interpretive sources and the primary interpretive sources under [sub]paragraph (k)(1)(i)," the latter "will normally govern in determining whether a product is covered by the scope of the order at issue." *Id*. If the Department determines that the sources under paragraph (k)(1) "are not dispositive," it must consider various enumerated factors. *Id*. § 351.225(k)(2)(i)(A)–(E). Those criteria are in turn subject to their own hierarchy. *See id.* § 351.225(k)(2)(ii).

Fedmet, a "domestic importer of refractory bricks and other products used in the steelmaking industry," *Fedmet I*, 755 F.3d at 916, then requested a scope ruling that the orders did not cover its magnesia alumina carbon bricks (MAC bricks). The company contended that "significant amounts" of alumina in those products—"8 to 15 percent"—"result in 'distinct properties'" that distinguish them from in-scope MCBs. *Id*. at 916–17.

After agency proceedings and litigation in this court in which Resco participated, the Federal Circuit agreed with Fedmet. *See id*. at 919–23. The court of appeals held that the sources identified in what is now 19 C.F.R. § 351.225(k)(1)(i)[4] "unequivocally confirm that [the importer's] MAC bricks are not within the scope of the orders." *Fedmet I*, 755 F.3d at 919. It reasoned that the petitioner repeatedly "disclaim[ed] coverage of all MAC bricks in general." *Id*. Moreover, both Commerce and the Commission reiterated "that the underlying investigations did not extend to MAC bricks." *Id*.

In response to the contention that "the (k)(1)[(i)] sources identify no 'cut-off point' at which addition of alumina to an MCB transforms it into a MAC brick," *id.* at 921 (emphasis added), the Federal Circuit reckoned that

> [t]he public—including domestic importers like Fedmet—is entitled to rely on the multiple statements in the (k)(1)[(i)] sources disclaiming coverage of MAC bricks. To the extent that MCBs and MAC bricks do in fact overlap to some degree, the overlap was surrendered by Resco's failure to provide a technical definition or "cut[-]off point" when asked to be more specific.

Id. Doubling down on this theme, the court of appeals emphasized that "the (k)(1)[(i)] sources do not mention, much less make a distinction, between so-called 'low-alumina' and 'high-alumina' bricks." *Id*. at 922. Instead, those sources made "clear statements that *all* MAC bricks were excluded from the scope of the underlying investigations." *Id*. (emphasis in original). This is true "[e]ven if, in fact, MCBs do overlap to some extent with MAC bricks," as the orders "are limited to only 'certain'" of the former. *Id*. at 922 n.7.

On remand, Commerce determined that the company's MAC brick was "8 to 15 percent . . . alumina" and thus out-of-scope. Appx02125. It limited its ruling to Fedmet's Bastion brand and stated that it did not intend to "address all" products characterized as MAC bricks because on the record before it "there [was] no apparent industry standard" for defining them. Appx02125–02126.

[4] Commerce amended the regulation in 2021.

That victory only bought Fedmet an armistice, rather than peace. In 2019, it found itself accused of evasion by the Magnesia Carbon Bricks Fair Trade Committee. This ad hoc group of domestic producers (including Resco) alleged that the importer unlawfully characterized MCBs from China as MAC bricks. Appx01048–01049. Customs launched an investigation and found Fedmet guilty as charged. Appx01049.

The company challenged that finding in a new round of litigation in this court. *See Fedmet Res. Corp. v. United States*, Ct. No. 21–248, ECF 6 (complaint). The government beat a hasty retreat and sought voluntary remand, which the court granted. *See* Case 21–248, ECF 38. When the time arrived for Customs to file its redetermination, the government asked for a stay. *See* Case 21–248, ECF 39. It explained that the agency could not determine whether the orders covered Fedmet's bricks and intended to punt the question to Commerce. *Id*.

Customs then did just that.[5] Appx01048–01053. Its referral reported test results for eleven Fedmet brick samples "from four different [agency] labs using multiple testing methods." ECF 41, at 10; *see also* Appx01050 (test results). The Department, in turn, opened a scope inquiry. *See* 87 Fed. Reg. 43,238.

In that proceeding, Commerce explained that "[a]lumina *is* the defining component" of MAC bricks. Appx01014 (emphasis added). It observed that on two prior occasions it had "consider[ed] the alumina content necessary" to constitute such a product. Appx01015. On remand from *Fedmet I* in 2015, it found that the Bastion brand contained at least "eight percent alumina" and was therefore an out-of-scope MAC brick. *Id*. And two years later, in its *S&S Refractories* ruling,[6] it similarly concluded that a brick with "at least five percent added alumina" was also out-of-scope. Appx01015. Taken together, the two decisions "established that refractory bricks containing *a threshold amount* of alumina" (five percent) are MAC bricks. *Id*. (emphasis added).

The Department then added a qualifier: "[T]he alumina content requirement is based on the state of the brick upon importation." *Id*. *S&S* "explicitly stated that the alumina must be 'added,' *i.e.*, deliberately present in the brick through the production process (rather than subsequently developed through oxidation in the testing process)." *Id*.

[5] The court stayed Case 21–248 pending Commerce's resolution of that referral. *See* ECF 44.

[6] *S&S* was a scope proceeding that concluded in mid-2017. *See* Memorandum from Edward C. Yang to Gary Taverman, *Certain Magnesia Carbon Bricks from the People's Republic of China and Mexico: Final Scope Ruling—S&S Refractories*, Agency Nos. A-201–837, A-570–954, C-570–955 (Dep't Commerce June 7, 2017). Excerpts from that ruling appear at Appx02032–02033.

This distinction is "critical[ ]," *id.*, because "[r]efractory bricks sometimes contain small amounts of aluminum . . . as an antioxidant, which can be converted to alumina . . . in the course of testing," Appx01014 n.26 (quoting Fedmet's comments). Alumina resulting from testing "does not impart the same characteristics or performance to [a] brick[ ]" and thus could not be "considered part of [its] chemical make-up." Appx01015. Thus, it is vital "to determine the content of alumina as it exists in the brick as it was sold and imported, *i.e.*, prior to any oxidation of aluminum caused by exposure during testing." *Id.*

Having so found, Commerce then considered whether the eleven brick samples discussed in the four reports Customs provided "have the threshold amount of alumina to be considered outside the scope of the orders"—five percent. Appx01016. Of those, the former found one definitive: Report 0826, which used x-ray diffraction (XRD) testing on two samples. Those tests showed they contained some alumina, but less than five percent. *See* Appx01017–01018. The Department thus found those bricks were *in*-scope. Appx01018. "Because this test provides the alumina content . . . as it exists" at the time of "sale and importation," the report "contain[ed] sufficient information" to allow a finding "as to whether [the samples] constitute MAC bricks." *Id.*

Commerce found the other three test results indeterminate. Appx01018–01019. Report 0430 revealed that all four samples were more than five percent alumina. *See* Appx01050. The Department discounted those results, however, explaining that they derived not from a "direct test" for that substance, but from a post-hoc assumption that such content was the residual after subtracting the measured levels of magnesia and carbon from 100 percent. *See* Appx01018.[7] Because the samples presumably also contained *other* substances beyond the trinity of magnesia, carbon, and alumina, Customs needed to address whether it is "appropriate to attribute the entire content of the brick that is not either magnesia or carbon to alumina." Appx01018.

The Department observed that although the alumina content for the samples in Reports 1030 and 1071 exceeded five percent, *see* Appx01050, those results derived from x-ray fluorescence (XRF) testing. Appx01018. That procedure "cause[s] oxidization of the . . . samples," Appx01016, meaning it converts aluminum to alumina, Appx01015 n.30. Because that method did not test for the presence of alumina at the time of importation, but rather changed the bricks' nature, Commerce would not rely on it to determine whether the orders covered the five samples in those reports. Appx01018.

[7] According to Fedmet, these results derived from XRD testing. *See* ECF 37–1, at 16–17.

Both Reports 1030 and 1071 also included the results of XRD testing approved by the Department, but those tests only identified "the *presence* of certain compounds and elements" within the samples, including alumina. *Id.* (emphasis added); *see also* Appx01111 (Report 1030: "The samples displayed reliable peaks for Magnesium Oxide, *Aluminum Oxide* [alumina], and Carbon.") (emphasis added); Appx01170 (Report 1071, same). They "did not include figures relating to the *proportion*" of those substances. Appx01018 (emphasis in original).

In short, Commerce found that the orders covered two of the eleven brick samples because although they contained added alumina, they didn't satisfy the five-percent standard announced in *S&S*. *Id.* For the other nine, the test results provided by Customs were "indeterminate." Appx01019. And while the former agency disclaimed "direct-[ing]" the latter "to use a particular testing methodology for determining alumina content," *id*., it noted "that the test must reasonably reflect the composition of the brick as sold/imported," *id*. At any rate, "[w]hether certain tests or estimation strategies can provide accurate results is an assessment that [Customs] is best positioned to make." *Id*. As to those nine samples, then, the Department punted the scope question back to Customs.[8]

B

Kicking off yet another round of litigation (the third, for those keeping count), Fedmet filed this suit under 19 U.S.C. §§ 1516a(a)(2)(A)(ii) and (a)(2)(B)(vi) to challenge the Department's final determination in the covered-merchandise referral. ECF 18, ¶ 2. The Committee intervened in support of the government. ECF 25. The importer moved for judgment on the agency record. ECF 37; *see also* USCIT R. 56.2. The government (ECF 41) and the Committee (ECF 42) opposed, and Fedmet replied (ECF 46).

In § 1516a(a)(2) actions, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by

[8] After receiving Commerce's response, Customs filed its remand redetermination in the related EAPA action. *See* Case 21–248, ECF 52. The latter agency stated that it "conducted additional laboratory testing" on the nine refractory brick samples that the former found indeterminate. *Id*. at 9. That (XRD) testing showed all contained alumina. *Id*. at 19. Applying the Department's five-percent standard, Customs decided that seven of the nine were in-scope because their alumina content did not meet that threshold. *Id*. The other two exceeded it and thus were out-of-scope. *Id*. Based on those findings, the latter agency concluded that Fedmet "entered covered merchandise . . . through evasion." *Id*. The company thus had the "burden . . . to show" by XRD testing or any other method able to measure "alumina content at the time of importation . . . that its entries contain non-subject MAC bricks with the chemical composition similar" to the two samples that passed muster. *Id*.

The parties to Case 21–248 then requested, and the court granted, a stay of that proceeding pending "a final and conclusive disposition" of this case. ECF 61.

substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). The court has jurisdiction under 28 U.S.C. § 1581(c).

III

In effect, Fedmet asserts two main arguments. First, Commerce applied the wrong legal standard and in so doing unlawfully expanded the orders' scope. ECF 37–1, at 25–38. Second, and in any event, substantial evidence does not support the Department's application of that standard here. *Id*. at 38–51. The court considers these in turn.

A

Fedmet attacks Commerce's requirement—announced in *S&S*—that to fall outside the orders, a refractory brick must contain at least five percent added alumina. *See id.* at 28–29. The company contends that the Federal Circuit "already rejected" such a demarcation based on Resco's "fail[ure] to provide a technical definition or 'cut[-]off point' when asked to be more specific." *Id*. at 29 (quoting *Fedmet I*, 755 F.3d at 921). Observing that the Department cannot enlarge the scope of antidumping and countervailing duty orders, *see id.* (citing *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1095 (Fed. Cir. 2002)), the importer argues that the agency's five-percent standard is unlawful under *Fedmet I*, *id*.

The government's response is to try to change the subject. *See* ECF 41, at 22–24. It points to 19 C.F.R. § 351.225(k)(1)(i)(C), which authorizes the Department to consider "prior scope rulings" bearing on an antidumping or countervailing duty order. Here, that includes the agency's earlier determinations in the *Fedmet I* remand proceeding and in *S&S*, but the government's argument begs whether those decisions are consistent with the Federal Circuit's opinion.

For its part, the Committee dares to confront *Fedmet I*. It argues that the court of appeals neither addressed "what it is to be a 'MAC brick' in the first place," ECF 42, at 7, nor "opine[d] upon where a line might be drawn in terms of alumina content," *id*.

Those points are correct, but they're also irrelevant. The issue before the Federal Circuit was not what *is* a MAC brick, but whether the *orders covered* the importer's product, which contained added alumina. As to *that* question, *Fedmet I*'s "reasoning—its *ratio decidendi*" that gives it "life and effect in the disposition of future cases," *AM/NS Calvert LLC v. United States*, 654 F. Supp. 3d 1324, 1345 (CIT 2023) (quoting *Ramos v. Louisiana*, 590 U.S. 83, 104 (2020))—is dispositive. It teaches that the addition of *any* alumina to an MCB takes it outside the orders, which "are limited to only 'certain' MCBs."

Fedmet I, 755 F.3d at 922 n.7. That's because the relevant sources "*do not mention, much less make a distinction* [ ] *between* [,] *so-called 'low-alumina' and 'high-alumina' bricks*." *Id*. at 922 (emphasis added). And while "MCBs and MAC bricks [may] in fact overlap to some degree, *the overlap was surrendered by Resco's failure to provide a technical definition or 'cut[-]off point' when asked to be more specific*." *Id*. at 921 (emphasis added).

Under this rationale, which binds Commerce as much as this court, the agency had no power on remand in *Fedmet I* or in *S&S* to expand the scope of the orders to include *low*-alumina bricks—for better or worse, they're not covered, whether characterized as MCBs or MAC bricks.[9] "No cut-off point" for added alumina means *no* cut-off point.

In sum, the Department erred as a matter of law in imposing its five-percent test. Under *Fedmet I*, the orders do not cover MCBs with *any* added alumina. That mistake, of course, requires a remand. The court nevertheless must now turn to the importer's challenge to the agency's application of its (erroneous) legal standard, as the resolution of that dispute will inform the administrative proceedings to follow.

B

As described above, Customs provided the Department with four reports regarding the alumina content of eleven samples of Fedmet's refractory bricks. Three of them (encompassing seven samples) disclosed the presence of added alumina using the Department's favored XRD test. *See* Appx01111 (Report 1030); Appx01170 (Report 1071);

[9] The dissent in *Fedmet I* lamented that the "majority leaves the Orders open to manipulation. Rather than paying the antidumping and countervailing duties on MCBs, importers can simply add small amounts of alumina to their products and label them MAC bricks instead of MCBs." 755 F.3d at 925 (Wallach, J.). The Committee echoes that jeremiad. *See* ECF 42, at 7 (noting that under Fedmet's reading of the Federal Circuit's decision, "MCBs containing only trace amounts of alumina" can masquerade as MAC bricks). The panel majority, however, considered and rejected that concern.

Appx01234, Appx01239–01240 (Report 0826).[10] Under the governing *Fedmet I* standard, those seven samples—even if they are otherwise MCBs—are "not covered by the orders" because they contain added alumina. 755 F.3d at 922.

Although Report 0430 also disclosed the presence of a certain percentage of added alumina, Commerce discounted this finding since it was "not the result of any direct test for" that substance. Appx01018. The Department explained that the estimated percentage might not be correct because it failed to account for other material potentially in the sample. *Id*. Thus, it could not determine "whether the bricks in Report 0430 are covered." *Id*.

Fedmet generally attacks Commerce's exercise of independent judgment in evaluating the test results forwarded by Customs. *See* ECF 37–1, at 45–51. The importer, however, cites no authority for this proposition, and the court is aware of none. In directing the Department to resolve covered merchandise referrals from Customs, *see* 19 U.S.C. § 1517(b)(4)(B), Congress necessarily delegated to the former authority to review de novo materials received from the latter. And Fedmet has offered no reasons why Commerce's analysis of Report 0430 is deficient on its own terms or otherwise "failed to consider an important aspect of the problem." *Motor Veh. Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

That said, here the Department applied the wrong legal standard—its five-percent alumina test—in evaluating the samples in Report 0430. On this record, it's unclear whether it would have reached the same conclusion if it had used the *Fedmet I* benchmark of any added alumina. It must do so on remand.[11]

* * *

[10] Fedmet challenges Commerce's refusal to accept the *XRF* results for the samples in Reports 1030 and 1071, but the Department reasonably explained why it found them distorted. As a matter of common sense, whether an order covers a given product must be determined based on the item as it existed on the date of importation, rather than after some later alteration or modification. It's undisputed here that the XRF test itself creates alumina through oxidation and thereby changes the brick's chemical composition.

In any event, the *XRD* testing approved by Commerce detected—but did not measure in percentage terms—"the *presence* of certain compounds and elements," including alumina, in those samples. Appx01018 (emphasis in original). Under *Fedmet I*, the relative proportion of alumina in an MCB isn't material because the orders do not cover "low-alumina" bricks.

Moreover, the more recent XRD tests conducted by Customs on redetermination in Case 21–248 confirmed that the samples in Reports 1030 and 1071 contain alumina. *See* note 8. This time, however, as required under Commerce's (erroneous) legal standard, the XRD testing measured the relative proportion of that substance. *See* Case 21–248, ECF 52, at 16.

[11] Alternatively, in its discretion Commerce may simply instruct Customs to apply the *Fedmet I* standard to the XRD retesting of the samples in Report 0430 described in the latter agency's redetermination. *See* note 8.

For the reasons explained above, the court remands to Commerce with instructions that it reconsider its decision as to all 11 samples using the *Fedmet I* metric. Under that standard, the orders do not cover MCBs containing *any* added alumina—such products are MAC bricks as far as those orders are concerned.

Dated: December 12, 2024
New York, NY

/s/ M. Miller Baker
JUDGE

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