U.S. Customs and Border Protection

Slip Op. 13–68

FEDMET RESOURCES CORPORATION, Plaintiff, v. UNITED STATES, Defendant, and ANH REFRACTORIES COMPANY, RESCO PRODUCTS, INC., and MAGNESITA REFRACTORIES COMPANY, Defendants.

Before: Nicholas Tsoucalas, Senior Judge
Court No.: 12–00215

Held: Plaintiff Fedmet Resources Corporation's motion for judgment on the agency record is denied.

Dated: May 30, 2013

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OPINION

TSOUCALAS, Senior Judge:

Before the court is Fedmet Resources Corporation's ("Fedmet") USCIT Rule 56.2 motion for judgment on the agency record appealing the United States Department of Commerce's ("Commerce") final scope ruling regarding antidumping and countervailing duty orders on magnesia carbon bricks ("MCBs"). Pl.'s Mot. J. Agency R. at 1–2 ("Pl.'s Br."); *see Certain Magnesia Carbon Bricks from the People's Republic of China and Mexico: Final Scope Ruling — Fedmet Resources Corporation*, Case Nos. A-201–837, A-570–954 and C-570–955

(July 3, 2012), Pub. R. 2d 74 at 1–2 ("*Final Scope Ruling*").[1] Fedmet imports "Bastion"-trademarked magnesia alumina carbon bricks ("MACBs"), which contain alumina in addition to magnesia and carbon. Pl.'s Br. at 6. In its *Final Scope Ruling*, Commerce determined that Fedmet's Bastion bricks are within the scope of the antidumping and countervailing duty orders. *Final Scope Ruling* at 1–2. Fedmet argues that Commerce's ruling is not based on substantial evidence or otherwise in accordance with the law because MACBs have distinct physical and commercial characteristics from in-scope MCBs, and because the International Trade Commission ("ITC") did not consider MACBs in its injury determination. Pl.'s Br. at 9–11; *see Certain Magnesia Carbon Bricks from China and Mexico (Final)*, USITC Pub. 4182, Inv. Nos. 701-TA-468 and 731-TA-1166–1167 at 3–6 (Sept. 2010) ("*ITC Final Determination*"). Commerce and defendant-intervenors Resco Products, Inc. ("Resco"), ANH Refractories Company, and Magnesita Refractories Company (collectively, "defendant-intervenors") oppose the motion. *See* Commerce's Resp. Pl.'s Br. at 7–8 ("Commerce Resp."); ANH's Resp. Pl.'s Br. at 2–5 ("ANH Resp."); Magnesita's & Resco's Resp. Pl.'s Br. at 4–5 ("M&R Resp.").

BACKGROUND

In September 2010, Commerce published antidumping duty orders on MCBs from Mexico and the People's Republic of China ("PRC"), and a separate countervailing duty order on MCBs from the PRC. *Certain MCBs From Mexico and the PRC: Antidumping Duty Orders*, 75 Fed. Reg. 57,257, at 57,257 (Sept. 20, 2010) ("*AD Orders*"); *Certain MCBs from the PRC: Countervailing Duty Order*, 75 Fed. Reg. 57,442, at 57,442 (Sept. 21, 2010) ("*CVD Order*," and collectively, "the Orders"). MCBs are a type of "refractory brick" necessary for certain applications in the steelmaking industry. R.3d 3 Ex. 1 at 6–7. Steelmakers use refractory bricks as lining for the inside of ladles that transport and pour molten steel and as lining for the inside of metallurgy furnaces. *Id.* & Ex. 2 at 5–7. Refractory bricks undergo repeated exposure to extreme temperatures and caustic substances in these roles, meaning each brick has a limited useful life. *Id.* Ex. 2 at 5–6. Bricks used in certain locations — particularly at the "slag line and at the top of the steel melt[,] where active chemical processes are taking place and impurities and waste tend to aggregate" — experi-

[1] Commerce implemented its new electronic filing system during the course of the proceedings below, causing the administrative record to be subdivided into four parts. Unless otherwise noted, all documents in the first, second, third, and fourth divisions of the record hereinafter will be designated "R.1st," "R.2d," "R.3d," and "R.4th," respectively. The first and second portions of the record contain public documents, while the third and fourth portions contain confidential documents.

ence more wear than bricks in other locations. *Id.* at 5. Consequently, producers offer a wide range of refractory bricks with finely tuned chemistries for use in different parts of the ladle or furnace. *Id.* at 5–6. Steelmakers arrange these specialized bricks to achieve uniform deterioration and to lower costs, although the exact arrangement "may be quite different from shop to shop." *Id.* at 5–7.

MCBs are a particularly strong variety of refractory brick composed of magnesia (MgO) and added carbon. *Id.* Ex. 1 at 10–12 & Ex. 2 at 5–7. MCBs exhibit high thermal conductivity, low porosity, and high corrosion resistance. R.2d 18 at 5 (citing R.3d 3 Ex. 1 at 10–11). Consequently, MCBs are used where corrosion is most severe — the slag line, the lower sidewall, the upper sidewall, the roofs of ladles, and the wall lining of high-temperature furnaces. R.3d 3 Ex. 1 at 6–7.

The scope of the Orders covers "certain chemically-bonded . . . magnesia carbon bricks with a magnesia component of at least 70 percent magnesia . . . by weight, . . . with carbon levels ranging from trace amounts to 30 percent by weight, regardless of enhancements . . . and regardless of whether or not antioxidants are present." Pl.'s Br. at 6 (quoting *AD Orders*, 75 Fed. Reg. at 57,257; *CVD Order*, 75 Fed. Reg. at 57,443).

On May 3, 2011, Fedmet filed a scope ruling request to determine whether its Bastion MACB product is covered under the Orders. *Certain Magnesia Carbon Bricks from the PRC and Mexico: Preliminary Scope Ruling — Fedmet Resources Corporation*, Case Nos. A-201–837, A-570–954, and C-570–955 at 1 (Mar. 30, 2012) ("*Preliminary Scope Ruling*"). Fedmet's Bastion bricks contain 70–90% magnesia and 3–15% carbon, levels well within the scope's technical parameters. Pl.'s Br. at 6–7. However, Fedmet argues that the 8–15% alumina (Al_2O_3) content of its Bastion bricks distinguish them from in-scope MCBs. *Id.* at 3. Specifically, the alumina reacts with magnesia in the brick at steelmaking temperatures to form a mineral called spinel. *Id.* "The spinel improves the performance of the brick in certain applications by promoting permanent expansion of the brick when it is heated, which hinders the formation of cracks, and maintains that expansion when the ladle cools between uses." *Id.*

All parties agree there is no standard chemical definition for bricks marketed as MACBs. *Final Scope Ruling* at 9; *see* Pl.'s Reply at 6. Evidence on the record demonstrates that the term "MACB" can refer to bricks with more than 70% magnesia ("low-alumina bricks"), as well as bricks with less than 70% magnesia ("high-alumina bricks").[2]

[2] As the amount of magnesia in an MACB increases, the amount of room left for added alumina decreases. Hence, a low-alumina brick with 70% magnesia cannot contain more than 30% alumina, whereas a high-alumina brick with less than 70% magnesia can have up

Preliminary Scope Ruling Ex. 2 at 3 (online description of products marketed as MACBs with less than 70% magnesia content); R.2d 18 Ex.1 at 3 (in reference to MACBs, "carbon-bonded bricks with 50–90% [magnesia] or 40–50% [alumina] are used in the Asian region"); R.4th 2 at 3–10 (discussing industry naming conventions indicating that any brick with a majority magnesia content and added alumina and carbon can be called an MACB). Fedmet stated at oral argument that the minimum level of alumina required to form spinel is about 5%, Hr'g Tr. at 17, *Fedmet Res. Corp. v. United States*, No. 12–00215 (Ct. Int'l Trade Mar. 26, 2013), but there is little evidence in the administrative record to support this claim. *See Preliminary Scope Ruling* Ex. 1 at 100–01 (showing that bricks with 4% added alumina exhibit characteristics similar to bricks with 5–7% added alumina, but noting that bricks with 4% alumina "show[] less expansion[,] which may not be optimal" for preventing slag penetration).

In its preliminary determination, Commerce ruled that Fedmet's Bastion low-alumina MACB is within the scope of the Orders. *Preliminary Scope Ruling* at 1–2. Commerce first found that "[b]ased on the magnesia and carbon content alone, it appears that Fedmet's Bastion[] [MACBs] fall within the scope of the Orders" because they contain more than 70% magnesia and have some added carbon. *Id.* at 26. Nevertheless, Commerce found "it necessary to look beyond the language of the scope of the Orders because of the potential ambiguity regarding whether the plain language of the scope covers MCBs with alumina." *Id.* Commerce then determined that conflicting language in the petition and in the investigations before it and the ITC "prevent[ed] a definitive conclusion on these sources alone." *Id.* at 26–27. Upon consideration of the physical characteristics, purchaser expectations, end use, channels of trade, price, and manner of advertising, however, Commerce concluded that Fedmet's Bastion bricks did fall within the scope of the Orders. *Id.* at 27–32. Commerce later affirmed each of these determinations in its *Final Scope Ruling*. *Final Scope Ruling* at 1–12.

Fedmet alleges that the *Final Scope Ruling* is unsupported by substantial evidence and contrary to law because the steel industry considers MACBs to be distinct products from MCBs. Specifically, Fedmet argues: (1) language in the petition, questionnaire responses, and investigations indicates the scope should be interpreted to exclude MACBs; (2) MACBs are distinguishable from in-scope MCBs on the basis of their distinct physical properties; and (3) Commerce acted

to nearly 50% alumina. Bricks with more alumina than magnesia are called alumina magnesia carbon bricks ("AMCBs"). R.4th 2 at 3.

contrary to law by interpreting the scope as covering MACBs even though the ITC excluded them from its injury determination. Pl.'s Br. at 12–38.

JURISDICTION

The court has jurisdiction over this matter pursuant to section 516(a)(2)(B)(vi) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(vi) (2006).[3]

STANDARD OF REVIEW

The court must uphold Commerce's scope determination unless it is "unsupported by substantial evidence on the record, or not otherwise 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)), "taking into account the entire record, including whatever fairly detracts from the substantiality of the evidence." *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1562 (Fed. Cir. 1984).

"[T]he plain language of the . . . order is paramount" in determining whether particular products are included in the scope. *King Supply Co. v. United States*, 674 F.3d 1343, 1345 (Fed. Cir. 2012); *see Walgreen Co. v. United States*, 620 F.3d 1350, 1354 (Fed. Cir. 2010). Nevertheless, antidumping and countervailing duty orders "sometimes employ general language," which "can render the . . . scope ambiguous." *See Mid Continent Nail Corp. v. United States*, 35 CIT __, __, 770 F. Supp. 2d 1372, 1378 (2011); 19 C.F.R. § 351.225(a) (2013). A scope ruling "is a highly fact-intensive and case-specific determination," *King Supply Co.*, 674 F.3d at 1345, that is "particularly within the expertise of [Commerce]." *Sandvik Steel Co. v. United States*, 164 F.3d 596, 600 (Fed. Cir. 1998). Thus, challenging a scope ruling is "a course with a high barrier to reversal." *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (quoting *Mitsubishi Heavy Indus.,* Ltd. v. United States, 275 F.3d 1056, 1060 (Fed. Cir. 2001)) (internal quotation marks omitted).

ANALYSIS

If a scope contains language "that is subject to interpretation," Commerce will resolve the ambiguity using the interpretive tools

[3] All further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the United States Code, 2006 edition, and all applicable supplements thereto.

contained in 19 C.F.R. § 351.225. *Duferco Steel, Inc. v. United States*, 296 F.3d 1087, 1096–97 (Fed. Cir. 2007). Fedmet concedes "the scope language alone is not dispositive of the treatment of [MACBs] under the [O]rders." Pl.'s Reply at 2–3; *see* Def.'s Br. at 13–14.

Under 19 C.F.R. § 351.225(k)(1), Commerce must first consider "[t]he descriptions of the merchandise contained in the petition, the initial investigation, and the determinations of [Commerce] . . . and the [ITC]." *Id.* If those "criteria are not dispositive," Commerce must then consider the factors listed in paragraph (k)(2): "(i) [t]he physical characteristics of the product; (ii) [t]he expectations of the ultimate purchasers; (iii) [t]he ultimate use of the product; (iv) [t]he channels of trade in which the product is sold; and (v) [t]he manner in which the product is advertised and displayed." *Id.* § 351.225(k)(2).

I. Commerce's 19 C.F.R. § 351.225(k)(1) Analysis

Commerce determined that "at no point in either the petition, the . . . pre-initiation stage, or the [ITC's determination] did [Resco] identify the chemical composition and technical specifications of each type of refractory brick, or expressly state that [MACBs] with a chemical composition like [Fedmet's Bastion brick] fall outside the scope." *Final Scope Ruling* at 5. In other words, Commerce found each reference to "MACBs" in the (k)(1) evidence to be ambiguous with respect to whether it actually identified low-alumina bricks like the Bastion brick. In light of this ambiguity, Commerce determined that the (k)(1) evidence was inconclusive and further analysis under the (k)(2) factors was necessary to determine to whether Fedmet's Bastion MACBs were within the scope. *Id.*; *Preliminary Scope Ruling* at 26–27.

Fedmet insists that Commerce's analysis is not supported by substantial evidence because MACBs are simply understood to be distinct from MCBs. *See* Pl.'s Br. at 13–24. Claiming that "MCBs do not contain added alumina," Fedmet argues that each reference to MACBs in the (k)(1) evidence demonstrates that MACBs like its Bastion brick were never intended to be included in the scope. *Id.* at 24. For example, Fedmet notes that Resco named "magnesite, fired bauxite, magnesia dolomite and [MACBs]" as products that "are not generally substitutable [for in-scope MCBs], in a technical sense, due to varying chemical and physical properties and wear characteristics." R.3d 3 Ex. 1 at 10. Based on this statement, Fedmet concludes that Resco "express[ly]" excluded low-alumina MACBs like Fedmet's Bastion brick from the scope. Pl.'s Br. at 13–14. Fedmet also identifies a questionnaire response where Resco stated that "[t]he scope of our petition focuses only on MCB" and that "[t]hese other products [in-

cluding MACBs] do not provide the same performance where MCB are used in steelmaking and steel handling applications." R.3d 3 Ex. 2 at 4. Fedmet argues this response "can only be read as confirmation that the scope language defining MCBs was adequate to clearly exclude [MACBs]." Pl.'s Br. at 16.

Fedmet's approach obscures two critical facts supported by the record that instill the term "MACB" with considerable ambiguity. First, advertisements and other record evidence indicate that the term "MACB" can refer to low-alumina bricks as well as high-alumina bricks. *Preliminary Scope Ruling*, at Ex. 2; R.2d 18 Ex. 1 at 3; R.4th 2 at 3–10. Second, record evidence of industry naming conventions reasonably suggests that so long as the magnesia content of a brick with added alumina remains above 70%, it can be called *either* an MCB *or* an MACB. R.2d 19 at Ex. 2 (advertisements describing the "Vesuvius"-trademarked product as an MCB even though it contains levels of added alumina comparable to the Bastion MACB product); *Preliminary Scope Ruling* at Ex. 2 (several online marketing sources describing products as MCBs even though they contain added alumina). Consequently, without further specification, "MACB" may refer to only high-alumina MACBs in some contexts, to high- and low-alumina MACBs in others, or to MCBs with added alumina in others still. R.2d 19 at Ex. 2; *Preliminary Scope Ruling* at Ex. 2. Commerce recognized this ambiguity throughout its analysis, *id.* at 19, 26–27; *Final Scope Ruling* at 5, and reasonably concluded it could not determine whether low-alumina MACBs like Fedmet's Bastion bricks were outside the scope based on the (k)(1) evidence alone. *See ArcelorMittal Stainless Belg. N.V. v. United States*, 694 F.3d 82, 88 (Fed. Cir. 2012) ("[A]ntidumping orders should not be interpreted in a vacuum devoid of any consideration of the way the language of the order is used in the relevant industry.").

Because Resco's use of the term "MACB" does not differentiate between high-alumina and low-alumina MACBs, the petition and questionnaire response language Fedmet identifies is plainly ambiguous. *See Preliminary Scope Ruling* at 26–27. MACBs "generally" are not substitutable for MCBs, but record evidence shows that low-alumina MACBs specifically are often substituted for MCBs due to their similar or even enhanced performance in MCB applications. *Id.* at Exs. 1 & 2; R.2d 19 at 8–13 & Exs. 2, 5. In a later response, Resco went on to describe how products it excluded by name from the proposed scope always fall outside of the scope's plain language, while making no similar claim elsewhere about MACBs. *See* R.3d 3 Ex. 3 at 1. As Commerce reasonably determined, without further chemical specification, these references to MACBs indicate that Resco may

have intended to exclude only *some* MACBs, namely, high-alumina MACBs that can never meet the scope's plain language. *See Preliminary Scope Ruling* at 26–27.

Fedmet's remaining arguments are similarly unpersuasive. Fedmet avers that Commerce failed "to meaningfully address the repeated, express statements by Resco that it did not intend to cover [MACBs]." Pl.'s Br. at 18. Fedmet argues further that Commerce "chose[] to accept" Resco's explicit statements excluding MACBs from the scope, and that Commerce cannot now change its position. Pl.'s Br. at 20. Fedmet also insists that Commerce and Resco never offered a "plausible alternative interpretation" of the references to MACBs in the petition and the questionnaire responses. Pl.'s Br. at 22. In fact, Resco *never* expressly stated that MACBs with in-scope quantities of magnesia and carbon should be excluded from the Orders. *See* R.3d 3 Exs. 1–3; *Preliminary Scope Ruling* at 26–27; Pl.'s Br. at 29 (quoting testimony before the ITC where counsel for Resco listed MACBs alongside other excluded bricks, but did not distinguish between high- and low-alumina MACBs). Furthermore, Fedmet's refusal to consider the difference between high- and low-alumina varieties of MACB does not eliminate the inherent linguistic ambiguity supporting multiple reasonable interpretations of the (k)(1) evidence. *See Preliminary Scope Ruling* at 19, 26–27; *Final Scope Ruling* at 5.

As every piece of (k)(1) evidence is ambiguous as to whether it is referring to MCBs with added alumina or to all bricks with more than 50% magnesia, some carbon, and some alumina, Commerce's determination that the (k)(1) factors were not dispositive was reasonable. *See Preliminary Scope Ruling* at 4–27; *Final Scope Ruling* at 3–5.

II. Commerce's 19 C.F.R. § 351.225(k)(2) Analysis

Fedmet contends that "even if the [c]ourt were to find that Commerce was lawfully permitted to consider the factors in 19 C.F.R. § 351.225(k)(2), Commerce's findings under those factors are also unsupported by substantial evidence." Pl.'s Br. at 11. Fedmet argues that Commerce made four general errors in finding that the physical characteristics of its Bastion brick are similar to those of in-scope MCBs.[4] Pl.'s Br. at 33–38.

[4] Fedmet includes two additional paragraph-long sections titled "Channels of Trade and Price and Manner of Sale and Advertising" and "Expectations of the Ultimate Purchaser and Ultimate Use of the Product." Pl.'s Br. at 37–38. In those sections, Fedmet argues that Commerce improperly based its finding that "MCBs and [MACBs] are 'interchangable'" on "certain product advertisements it pulled off the internet . . . by entities who were not parties to Commerce's scope inquiry," Pl.'s Br. at 37 (quoting *Final Scope Ruling* at 10), and "ignore[d] detailed evidence provided by Fedmet on the different specific uses of [MACBs]." Pl.'s Br. at 38. It is not the court's role to reweigh evidence before Commerce, *see Laminated*

First, Fedmet claims "Commerce's finding is contrary to the ITC's final injury determination," wherein "the [ITC] found that 'other refractory bricks, such as fired magnesite, fired bauxite, magnesia dolomite, and [MACBs] . . . do not have the same physical characteristics of MCB, are easily differentiated by price, and their uses are not perceived by the steel producers as substitutable.'" Pl.'s Br. at 33 (quoting *ITC Final Determination*, at I-8). Fedmet again fails to acknowledge the difference between high-alumina and low-alumina MACBs. Therefore, Fedmet has not demonstrated how this reference to MACBs definitively identifies *all* MACBs instead of only those high-alumina MACBs that are not interchangeable with MCBs. *See id.*

Second, Fedmet argues that Commerce "ignore[d] the extensive and detailed evidence" demonstrating that Bastion MACBs are distinct from in-scope MCBs due to their spinel-producing alumina content "in favor of a single article that Commerce found on the internet" in a publication called *Millennium Steel*. Pl.'s Br. at 33–34. Fedmet challenges "the *bona fides* of this publication" and "the credentials of the authors of this study," while simultaneously insisting that the *Millennium* study supports its own conclusion that MACBs are distinguishable from MCBs. Pl.'s Br. at 34–35.

Fedmet has not demonstrated that Commerce's reliance on the *Millennium* study was unreasonable. The court's role is not to reweigh evidence, *see Laminated Woven Sacks*, 716 F. Supp. 2d at 1328 (citing *Burlington Truck Lines*, 371 U.S. at 168), and it will not accept Fedmet's invitation to do so here, especially in the complete absence of evidence questioning the study's credibility. In any event, Commerce used the *Millennium* study to "confirm[] that MCBs with added alumina are widely used" in the same applications and have similar physical properties as in-scope MCBs. *Preliminary Scope Ruling* at 28 & Ex. 1 (internal quotation marks omitted). The study concludes that some MACBs may offer better performance than non-alumina MCBs in areas where MCBs are generally used. *Id.* Ex. 1 at 101–02. Nevertheless, according to the *Millennium* study, "[e]xcessive expansion" caused by spinel formation in high-alumina MACBs "may lead to development of stresses which causes structural spalling." *See id.* at 100–02. Consequently, the *Millennium* study is consistent with other record evidence demonstrating a physical distinction between high-alumina and low-alumina MACBs — that spinel formation in

Woven Sacks Comm. v. United States, 716 F. Supp. 2d 1316, 1328 (2010) (citing *Burlington Truck Lines Inc. v. United States*, 371 U.S. 156, 168 (1962)), and there is substantial additional evidence on the record indicating that low-alumina MACBs like Fedmet's Bastion brick are in fact interchangeable with MCBs. *See Preliminary Determination* Exs. 1 & 2; ITC Final Determination at I-9; R.2d 19 at Exs. 3 & 5.

low-alumina MACBs provides the same physical properties that set in-scope MCBs apart from other refractory bricks, whereas spinel formation in high-alumina MACBs causes those bricks to behave like other out-of-scope refractory products. *See Preliminary Scope Ruling* at 28–29.

Third, Fedmet contends that Commerce improperly "dismissed the information" contained in the *Pocket Manual* on the basis that it contains ambiguous language as to the chemical content of MACBs. Pl.'s Br. at 36. Appearing directly below a table titled "Classification of the [AMCBs] according to ISO/DIS 10081–4," the *Pocket Manual* notes: "Regarding the magnesia side of the variation range of MgO and Al_2O_3 at the moment carbon-bonded bricks with 50–90% MgO or 40–50% Al_2O_3 are used in the Asian region. bricks are designated as [MACBs]." R.2d 18 Ex. 1 at 108. The remainder of the article makes conclusions regarding the difference between AMCBs and MCBs, without further specifying the nature of MACBs. *Id.* at 108–11. Commerce argues that it "reasonably found the reference to MACBs in the *Pocket Manual* ambiguous as to the chemical composition of [MACBs] because it is unclear whether the focus of the paragraph is MACBs or [AMCBs], which contain a higher alumina content than [MACBs]," and is unclear as to whether that "standard" applies outside of Asia. Def.'s Resp. at 33.

Extending to Commerce the appropriate deference in analyzing the record before it, *King Supply Co.*, 674 F.3d at 1348, Commerce's treatment of this passage as ambiguous was reasonable. In context, the *Pocket Manual* can reasonably be considered ambiguous as to which bricks "are designated as [MACBs]," and by whom. *See* R.2d 18 Ex. 1 at 107–11. For example, the quote does not illuminate whether a brick with 91% magnesia, 8% alumina, and 1% carbon can be considered an MACB, or whether it would be called something else outside of Asia. *See id.* at 108. Furthermore, even if Commerce determined MACBs can contain "up to 50%" alumina as Fedmet insists it should have, the *Pocket Manual* would not undermine the *Final Determination*. The *Pocket Manual* simply does not identify any physical characteristics or uses that distinguish low-alumina MACBs like Fedmet's Bastion bricks from MCBs. *See id.* at 107–11. Moreover, several pieces of record evidence otherwise support Commerce's finding that there is substantial physical and functional overlap between low-alumina MACBs like Fedmet's Bastion brick and in-scope MCBs. *See Preliminary Determination* Exs. 1 & 2; *ITC Final Determination* at I-9; R.2d 19 at Exs. 3 & 5.

Lastly, Fedmet argues that Commerce improperly relied on statements in the ITCs determination indicating that carbon — not alu-

mina — is the most important additive in preventing slag penetration in bricks with greater than 70% magnesia. Pl.'s Br. at 46–47. Fedmet insists that "the significance of spinel formation is that it promotes permanent expansion of the bricks, which, in turn, reduces slag penetration of the joints between the bricks." Pl.'s Br. at 37. However, Fedmet does not cite any record evidence that contravenes the ITC's conclusion that "[t]he carbon in MCBs" *also* "prevents liquid slag from penetrating and eroding bricks." *ITC Final Determination* at I-9; *see* Pl.'s Br. at 46–47. Further, as the *Millennium* study noted, too much alumina can cause cracks that lead to excessive slag penetration, meaning that the relevance of Fedmet's claims are limited by their lack of chemical specificity. *Preliminary Scope Ruling* Ex. 1 at 100. Put simply, the record shows that the low alumina content in an MACB like Fedmet's Bastion brick promotes the same physical characteristics that set in-scope MCBs apart from other refractory products — slag resistance and low porosity. *Id.* ; *ITC Final Determination* at I-9; R.2d 19 Ex. 3 at 176.

For the foregoing reasons, and on balance with Commerce's analysis of the remaining (k)(2) factors including the manner of advertisement and ultimate use of low-alumina MACBs, Commerce's interpretation of the scope using the (k)(2) factors was reasonable. *See Preliminary Scope Ruling* at 27–29; *Final Scope Ruling* at 8–10.

III. ITC Injury Determination

According to Fedmet, "[t]he antidumping statute provides that in order to impose antidumping duties on imported merchandise, there must be affirmative determinations by both Commerce and the ITC." Pl.'s Br. at 30 (citing 19 U.S.C. § 1673). Consequently, "the failure of the ITC to have investigated or reached an affirmative determination with respect to [MACBs] is itself sufficient grounds for holding that the scope of the Orders does not cover [MACBs]." *Id.* Although there is no controlling authority explicitly supporting Fedmet's legal position, *see Eckstrom Indus., Inc. v. United States*, 254 F.3d 1068, 1075 n.3 (Fed. Cir. 2001) (declining to reach the question of whether the exclusion of a product from the ITC investigation, by itself, could establish that the product is not covered under the scope); *Wheatland Tube Co. v. United States*, 161 F.3d 1365, 1371 (Fed. Cir. 1998) (stating in dicta that scope inconsistencies between the ITC's investigation and Commerce's investigation would "frustrate the purpose of antidumping laws"), no party offers an alternative interpretation of the Act. *See* Commerce Resp. at 23–26; ANH Resp. at 26; M&R Resp. at 8–9. Commerce and defendant-intervenors argue instead that the

ITC did include an MACB in its injury determination. Commerce Resp. at 23–26; ANH Resp. at 26; M&R Resp. at 8–9.

Even assuming that Fedmet's interpretation of the law is correct, *see Wheatland Tube*, 161 F.3d at 1371, Commerce's determination was not contrary to law. Because there is substantial evidence on the record demonstrating that low-alumina MACBs are interchangeable with in-scope MCBs, the question of whether or not the ITC considered an MACB is irrelevant. *See Preliminary Determination* Exs. 1 & 2; *ITC Final Determination* at I9; R.2d 19 at Exs. 3 & 5. Even so, the record indicates that the ITC did include a low-alumina MACB in its injury determination. *See Final Scope Ruling* at 5. Specifically, as Commerce explained in the *Final Scope Ruling*, "the ITC included [Resco's] Maxline 10 AFX trademarked product, an MCB with added alumina, in its pricing analysis." *Id.* at 5; *see* Pl.'s Br. at 24 ("MCBs do not contain added alumina.").

In its Reply brief, Fedmet argues that the Maxline 10 AFX brick is not an MACB because the ITC record does not describe it as containing alumina and because Resco has not provided any evidence that the Maxline brick promotes the formation of spinel. Pl.'s Reply at 16–18. However, Fedmet fails to address record evidence indicating that any MCB with added alumina can be called an MACB. *See* R.4th 2 at 3–10 (discussing naming conventions); *Preliminary Scope Ruling* at Ex. 2; R.2d 19 at Ex. 2. In the absence of a standard technical definition for MACBs based on spinel formation that readily distinguishes Resco's Maxline brick from other low-alumina MACBs, Commerce's determination was justified and in accordance with the law. *See* R.4th 2 at 3–10; *Preliminary Scope Ruling* at Ex. 2; R.2d 19 at Ex. 2.

CONCLUSION

The record demonstrates a physical distinction between low-alumina MACBs and high-alumina MACBs, imparting an ambiguity into the phrase "MACB" in each (k)(1) source. Commerce therefore acted reasonably in moving on to the (k)(2) factors to determine whether Fedmet's Bastion brick is covered under the scope of the Orders. Although Fedmet is able to identify evidence showing that low-alumina MACBs exhibit certain characteristics as a result of spinel formation, it does not and cannot refute evidence demonstrating that these characteristics are the same as those that set in-scope MCBs apart from other refractory products, namely, slag resistance and low porosity. As there is substantial evidence in the record showing that low-alumina MACBs like Fedmet's Bastion brick meet the scope's plain language and are interchangeable with in-scope MCBs,

Fedmet's motion for judgment on the agency record must be denied. Judgment will be entered accordingly.

Dated: May 30, 2013
New York, New York

/*s*/*NICHOLAS TSOUCALAS*
NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip Op. 13–69

SINCE HARDWARE (GUANGZHOU) CO., LTD., Plaintiff, v. UNITED STATES, Defendant.

Before: Leo M. Gordon, Judge
Consol. Court No. 11–00106

[Final results of administrative review sustained in part and remanded in part.]

Dated: May 30, 2013

William E. Perry and *Emily Lawson*, Dorsey & Whitney LLP of Seattle, Washington for Plaintiff Since Hardware (Guangzhou) Co., Ltd.

Gregory S. Menegaz, *J. Kevin Horgan*, and *John J. Kenkel*, DeKieffer & Horgan of Washington, DC for Plaintiff-Intervenor Foshan Shunde.

Carrie A. Dunsmore, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice for Defendant United States. With her on the brief were *Stuart F. Delery*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director. Of counsel on the brief was *Thomas M. Beline*, Office of the Chief Counsel for Import Administration of Washington, DC.

Frederick L. Ikenson, *Peggy A. Clarke*, and *Larry Hampel*, Blank Rome LLP of Washington, DC for Defendant-Intervenor Home Products International, Inc.

OPINION AND ORDER

Gordon, Judge:

This consolidated action involves the U.S. Department of Commerce's ("Commerce") fifth administrative review of the antidumping duty order covering Floor-Standing, Metal-Top Ironing Tables from China. *See Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 76 Fed. Reg. 15,297 (Dep't of Commerce Mar. 21, 2011) (final results admin. review), *as amended by* 76 Fed. Reg. 23,543 (Dep't of Commerce Apr. 27, 2011) (amended final results admin. review) (collectively, "*Final Results*"); *see also* Issues and Decision Memorandum for Ironing Tables from China, A-570–888 (March 22, 2011), available at http://ia.ita.doc.gov/frn/summary/PRC/2011–6558–1.pdf (last visited this date) ("*Decision Memorandum*"). Before the court are the Final Results of Redetermi-

nation, ECF No. 85 ("*Remand Results*") filed by Commerce pursuant to *Since Hardware (Guangzhou) Co. v. United States*, Consol. Court No. 11–106, ECF No. 81 (Aug. 14, 2012) ("*Since Hardware*") (order remanding to Commerce). The court has jurisdiction pursuant to Section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006),[1] and 28 U.S.C. § 1581(c) (2006).

Plaintiffs Since Hardware (Guangzhou) Co., Ltd. ("Since Hardware") and Foshan Shunde Yongjian Housewares & Hardwares Co., Ltd. ("Foshan Shunde") both challenge Commerce's financial statement selection; Foshan Shunde challenges Commerce's brokerage and handling surrogate valuation; and Since Hardware challenges Commerce's cotton fabric surrogate valuation and labor wage rate surrogate valuation.[2] *See* Since Hardware Comments to Remand Results, ECF No. 90 ("SH Remand Br."); Foshan Shunde Comments to Remand Results, ECF No. 89 ("FS Remand Br."). The court sustains Commerce's labor wage rate valuation and cotton fabric valuation, but remands the issues of financial statements, and brokerage and handling to Commerce for further consideration.

I. Standard of Review

When reviewing Commerce's antidumping determinations under 19 U.S.C. § 1516a(a)(2)(B)(iii) and 28 U.S.C. § 1581(c), the U.S. Court of International Trade sustains Commerce's "determinations, findings, or conclusions" unless they are "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). More specifically, when reviewing agency determinations, findings, or conclusions for substantial evidence, the court assesses whether the agency action is reasonable given the record as a whole. *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1350–51 (Fed. Cir. 2006). Substantial evidence has been described as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938). Substantial evidence has also been described as "something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by

[1] Further citations to the Tariff Act of 1930, as amended, are to the relevant provisions of Title 19 of the U.S. Code, 2006 edition.

[2] Since Hardware also attempted to challenge Commerce's brokerage and handling ("B&H") valuation, but the court had to deem the issue waived for failure to adequately brief the argument. *Since Hardware* at 7; *see also Home Prods. Int'l, Inc. v. United States*, No. 11–00104 (Jan. 3, 2012), ECF No. 62 (order waiving challenge to B&H calculation), as amended, ECF No. 63; *Home Prods Int'l, Inc. v. United States*, 36 CIT ___, ___, 837 F. Supp. 2d 1294, 1300–1302 (2012); *opinion after remand*, *Home Prods. Int'l, Inc. v. United States*, 36 CIT ___, 853 F. Supp. 2d 1257 (2012).

substantial evidence." *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).Fundamentally, though, "substantial evidence" is best understood as a word formula connoting reasonableness review. 3 Charles H. Koch, Jr., Administrative Law and Practice § 9.24[1] (3d. ed. 2013). Therefore, when addressing a substantial evidence issue raised by a party, the court analyzes whether the challenged agency action "was reasonable given the circumstances presented by the whole record." Edward D. Re, Bernard J. Babb, and Susan M. Koplin, 8 *West's Fed. Forms, National Courts* § 13342 (2d ed. 2013).

Separately, the two-step framework provided in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842–45 (1984), governs judicial review of Commerce's interpretation of the antidumping statute. *See United States v. Eurodif S.A.*, 555 U.S. 305, 316 (2009) (Commerce's "interpretation governs in the absence of unambiguous statutory language to the contrary or unreasonable resolution of language that is ambiguous.").

II. Discussion

A. Financial Statement Selection

Commerce's selection of financial statements to calculate the financial ratios for respondents' margins is an oft-litigated issue in nonmarket economy antidumping cases. Commerce is guided by a general regulatory preference for publicly available, non-proprietary information. 19 C.F.R. § 351.408(c)(1), (4) (2009). Beyond that, Commerce generally considers the quality, specificity, and contemporaneity of the available financial statements. *See Fresh Garlic from the People's Republic of China*, 67 Fed. Reg. 72,139 (Dep't of Commerce Dec. 4, 2002) (final results new shipper review).

During the administrative review, Commerce had a choice from among four Indian financial statements: '06-'07 Infiniti Modules Private Ltd. ("Infiniti Modules"); '08 '09 Omax Autos Ltd. ("Omax"); and '07-'08 and '08-'09 Maximaa Systems Ltd. ("Maximaa"). In the *Final Results* Commerce chose the '06-'07 Infiniti Modules' financial statements alone as the best available information from which to calculate the financial ratios. Foshan Shunde and Since Hardware challenged this decision, arguing that the statements were not publicly available and that Omax's and Maximaa's financial statements represented the best available information to calculate the financial ratios. Since Hardware Mot. for J. upon the Agency R., ECF No. 43 (SH 56.2 Br."); Foshan Shunde Mot. for J. upon the Agency R., ECF No. 44 (FS 56.2 Br."). In its initial consideration of the issue, the court agreed that Commerce's choice may not have been reasonable and remanded for Commerce to "reconsider[] the issue of the public availability of the

Infiniti Modules financial statement, . . . [and to] review and reconsider whether the more contemporaneous statements of Omax or Maximaa might be useful additional data points, either in place of, or in addition to, Infiniti Modules." *Since Hardware* at 6. On remand Commerce again solely selected the '06-'07 Infiniti Modules' financial statements and found them to be publicly available. *See Remand Results* at 7,15.

1. Public Availability

When first reviewing the issue of the public availability of the '06-'07 Infiniti Modules' financial statements, the court could not sustain Commerce's determination as reasonable. *Since Hardware* at 6. Although Commerce found that the statements were available through the Indian Ministry of Corporate Affairs' ("MCA") website, *Decision Memorandum* at 10, there was more than a "fair amount of record information demonstrating that the Infiniti Modules financial statements may not have been publicly available[,]" as evidenced by Since Hardware and Foshan Shunde's unsuccessful attempts to obtain the financial statements or other Infiniti Modules' financial information. *Since Hardware* at 4.

On remand Commerce acknowledges that it erred in the *Final Results* when it concluded that the Infiniti Modules' financial statements were available through the MCA website; they are not. *Remand Results* at 7. Commerce nevertheless clarifies that it still believes they are publicly available. *Id.* at 29. In the *Remand Results* Commerce reasons that the Infiniti Modules' financial statements are publicly available because they were used in a prior administrative review and available on the public administrative record of that review are publicly available. *Id.* at 29. Commerce explains that Commerce and all interested parties have significant experience with Infiniti Modules as a surrogate company. *Id.* at 5–6. In each of the four prior administrative reviews, Commerce calculated financial ratios using a single year of Infiniti Modules' financial statements. *See Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 72 Fed. Reg. 13,239 (Dep't of Commerce Mar. 21, 2007) (final results 1st admin. review) (selected Infiniti Modules' '04-'05 statement); *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 73 Fed. Reg. 14,437 (Dep't of Commerce Mar. 18, 2008) (final results 2nd admin. review) (selected Infiniti Modules' '04-'05 statement); *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 74 Fed. Reg. 11,085 (Dep't of Commerce Mar. 16, 2009) (final results 3rd admin. review)

(selected Infiniti Modules' '06-'07 statement); *Floor-Standing, Metal-Top Ironing Tables and Certain Parts Thereof from the People's Republic of China*, 75 Fed. Reg. 55,759 (Sept. 14, 2010) (prelim. results 4th admin. review) (selected Infiniti Modules' '05-'06 statement). In prior administrative reviews both Since Hardware and Foshan Shunde accepted Infiniti Modules' financial statements as publicly available and argued about the specific substantive application of the financial statements:

> Specifically, Infiniti Modules' 2006–2007 financial statements were obtained by Petitioner and placed on the record of the third administrative review along with the 2005–2006 financial statements of Infiniti Modules. [Commerce] used the 2006–2007 financial statements of Infiniti Modules in the calculations set forth in the final results of the third administrative review. More importantly, Since Hardware acknowledged the existence of and was given the opportunity to comment on both Infiniti Modules' 20052006 and Infiniti Modules' 2006–2007 financial statements in that review. Specifically, during that review, Since Hardware asserted that regardless of whether [Commerce] selected the 2005–2006 financial statements of Infiniti Modules or the 2006–2007 financial statements of Infiniti Modules, [Commerce] should make certain adjustments to the financial ratios derived from those financial statements. Similarly, Foshan Shunde engaged in argument over certain aspects of using Infiniti's financial statements in the fourth administrative review, though it did not dispute that the information was publicly available.

Remand Results at 5–6 (citations omitted). Noting that its regulatory preference for publicly available information addresses "the concern that a lack of transparency about the source of the data could lead to proposed data sources that lack integrity or reliability," Commerce found that nothing had "transpired to undermine the integrity or reliability" of the '06-'07 Infiniti Modules' financial statements. *Id.* at 6.

This though is not really a determination of "public availability" made against measurable objective criteria. It is instead a determination that the Infiniti Modules' data remains among the best available information because of its reliability (notwithstanding that it may not be publicly available). The court understands Commerce's desire to use information with which it is familiar from a surrogate company that it knows well. It makes good, practical, efficient sense. The '06-'07 Infiniti Modules' financial statements were apparently obtained directly from the company by petitioner, Home Products

International, Inc. ("HPI"), in the third administrative review. The public availability of that document was not challenged. Financial statements from Infiniti Modules were also used in the fourth administrative review, and again the public availability of that data was not challenged. In both instances respondents accepted the data and made substantive arguments about its proper use. Commerce and the interested parties have invested significant time and energy over the course of the prior reviews vetting and refining the Infiniti Modules' financial statements for use in the financial ratio calculations. The court fully understands Commerce's reluctance to abandon otherwise reliable data on a technicality that it has become publicly unavailable (or perhaps never was when measured against objective criteria).

The court, though, cannot sustain Commerce's determination that these financial statements are publicly available. In the *Remand Results* Commerce cites to *Catfish Farmers of Am. v. United States*, 33 CIT ___, ___, 641 F. Supp. 2d 1362, 1377 (2009), as an example of "the standard for public availability established in our practice." *Remand Results* at 29. One searches *Catfish Farmers* in vain for an explanation of the "standard for public availability established in [Commerce's] practice." *Remand Results* at 29. That explanation does not appear in *Catfish Farmers* because it did not involve Commerce's administrative practice for determining public availability. Instead, *Catfish Farmers* involved a challenge to Commerce's use of a proprietary auditors' report to supplement a publicly available financial statement. *Catfish Farmers*, 33 CIT at ___, 641 F. Supp. 2d at 1377. Unlike here, Commerce did not determine that the proprietary auditors' report was publicly available. Commerce, instead reasoned that because everyone had fair and open access to it during the proceeding, it was appropriate to supplement an otherwise publicly available financial statement as among the best available information. *Id.* The court, in turn, sustained as reasonable Commerce's use of the non-public, confidential, auditors' report to supplement a publicly available financial statement. *Id.*

Further, *Catfish Farmers* does not identify or explain Commerce's standards or criteria for public availability. Instead, it more modestly demonstrates that Commerce's regulatory preference for public availability is not absolute, offering an instance in which Commerce's use of proprietary surrogate information was reasonable. *Catfish Farmers* does not provide support for Commerce's conclusion that the Infiniti Modules' financial statements are publicly available. *Catfish Farmers* would instead appear to lend support for the conclusion that although the '06-'07 financial statements are no longer publicly available, they may still merit consideration as among the best available

information to calculate surrogate financial ratios because all parties had full and fair access to otherwise reliable data.

As for the missing public availability criteria necessary to evaluate Commerce's decision here, Foshan Shunde directs the court to another administrative proceeding, contemporaneous with the *Remand Results*, where Commerce applied what appears to be fairly rigorous standards for public availability. *See Yantai Xinke Steel Structure Co. v. United States*, Court No. 10–00240, Final Results of Redetermination Pursuant to Court Remand, ECF No. 83 at 18–23 ("*Steel Grating Remand Results*"); *see* also *Certain Steel Grating from the People's Republic of China*, 75 Fed. Reg. 32,366 (Dep't of Commerce June 8, 2010) (final LTFV determ.). In that proceeding Commerce

> sought clarification by issuing a supplemental questionnaire . . . . In this supplemental questionnaire, the Department requested that Petitioners provide a detailed step-by-step explanation of how they obtained Greatweld's 2008–09 financial statements, and that the steps provided should be of sufficient detail so that any party would be able to replicate these steps to acquire Greatweld's 2008–09 financial statements. If such a step-by-step explanation could not be provided, the Department requested that Petitioners provide a detailed explanation of why they could not provide such information. In addition, the Department also asked Petitioners to provide a detailed explanation as to the reason they believed Greatweld's 2008–09 financial statements were properly described as publicly available and, in providing their response, to indicate if Greatweld was required under Indian law to publicly file its 2008–09 financial statements with any governmental authority.

Steel Grating Remand Results at 19–20. Petitioners there provided the step-by-step process of obtaining the "1) annual return; 2) balance sheet; 3) schedules; 4) auditor's report; 5) director's report; and 6) notice," but did not provide the step-by-step process of receiving the income statements. Commerce determined Greatweld's financial statements were not publicly available "[b]ecause the other interested parties to the proceeding, as well as the Department itself, do not know the steps necessary to acquire Greatweld's 2008–09 income statement, and, therefore, could not acquire that data themselves . . . ." *Id.* at 22.

In contrast, Commerce here was satisfied that Infiniti Modules' statements were publicly available because "Petitioner was able to get them directly from the company simply by requesting them,"

Remand Results at 7, even though respondents were apparently unsuccessful with similar requests. Under the standards Commerce enunciated in the *Steel Grating Remand Results*, respondents' inability to obtain the data from the same source and in the same manner does seem to establish that Infiniti Modules' statements are now publicly unavailable. In the *Remand Results* Commerce casts a skeptical eye on respondents' efforts to obtain the data from Infiniti Modules, noting that respondents never specifically requested the '06-'07 data. *Id.* at 6–7. The court was somewhat surprised by this interpretation of the record. Although it may be technically correct, the court was under the impression that the record made clear that respondents had made a good faith effort to obtain general financial information from Infiniti Modules (including more contemporaneous financial statements), but were completely rebuffed, which then instigated their arguments about public availability.

The court will remand the issue of public availability for Commerce to reconcile its approach here with the *Steel Grating Remand Results*, as well as to reconsider its determination in light of the court's explanation of *Catfish Farmers*. Commerce's determination that Infiniti Modules financial statements are publicly available remains unreasonable (unsupported by substantial evidence), and therefore cannot be sustained.

2. Other Financial Statements

In *Since Hardware* the court also remanded for Commerce to "review and reconsider whether the more contemporaneous statements of Omax or Maximaa might be useful additional points, either in place of, or in addition to, Infinit[i] Modules" and to "explain its choices in this administrative review against the choices made in *Folding Metal Tables and Chairs* . . . ." *Since Hardware* at 6. On remand Commerce again selected the '06-'07 Infiniti Modules' financial statements. Since Hardware and Foshan Shunde argue that Commerce's selection was unreasonable and that it should have selected Omax or Maximaa. As previously discussed, Infiniti Modules' data has certain advantages. It has been used in every review under the order, and Commerce and the parties know it well. The '06-'07 Infiniti Modules' financial statements, however, are less contemporaneous than the other choices, and have this nagging problem with public availability. The court, for its part, remains unconvinced that Commerce's sole selection of the '06-'07 Infiniti Modules' financial statements alone is a reasonable choice on this administrative record.

a. Maximaa

Compared to the '06-'07 Infiniti Modules financial statements, the '07-'08 Maximaa financial statements are more contemporaneous, and the '08-'09 Maximaa financial statements cover the exact period of review. Unlike Infiniti Modules' financial statements, Maximaa's public availability is not in dispute. Commerce, nevertheless, continues to reject Maximaa's financial statements for the following reasons:

> We . . . dispute Foshan Shunde's assertion that Maximaa's financial statements represent the best available information. Foshan Shunde argues that the Department's selection of Maximaa's financial statements in *Folding Metal Tables and Chairs* undercuts the rejection of Maximaa's 2007–2008 financial statements in the instant proceeding. However, in the proceeding at issue in this remand, **the Department declined to use the 2008 and 2009 financial statements of Maximaa based on record evidence that was submitted by interested parties on the record of this case, not the record of the case Foshan cites**. The record evidence in this proceeding is separate and distinct from the information that comprised the record in *Folding Metal Tables and Chairs* and relates to a different product. Necessarily, our comments about the nature of financial statements in that case were made in the context of comparing them to folding metal tables and chairs, not ironing tables. In *Folding Metal Tables and Chairs*, we based our selection of Maximaa on the fact that, **based on the evidence in that proceeding, "a greater proportion of Maximaa's production appears to consist of comparable merchandise (i.e., metal furniture)," and "because it has a similar production process to that of the respondent." The record in this case does not support the same conclusions. Rather, Maximaa's business activities and production processes do not resemble that of respondent in this case and with respect to this product.** . . .[T]he Department's review of the information submitted by Petitioner concerning Maximaa's financial statements indicated that **Maximaa had increasingly become an assembler rather than a manufacturer of the merchandise. Thus, notwithstanding the conclusion reached in *Folding Tables and Chairs* that Maximaa was an integrated producer of steel furniture**, we continue to maintain that facts on the record in this case demonstrate that the use of Maximaa's financial statements inappropriate in this proceeding.

Remand Results at 12–13 (citations omitted) (emphasis added).

Commerce fails to reasonably distinguish its financial statement selection here from its financial statement selection in *Folding Metal Tables and Chairs from the People's Republic of China*, 74 Fed. Reg. 68,568 (Dep't of Commerce Dec. 28, 2009) (final results admin. review) ("*Folding Metal Tables and Chairs*"); *see also* Issues and Decision Memorandum for Folding Metal Tables and Chairs from China, A-570–868 (Dec. 18, 2009), *available at* http://ia.ita.doc.gov/frn/summary/prc/E9–30695–1.pdf (last visited this date) ("*FMTC Decision Memorandum*"). *Folding Metal Tables and Chairs* involved merchandise similar to metal ironing boards and a choice among similar financial statements, Maximaa's '07-'08 and Infiniti Modules' '06-'07. In that review, Commerce selected the Maximaa financial statement because it found that Maximaa produced a greater proportion of comparable merchandise--metal furniture--than Infiniti Modules, and because Maximaa was an integrated producer while Infiniti was an assembler. *FMTC Decision Memorandum* at 4–5.

Commerce distinguished *Folding Metal Tables and Chairs* by explaining that, in this review, Maximaa had "increasingly become an assembler." *Remand Results* at 13. Commerce rejected Maximaa's financial statement because of this critical finding. *Id*. However, Infiniti Modules was "evermore a 100% assembler." FS Remand Br. at 10. Therefore, the court does not understand the basis for rejecting Maximaa's financial statements because it was becoming an assembler, while accepting the financial statements of Infiniti Modules, who was an assembler. The simple fact is that both were assemblers. Commerce's distinction appears to be one without a difference, and is accordingly unreasonable.

Turning to Commerce's remaining criteria for selecting the best available information, Maximaa remains more contemporaneous, has more comparable metal merchandise, and its public availability is not in dispute. On this administrative record, it is difficult to imagine a reasonable mind concluding that Maximaa's financial statement is not at least as useful, if not better, than the Infiniti Modules data. Further, Commerce has a "preference . . . to use more than one financial statement where more than one representative financial statement is available." *Remand Results* at 14. The court, therefore, remands this issue to Commerce to reconsider its financial statement selection.

b. Omax

Since Hardware and Foshan Shunde argue that Commerce also unreasonably excluded the '08-'09 Omax financial statements. In

selecting financial statements, Commerce is driven by a statutory preference for selecting financial statements from producers of comparable merchandise. 19 U.S.C. § 1677b(c)(4)(B); *see also* 19 C.F.R. § 351.408(c)(4) ("For manufacturing overhead, general expenses, and profit, the Secretary normally will use non-proprietary information gathered from producers of identical or comparable merchandise in the surrogate country."). In the final results Commerce declined to use Omax's financial statements because it determined that Omax was primarily an auto producer and therefore not an appropriate surrogate. *Final Results*; *see Decision Memorandum* at 10–11. Respondents challenged Commerce's findings and argued that they had supplied evidence of Omax's production of home furnishings. The court, therefore, directed Commerce to address the evidence of Omax as a manufacturer and supplier of ironing tables. *Since Hardware* at 6.

On remand, Commerce determined that Omax was not a producer of ironing tables:

> [T]here is no record evidence that suggests Omax sold ironing tables to either Ikea or Polder during either the POR or the period covered by Omax's 2008–2009 annual report. We thus conclude that while Omax may have been in a position to supply ironing tables to Polder subsequent to the end of the POR, there is insufficient evidence to conclude that Omax was a producer of ironing tables during the POR.

Remand Results at 12. This finding is unreasonable on an administrative record in which the Omax '08-'09 financial statements actually contain a picture of an ironing table. *Id.* at 31. Although Commerce tries to explain the picture away, *id.* at 31, the court is not persuaded that a company not producing ironing tables would include a picture of an ironing table in its financial statements as a representative product. Additionally, Polder, Inc., a company that imported ironing tables from Omax, stated in a letter that Omax "has supplied global behemoth Ikea with ironing tables and other steel housewares for the *last two years*." Since Hardware SV Submission, PD 98, App. 1 at 1–2 (emphasis added).[3] Because Polder's letter was dated, October 15, 2010, the "last two years" references October 2008 through October 2010. *Id.* This period overlaps this 2008–2009 administrative review. Therefore, Commerce unreasonably concluded that "there is no record evidence that suggests Omax sold ironing tables to either Ikea or Polder during the POR or the period covered by Omax's 2008–2009 annual report." *Remand Results* at 12.

[3] "PD" refers to a document in the public administrative record.

This error though is ultimately harmless because Commerce's overall decision to exclude the Omax financial statements remains reasonable. The administrative record supports Commerce's determination that Omax is not a suitable surrogate because it is primarily an auto producer:

> . . . [T]he record in this case establishes that during the period of review (POR), Omax's principle business comprised automotive products. Ironing tables constituted, at most, a very small portion of Omax's business during Omax's 2008–2009 financial reporting period.
>
> As a fundamental matter, Omax's 2008–2009 annual report establishes that during the 2008–2009 fiscal reporting period, Omax was principally a manufacturer of automobile parts. First, we note that Omax's official name is "**Omax Autos Limited**." More importantly, we note that at page 13 of its financial statements, Omax lists 29 of its customers. **Of those 29 customers, only one customer** (Ikea) seems to be involved in the business that Omax describes as "home furnishings." The rest of the customers listed by Omax in that section of the report appear to be involved in the automotive business based upon a simple examination of the company names. The importance of the automotive business to Omax is further highlighted in the account from Jatender Mehta, the Managing Director of Omax, which can be found in Omax's 2008–2009 annual report . . . . In that account, Mr. Mehta discusses Omax's financial performance during the fiscal year. In discussing the challenges that Omax faced during the 2008–2009 fiscal reporting period, Mr. Mehta cites to a decline from "**World Giants like GM, Chrysler and Ford." Mr. Mahta** [sic] **also notes a downturn that was experienced by Toyota.** While Mr. Mehta indicates elsewhere in this account that Omax intends to expand the company's "product profile to Home Furnishings, Commercial Vehicles and the Indian Railway," Mr. Mehta merely indicates that "[I]nvestments for creating manufacturing facilities have been earmarked." However, Omax's "foray" into the home furnishings business, is primarily described as a business segment from which Omax expects to derive future, rather than current, business. Mr. Mehta discusses no specific sales volume for "home furnishings" during the POR. Additionally, Mr. Mehta indicates that;
>
> > . . . the company has made a foray into the Home Furnishings segment. The strategy has been to tie up with the biggest international brand—Ikea. This would include the desired level of quality, delivery and cost awareness within the Company. The company has started exports of various

> items under the division. We are putting up a new 10 Acre plant facility at Bawai Haryana. This plant will be operational in the 3rd quarter of FY 09–10.
>
> From our review of the customers identified by Omax, in its 20082009 Annual Report, and the account of Omax's business that is set forth by Mr. Mehta, we continue to conclude that **Omax's primary business during the period captured by its 2008–2009 financial statements was the production of automotive products.**
>
> ***
>
> Because automotive products are less similar to ironing tables than is furniture, we conclude that data from Infiniti Modules represents a higher quality of data within the meaning of section 773(c)(l) of the Act.

Id. at 10–12 (emphasis added). Commerce, therefore, determined Omax was primarily an auto producer based on its name, customers, and the statements of its Managing Director.

The name of the company, Omax Autos Limited, pretty much says it all. It communicates that the company is primarily involved in the automotive business. Similarly, all but one of Omax's 29 customers is in the automotive business. Admittedly, that one customer in the home furnishings business is the "global behemoth" Ikea. Since Hardware SV Submission, PD 98 at App. 1. And although that does count for something, a reasonable mind could conclude on this administrative record that Omax concentrates the bulk of its operations on the automotive sector and is therefore not a suitable surrogate for the general financial ratio calculations of a metal ironing board manufacturer. Accordingly, the court must sustain Commerce's decision to exclude the Omax financial statements.

B. Brokerage and Handling

In the final results Commerce determined the World Bank's *Doing Business 2010: India* is "the best available source for valuing Foshan Shunde's brokerage and handling expenses." *Final Results* ; *see Decision Memorandum* at cmt. 3. Commerce used the World Bank data to calculate Foshan Shunde and Since Hardware's brokerage and handling ("B&H") expenses based on their respective container sizes. *Id.* Foshan Shunde challenged Commerce's reliance on the World Bank data and the specific B&H calculations. Commerce requested a voluntary remand to correct Foshan Shunde's container weight and to address Foshan Shunde's requested letter of credit deduction. The court granted Commerce's voluntary request for remand and further remanded the issue for Commerce to (1) prepare a clear and complete

public summary of its calculations of Foshan Shunde's B&H expense; (2) explain why its chosen surrogate data source and calculation is reasonably the best choice by comparing the advantages and disadvantages of each; and (3) respond to Foshan Shunde's arguments with respect to Commerce adjusting Foshan Shunde's actual shipped weight and actual shipping mode. *Since Hardware* at 8–9.

On remand Commerce affirmed its selection of the World Bank data and its B&H calculation. *Remand Results* at 15–22, Attach. 1. Commerce also detailed the mechanics of its calculation for public summary:

> This details [Commerce's] calculation of brokerage and handling expense. In *Doing Business India*, total brokerage and handling expenses are listed as follows: [*See Doing Business in India - Doing Business - The World Bank Group* (*Doing Business India—2010*) at 37 and 84; *see also* HPI November 15, 2010 Case Brief at 17–18.]

1) Document Preparation:	$350
2) Customs Clearance and technical control	$120
3) Ports and Terminal Handling	$175
Total charges	$645

> Moreover, as noted in the *Doing Business India—2010* study, the container size assumed in the study is for a 20 foot full container load. However, both Since Hardware and Foshan Shunde shipped in 40 foot containers. Therefore, using the formulae set forth, we estimated the shipment weight that would be incurred in a 20 foot container as follows: [This calculation is also explained at HPI November 15, 2010 Case Brief at 17–18.]
>
> D= (A*B)/C
>
> E= $645/D
>
> A represents the cubic capacity of a 20 foot container which is 33 cubic meters
>
> B represents the weight of product shipped in 40 foot containers which is { } kg of product
>
> C represents the cubic capacity of a 40 foot container (the size in which both respondents shipped merchandise) which is 67.3.
>
> D represents the estimated weight of product shipped in 20 foot containers

E represents the calculated, per kilogram amount for brokerage and handling.

In this case D yields an estimated weight of { } kilograms for product shipped in a 20 foot container

D= 33*{ }/67.3= { }.

Therefore, to derive the { } per unit brokerage and handling amount utilized in the Final Results, we divided the total brokerage and handling amount of $645 by the { } estimated weight of product shipped in 20 foot containers.

E=$645/{ }={ }

Public Summary of Calculation

This calculation can also be illustrated publicly through the use of hypothetical numbers. In this hypothetical example, we continue to allocate the total pool of brokerage and handling expenses ($645) from *the Doing Business India—2010* study. We assume that this respondent shipped in a 40 foot container. We, thus adjust the calculated shipment weight for this hypothetical respondent to adjust for shipments in a 20 foot container instead of in a 40 foot container. We also continue to assume the same cubic capacity for both the 20 foot and 40 foot containers that we utilized in the Final Results of this review.

In our hypothetical example, we assume that the respondent shipped 5000 kg of product in a 40 foot container. In such an instance

A (the cubic capacity of a 20 foot container) would continue to equal 33 cubic meters.

B (the weight of product shipped in 40 foot container) would equal 5000 kilograms.

C (the cubic capacity of a 40 foot container) would continue to equal 67.3 cubic meters.

D represents the estimated weight of product shipped in 20 foot container which would be

D= 33*5000/67.3= 2,451.71

E represents the calculated, per kilogram amount for brokerage and handling which would equal $0.2631 or

E= $645/2451.71=.2631

Remand Results at Attach. 1. Commerce further explained:

> [W]e have determined that brokerage and handling expenses were properly calculated in the *Final Results* for the following reasons. The Department's practice when selecting the best available information for valuing FOPs, in accordance with section 773(c)(1) of the Act, is to select surrogate values which are product-specific, representative of a broad-market average, publicly available, contemporaneous with the POR, and free of taxes and duties. The *Doing Business 2010: India* data from the World Bank reflect the experience of a broad number of companies, are publicly available, specific to the costs in question, represent a broad market average, and are contemporaneous to the POR.
>
> ***
>
> [T]he Department has utilized such World Bank data in a number of cases including *Wooden Bedroom Furniture from the People's Republic of China*, *Stainless Steel Sinks from China*, and *Wooden Bedroom Furniture from the People's Republic of China*, consistently finding the World Bank data to be a reliable and accurate source of surrogate value information. World Bank data represent a reputable source of information for valuing brokerage and handling because those data are prepared by an independent organization and are based upon a survey derived from a broad number of producers. In contrast, the import data offered by Foshan Shunde were limited to two freight forwarders (Samsora[sic] and Hapang[sic] Lloyd). While Foshan Shunde has argued that the import data of Samsora and Hapang[sic] Lloyd also relate somehow to exports, **the facts on the record of this proceeding do not substantiate the quantification of any such export experience**. As previously noted, the business of exporting is fundamentally different than the business of importing and the data from these activities cannot be considered interchangeable.
>
> Further, the data provided by Foshan Shunde to link brokerage and handling expenses to Foshan Shunde's specific business situation fail to substantiate its claims with regard to the expenses associated with the preparation of letters of credit. As Petitioner has demonstrated, the World Bank data upon which the Department relied constituted $350 and are comprised of eight items: 1) bill of lading, 2) certificate of origin, 3) commercial invoice, 4) custom's export declaration, 5) inspection report, 6) packing list, 7) technical standard/health certificate, and 8) terminal handling receipts. Nowhere in this schedule of eight items are letter of credit expenses mentioned. More to the point,

. . .**Foshan Shunde has claimed a constructed letter of credit cost of $390 which exceeds the total amount of brokerage and handling expenses calculated by the World Bank. Applying the $390 letter of credit expense, to the $350 of charges set forth in the Doing Business report would thus result in the nonsensical calculation of a negative expense amount for Foshan Shunde's brokerage and handling expenses.** . . . .

Foshan Shunde's fails to substantiate its assertions that as a "rational producer" it would never incur expenses as high as those enumerated in the *Doing Business* report or that distance from seaport is a determining factor in brokerage and handling expenses. As Petitioner has noted, **because "inland transportation and handling" are calculated elsewhere in NV calculations, distance from a seaport is an irrelevant factor for purposes of calculating brokerage and handling expenses. These expenses are by definition incurred at the port of export.**

***

. . . **While Foshan Shunde asserts that exporters close to a seaport incur lower brokerage and handling costs than do inland manufacturers, there is no evidence on the record that permits the Department to quantify that suggested difference.** Similarly, there is no information on the record of this proceeding that would permit the Department to tailor any publicly-available surrogate value data to the specific business situation experienced by Foshan Shunde or to remove elements of brokerage and handling expense which Foshan Shunde claims not to have incurred. . . . Foshan Shunde's claim that it does not incur letter of credit expenses invites an inquiry that is beyond the scope of the issue here. The relevant question is whether the World Bank data are a reliable source for general brokerage and handling expenses, not whether the World Bank report reflects Foshan Shunde's line-by-line experience. . . . **Without knowing the exact breakdown of the data included in the World Bank report, the Department can no more deduct a letter of credit expense than add extra expenses which Foshan Shunde incurred but are not reflected by the World Bank data.** In other words, the averaged data in the World Bank report is a reasonable surrogate value because a line-by-line analysis is simply not possible. . . . .

Foshan Shunde has also challenged the Department's adjustment from the 40 foot container size in which it shipped to the 20 foot container sizes that are reflected in the *Doing Business 2010: India* data. This issue was also reviewed by the Court in

> *Dongguan Sunrise*. . . . In sustaining the Department's conversion from a 40 foot to a 20 foot container size, the Court rejected Fairmont's argument indicating:
>
> > This argument fails because Fairmont has not presented evidence that brokerage costs are based on value, not volume, and do not increase proportionately with the number of cubic feet.
>
> The methodology employed in this review is consistent with that employed in *Dongguan Sunrise*. Foshan Shunde has failed to demonstrate which, if any, of the costs included within the *Doing Business 2010: India* data do not increase proportionately with volume. Accordingly, . . . we continue to maintain that our adjustment for container size is supported by record evidence in this proceeding.

Remand Results at 17–21, 38–40 (citations omitted) (emphasis added).

Foshan Shunde first argues that Commerce's B&H calculations are unreasonable because Commerce should not have relied on the World Bank data but should have instead used the data from Indian freight forwarders: Samsara and Hapag-Lloyd. FS Remand Br. at 11–20. Foshan Shunde challenges the World Bank data as not reflecting the experience of any Indian producers at all, but being based on a survey completed by "[l]ocal freight forwarders, shipping lines, customs brokers, port officials, and banks." *Id.* at 13 (citing Foshan Shunde SV Submission for Final Results, PD 96 at Ex. 6). Foshan Shunde adds that Commerce is generally reluctant to use the results of a survey as source documentation when "none of the actual responses or data collected from these questionnaires were provided in the report" and that therefore, Commerce "had no way to evaluate whether the information collected in the questionnaire responses was complete or properly analyzed, much less whether the responses can be considered representative . . . ." *Id.* at 13 (quoting *Fresh Garlic from China*, 77 Fed. Reg. 34,346 (Dep't of Commerce June 11, 2012) (final results admin. review)). The court disagrees.

Commerce explained that its practice when selecting the best available information for valuing factors of production, in accordance with 19 U.S.C. § 1677b(c)(1), is to "select surrogate values which are product-specific, representative of a broad-market average, publicly available, contemporaneous . . . and free of taxes and duties." *Remand Results* at 17–18 (citing *Certain Polyester Staple Fiber from the People's Republic of China*, 75 Fed. Reg. 1336 (Dep't of Commerce Jan. 11, 2010) (final results admin. review). Accordingly, Commerce calculated

Foshan Shunde's B&H costs using the World Bank's *Doing Business 2010: India* which "reflect[s] the experience of a broad number of companies, [is] publicly available, specific to the costs in question, represent a broad market average, and are contemporaneous." *Remand Results* at 17–18. In contrast, Foshan Shunde's data are limited to two sources, Samsara and Hapag-Lloyd. Commerce explained that while the World Bank data largely satisfy Commerce's surrogate value criteria, Foshan Shunde's two sources are deficient in several respects. *See id.* at 18–19. First, they fail to represent a broad market average because they are from only two companies. *Id.* at 18. Second, the experience of two freight forwarders is not specific to the expenses in question because the expenses reported in these data sources represent import expenses—not export expenses. *Id.* at 19 ("[T]here is no documentation on the record of this proceeding to suggest that the costs for importing merchandise parallel the costs that are related to exporting merchandise."). Commerce further explained that "the business of exporting is fundamentally different than the business of importing and the data from these activities cannot be considered interchangeable." *Id.* at 39. In response, Foshan Shunde contends that Commerce's finding "is simply incorrect" and that it submitted "prices for all port activities – for both importers and exporters." FS Remand Br. at 16. However, the Samsara and Hapag-Lloyd data that Foshan Shunde submitted are both labeled as import data. *See* Foshan Shunde SV Submission for Prelim. Results, PD 77 at Ex. 2. Further, when arguing that it submitted export data, Foshan Shunde cites to its submission of the Indian port schedules, Foshan Shunde SV Submission for Prelim. Results, PD 77 Ex. 1, and not the Samsara and Hapag-Lloyd data, Foshan Shunde SV Submission for Prelim. Results, PD 77 Ex. 2. Therefore, Commerce reasonably concluded that the Samsara and Hapag-Lloyd data reflect only import data. *See* Foshan Shunde SV Submission for Prelim. Results, PD 77 at Ex. 2.

Additionally, although Foshan Shunde claims that consistent with Commerce practice, Commerce "must reject the World Bank *Doing Business* Report as unrepresentative, unreliable, and unverifiable," FS Remand Br. at 13, Commerce reasonably found the World Bank data to be a "reliable and accurate source." *Remand Results* at 38. Commerce explained that the "World Bank data represent a reputable source of information for valuing brokerage and handling because those data are prepared by an independent organization and are based upon a survey derived from a broad number of producers." *Id.* at 38–39. Commerce has also previously relied on the World Bank

data to calculate surrogate B&H values. *See e.g.*, *Wooden Bedroom Furniture from the People's Republic of China*, 76 Fed. Reg. 9,747 (Dep't of Commerce Feb. 22, 2011) (new shipper review final results); *Drawn Stainless Steel Sinks from the People's Republic of China*, 78 Fed. Reg. 13,019 (Dep't of Commerce Feb. 26, 2013) (final results admin. review); *Wooden Bedroom Furniture from the People's Republic of China*, 75 Fed. Reg. 50,992 (Dep't of Commerce Aug. 18, 2010) (final results admin. review); *see also Dongguan Sunrise Furniture Co. v. United States*, 36 CIT ___, ___, 865 F. Supp. 2d 1216, 1246 (2012) (affirming Commerce's reliance on the World Bank data and noting that "Commerce has consistently found the World Bank to be a reliable source for data"). Therefore, Commerce reasonably relied on the World Bank data.

Foshan Shunde next argues that Commerce should have altered the World Bank data to reflect Foshan Shunde's actual expenses. FS Remand Br. at 12. First, Foshan Shunde argues that Commerce should remove a specific expense from the aggregate data, specifically, the expense for preparing a letter of credit. *Id.* at 17. Foshan Shunde contends that because it did not incur a letter of credit expense, Commerce should adjust the B&H by deducting amounts for letter of credit expenses. *Id.* at 17. Foshan Shunde explains that "the World Bank data includes costs for procuring an export letter of credit," *id.* at 17, and that "the L/C costs are embedded in the "documents required to export and import" and greatly inflate the document preparation costs." FS 56.2 Br. at Ex. 1, 31. Foshan Shunde lists the price of an export letter of credit as $390. FS Remand Br. at 17 (citing FS' Br. 56.2 at 26). Commerce, however, responds that it will not adjust the B&H because the listed items composing the B&H do not include a letter of credit expense. *Remand Results* at 39 ("Nowhere in this schedule of eight items are letter of credit expenses mentioned."). Moreover, Defendant argues that Foshan Shunde's $390 letter of credit cost "*exceeds* [$350,] the total amount of [the document preparation costs of the] brokerage and handling expenses calculated by the World Bank. Applying the $390 letter of credit expense, to the $350 . . . charges . . . would result in the nonsensical calculation of a negative expense." *Id.* at 39 (citations omitted) (original emphasis).

The B&H costs from the Word Bank data are composed of three categories of expenses: (1) document preparation; (2) customs clearance and technical control; and (3) ports and terminal handling. *Id.* at Attach. 1. The document preparation fee is composed of eight items: (1) bill of lading; (2) certificate of origin; (3) commercial invoice; (4)

custom's export declaration; (5) inspection report; (6) packing list; (7) technical standard/health certificate; and (8) terminal handling receipts. *Id.* at 39. Letters of credit are not included in the eight listed expenses for document preparation. Even if the letter of credit expenses are embedded, as Foshan Shunde argues, the court agrees that, "without knowing the exact breakdown of the data included in the World Bank Report, [Commerce] can no more deduct a letter of credit expense than add extra expenses which Foshan Shunde incurred but are not reflected by the World Bank data." *Id.* at 19–20. Therefore, Commerce's refusal to adjust the B&H costs for possible letter of credit expenses was reasonable.

Next, Foshan Shunde argues that Commerce should have adjusted its B&H calculations to reflect Foshan Shunde's proximity to China's seaports. Foshan Shunde argues that "proximity to a major seaport is a key factor in the World Bank's determination of the cost of trading across borders in India" and that companies near ports bear lower B&H expenses. FS 56.2 Br. at Ex. 1, 28; FS Remand Br. at 16. Commerce responds that "because 'inland transportation and handling' are calculated elsewhere in NV calculations, distance from a seaport is an irrelevant factor for purposes of calculating brokerage and handling expenses. These expenses are by definition incurred at the port of export." *Remand Results* at 40. Commerce further adds that "[w]hile Foshan Shunde asserts that exporters close to a seaport incur lower brokerage and handling costs than do inland manufacturers, there is no evidence on the record that permits [Commerce] to quantify that suggested difference." *Id.* at 19. The court does not believe this conclusion is reasonable on this administrative record.

Foshan Shunde placed on the administrative record the World Bank's *Doing Business Subnational Report* that includes the specific B&H costs for Indian seaports: Chennai, Kochi, Kolkata, and Mumbai. Foshan Shunde SV Submission for Final Results, PD 96 at Ex. 4. The data that Commerce relied on, the World Bank's *Doing Business in India: 2010*, is composed of the B&H costs of 17 Indian cities/regions including the four above mentioned port cities. *Id.* at Ex. 3–4. Four of the 17 cities are seaports, and the remaining 13 are inland. *Id.* at Ex. 4. The *Doing Business Subnational Report* contains the following categories of expenses for each seaport: (1) document preparation; (2) customs clearance and technical control; (3) ports and terminal handling; and (4) inland transportation and handling. *Id.* Commerce explained that it did not include inland transportation and handling in its B&H calculations. *Remand Results* at 40. Commerce instead calculated B&H from the other three categories of costs: (1) document preparation; (2) customs clearance and technical

control; and (3) ports and terminal handling. *Id.* at Attach. 1. Therefore, in arguing the proper B&H calculation for each seaport, Foshan Shunde also omitted inland transportation and handling costs from the *Business Subnational Report* data. FS 56.2 Br. at 28. The *Business Subnational Report*, excluding inland transportation and handling fees, provides the following B&H costs for the four seaports: Chennai: $439; Kochi: $375; Kolkata: $462; and Mumbai $645. Foshan Shunde SV Submission for Final Results, PD 96 at Ex. 4.; *see also id.* The average B&H costs for the four seaports are $480. In contrast, based on the aggregate data of all 17 cities, Commerce calculated $645 in B&H costs. *Remand Results* at Attach. 1. Therefore, even excluding inland transportation costs, there is a $165 difference between the combined data for all 17 Indian cities and the data from the seaports. This evidence directly contradicts Commerce's conclusion that "distance from a seaport is an irrelevant factor" and that there is no evidence to "quantify that suggested difference." *Id.* at 19, 40. Further, the court agrees with Foshan Shunde that Commerce "offered no explanation why the World Bank report including export costs from 17 Indian cities, most of which lie far inland, was a more appropriate data set than the regional reports of four Indian cities geographically located near major ports, when Foshan Shunde itself is located near major Chinese ports." FS 56.2 Br. at 26. Commerce's determination appears unreasonable. The court must therefore remand this issue to Commerce to consider the World Bank data from the seaports or to provide a reasonable explanation as to why that is not appropriate.

Finally, Foshan Shunde argues that Commerce's adjustment of the World Bank data from 20-foot to 40-foot containers is unreasonable because B&H costs do not increase proportionally from 20-foot to 40-foot containers. FS Remand Br. at 19–20. Foshan Shunde contends that the per-kilogram B&H costs of a 40-foot container is lower than that of a 20-foot container. *Id.* Commerce calculated the B&H costs by first determining the per-kilogram B&H costs of a 20-foot container, and then applied that value to the weight of a 40-foot container. This type of calculation assumes that B&H costs increase proportionally from 20-foot to 40-foot containers. From this calculation, Commerce determined B&H costs to be $645. *Remand Results* at Attach. 1. Defendant and HPI respond to Foshan Shunde's argument, explaining that Commerce "merely converted the data, such that the World Bank data would reflect the ways in which Foshan Shunde actually ships its goods" and that, "Commerce made a straightforward mathematical adjustment from the 40-foot container size in

which it shipped to the 20-foot container size that are reflected in the World Bank data." Defendant's Resp. to Plaintiffs' Comm. Concerning Remand Results, ECF No. 100 at 19–20 ("Def. Remand Br."); *see also* Reply of HPI to Comm. Concerning Remand Results, ECF No. 101 at 19 ("HPI Remand Br."). Defendant also argues that this same issue was addressed in *Dongguan Sunrise v. United States*, 36 CIT ___, ___, 865 F. Supp. 2d 1216, 1247 (2012), in which the court held Commerce's conversion from a 20-foot to a 40-foot container reasonable. Def. Remand Br. at 20. HPI also relies on *Utility Scale Wind Towers from the People's Republic of China*, 77 Fed. Reg. 75,992 (Dep't of Commerce Dec. 26, 2012) (final determ.), in arguing that total B&H costs increase proportionally with container capacity. HPI Remand Br. at 19. On remand, Commerce explained that "Foshan Shunde has failed to demonstrate which, if any, of the costs included within the *Doing Business 2010: India* data do not increase proportionately with [container size]." *Remand Results* at 21. Defendant and HPI, therefore, argue that Commerce's conversion of the data was reasonable (supported by substantial evidence).

In *Dongguan Sunrise* the court sustained Commerce's adjustment of the World Bank data from a 20-foot to a 40-foot container "because [Respondent] ha[d] not presented evidence that brokerage costs are based on value, not volume, and do not increase proportionally with the number of cubic feet." *Dongguan Sunrise*, 36 CIT at ___, 865 F. Supp. 2d at 1247. Similarly, in *Utility Scale Wind Towers from the People's Republic of China*, Commerce stated, "*absent record evidence to the contrary*, total brokerage and handling costs increase proportionally with a container's capacity and, therefore, per-unit brokerage and handling rates do not change as a container's capacity increases." *Utility Scale Wind Towers from the People's Republic of China*, 77 Fed. Reg. 75,992, 75,997 (Dep't of Commerce Dec. 26, 2012) (final determ.) (emphasis added). If B&H costs increased proportionally from 20-foot to 40-foot containers, as Commerce calculated, then there would be a 100% increase in B&H costs from a 20-foot to a 40-foot container. Foshan Shunde, however, points to evidence in the record that shows only a 30–50% increase in costs from 20-foot to 40-foot containers. Foshan Shunde SV Submission for Prelim., PD 77, Ex. 1 at 3–6, 14–16, 37, 64–65, Ex. 2; *see also* FS 56.2 Br. at 33. Therefore, Foshan Shunde has demonstrated that B&H costs do *not* increase proportionally from 20-foot to 40-foot containers. Accordingly, Commerce unreasonably concluded that, "Foshan Shunde has failed to demonstrate, which if any, of the costs . . . do not increase

proportionately with volume." *Remand Results* at 21. The court remands this issue to Commerce to consider Foshan Shunde's evidence regarding B&H costs in 20-foot versus 40-foot containers.

C. Cotton Fabric Surrogate Valuation

In *Since Hardware* the court granted Commerce's voluntary remand request to reconsider Since Hardware's cotton fabric weight and recalculate the conversion factor. *Since Hardware* at 2. On remand, Commerce changed the conversion factor from 5.0 to 7.5 and explained:

> Since Hardware has demonstrated that the weight of its cotton fabric was between 100 grams and 200 grams per square meter. The precise conversion factor for Since Hardware's cotton inputs would therefore range between 5 and 10. Therefore, based upon the information on record, the Department has based its determination on a reasonable inference that the conversion factor is 7.5.

Remand Redetermination at 23. In challenging the cotton fabric conversion factor, Since Hardware presents a hollow argument. Since Hardware's *entire* argument consists of the following: "[t]his Court should find that Commerce should use the record information verified for Since Hardware and apply the 5.49 conversion factor instead of the 7.5 as it is more specific to Since Hardware Draft Remand Comments at 2–6[sic]." SH Br. at 20. Missing is any effort to develop an argument as to how the 5.49 conversion factor is "more specific to Since Hardware" and to identify standards against which the court can evaluate the reasonableness of Commerce's cotton fabric valuation. *Id.* Since Hardware's "argument" is all the more difficult to countenance because the Scheduling Order specifically cautioned against just such a submission:

> Please be advised that the court will not permit the plaintiff to shift to the court and the other parties the burden of establishing the ossature of plaintiff's arguments against the standard of review the court applies to resolve them. Instead, the court will summarily sustain Commerce's action.

Scheduling Order at 5, ECF No. 36. Rule 56.2(c)(2) requires that briefs "must include the authorities relied on and the conclusions of law deemed warranted by the authorities." USCIT R. 56.2(c)(2). As Since Hardware has failed to satisfy this basic requirement, and abide by the express instructions of the Scheduling Order, the court deems this issue waived and sustains Commerce's cotton fabric surrogate valuation. *See MTZ Polyfilms, Ltd. v. United States*, 33 CIT

___, ___, 659 F. Supp. 2d 1303, 130809 (2009); *Fujian Lianfu Forestry Co. v. United States*, 33 CIT ___, ___, 638 F. Supp. 2d 1325, 1350 (2009); *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.") (citations omitted).

D. Labor Wage Rate Surrogate Valuation

In the final results Commerce calculated the surrogate labor wage rate using data from the International Standard Classification of all Economic Activities ("ISIC") Revision 3 rather than ISIC Revision 2. *Final Results*; *see Decision Memorandum* at 16. The court in *Since Hardware* remanded the issue to have Commerce conform its results with the prior review, *Home Prods.*, 36 CIT ___, ___, 837 F. Supp. 2d 1294, 1296–97, and to include Indian data under ISIC Revision 2, as well as any other appropriate country in that data set. *Since Hardware* at 9–11. The court rejected Since Hardware and Foshan Shunde's argument that Commerce must use data from India because "the statute does not mandate Commerce must, as a matter of law, use Indian data alone." *Since Hardware* at 10. The court also deemed waived any argument by Since Hardware and Foshan Shunde that, as a factual matter, India alone was both economically comparable to China and a significant producer of comparable merchandise, because neither party identified even one country included in Commerce's analysis that failed either standard, leaving that work to the court or the other interested parties. *Id.* Consequently, the court did not "require Defendant or HPI to expend any more energy on this issue" other than for Commerce to conform its decision to its Remand Redetermination from the prior administrative review. *Id.* at 11.

On remand Commerce followed the court's instructions and recalculated the labor wage rate "rely[ing] on labor data reported by countries either under the International Standard Industrial Classification (ISIC) Revision 3, or, as discussed below, ISIC Revision 2," including "data from India and Nicaragua." *Remand Results* at 22–22. Since Hardware again argues that Commerce should have selected India alone to calculate the surrogate wage rate. SH Br. at 19–20. The court previously rejected this argument in *Since Hardware*, and Commerce's labor wage rate surrogate valuation is therefore sustained. *See Since Hardware* at 10–11; *see also Home Prods. Int'l, Inc. v. United States*, 36 CIT ___, ___, 810 F. Supp. 2d 1373, 1380 (2012); *opinion after remand*, *Home Prods. Int'l, Inc. v. United States*,

36 CIT ___, ___, 837 F. Supp. 2d 1294, 1297 (2012); *opinion after remand*, *Home Prods. Int'l, Inc. v. United States*, 36 CIT ___, 853 F. Supp. 2d 1257 (2012), *aff'd*, *Home Prods. Int'l, Inc. v. United States*, 501 Fed. Appx. 981 (Fed. Cir. Apr. 11, 2013).

III. Conclusion

Accordingly, it is hereby

ORDERED that Commerce's financial statement selection is remanded to reconsider the exclusion of the Maximaa financial statements; it is further

ORDERED that Commerce's brokerage and handling calculations are remanded for Commerce to reconsider its treatment of container sizes and proximity to seaports; it is further

ORDERED that Commerce's labor wage rate surrogate valuation is sustained; it is further

ORDERED that Commerce's cotton fabric surrogate valuation is sustained; it is further

ORDERED that Commerce shall file its remand results on or before July 30, 2013; and it is further

ORDERED that, if applicable, the parties shall file a proposed scheduling order with page limits for comments on the remand results no later than seven days after Commerce files its remand results with the court.

Dated: May 30, 2013
New York, New York

/s/ Leo M. Gordon
JUDGE LEO M. GORDON

Slip Op. 13–70

MEDLINE INDUSTRIES, INC., Plaintiff, v. UNITED STATES, Defendant,

Before: Nicholas Tsoucalas, Senior Judge
Court No.: 13–00031

Held: Defendant's motion to dismiss is granted and plaintiff's cross-motions to stay and to consolidate are denied.

Dated: May 30, 2013

Hodes Keating & Pilon (*Lawrence R. Pilon* and *Michael G. Hodes*) for Medline Industries, Inc., Plaintiff.

Stuart F. Delery, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Douglas G. Edelschick*); Office of the Chief Counsel for Import Administration, United States Department of Commerce, *Scott D. McBride*, Of Counsel, for the United States, Defendant.

OPINION AND ORDER

TSOUCALAS, Senior Judge:

This case comes before the court on defendant United States Department of Commerce's ("Commerce") motion to dismiss plaintiff Medline Industries, Inc.'s ("Medline") complaint, Def.'s Mot. Dismiss, No. 13–00031, Dkt. No. 13 at 1 ("Def.'s Mot."), and Medline's cross-motions to stay Commerce's motion and consolidate the instant case ("*Medline I*") with *Medline Industries, Inc. v. United States*, No. 13–00070 (Ct. Int'l Trade filed Feb. 18, 2013) ("*Medline II*"). *See* Pl.'s Resp. Mot. Dismiss, No. 13–00031, Dkt. No. 17 at 1 ("Pl.'s Resp."). *See also* Pl.' s Mot. Consolidate, No. 13–00031, Dkt. No. 18; Pl.'s Mot. Stay Proceedings, No. 13–00031, Dkt. No. 19. Commerce argues that *Medline I* "was filed prematurely and is duplicative of Medline's identical challenge in [*Medline II*]." Def.'s Mot. at 1. Medline argues that at least one of its cases is jurisdictionally proper, and therefore asks this court to stay Commerce's motion and to consolidate *Medline I* with *Medline II* to "avoid the necessity of Medline being whipsawed on the jurisdictional issue and forced into appealing a dismissal now to protect itself from a successful jurisdictional challenge in [*Medline II*]." Pl.'s Resp. at 3. For the following reasons, the court grants Commerce's motion and denies Medline's cross-motions.

BACKGROUND

On November 14, 2012, Medline filed a scope ruling request asking Commerce to determine that its hospital bed end panel components are outside the scope of the antidumping duty order on wooden bedroom furniture from the People's Republic of China ("PRC"). *See* Complaint, No. 13–00031, Dkt. No. 10 at 7 ("Compl."). *See also Wooden Bedroom Furniture From the PRC: Final Results and Final Rescission in Part*, 77 Fed. Reg. 51,754 (Aug. 27, 2012) (the "*Order*"). In a determination dated December 21, 2012, Commerce found that the merchandise in question was within the scope of the *Order*. *See Wooden Bedroom Furniture from the PRC: Scope Ruling on Medline Industries, Inc.'s Hospital Bed End Panel Components*, Inv. No. A-570–890 (Dec. 21, 2012) ("*Scope Ruling*").

On December 27, 2012, Commerce emailed a copy of the *Scope Ruling* to Medline's counsel. *See* Compl. at 2. Medline insists that Commerce "confirmed to [Medline's] legal counsel that there would be

no mailing other than the emailing on December 27, 2012."[1] *Id.* Relying on Commerce's representations regarding the December 27 email, Medline commenced this action on January 18, 2013 to appeal the results of the *Scope Ruling*. *See id.* at 3; Pl.'s Resp. at 2; Summons, No. 13–00031, Dkt. No. 1 at 1.

On January 28, 2013, Commerce mailed a copy of the *Scope Ruling* to Medline's counsel. *See* Compl. at 2–3. In response to this mailing, Medline also commenced *Medline II* to appeal the results of the *Scope Ruling*.[2] *See* Summons, No. 13–00070, Dkt. No. 1 at 1.

Commerce now moves to dismiss *Medline I* for lack of subject matter jurisdiction or, alternatively, for failure to state a claim. *See* Def.'s Mot. at 1. Specifically, Commerce argues that this Court lacks jurisdiction because Medline filed *Medline I* before commencement of the thirty-day window for filing an appeal of a scope determination under section 516A(a)(2)(A)(ii) of the Tariff Act of 1930.[3] *See id.* at 3–4. Commerce also argues that *Medline I* should be dismissed because Medline's complaint is "duplicative" of the complaint in *Medline II*. *Id.* at 2.

STANDARD OF REVIEW

"Subject matter jurisdiction constitutes a 'threshold matter' in all cases, such that without it, a case must be dismissed without proceeding to the merits." *Demos v. United States*, 31 CIT 789, 789 (2007) (not reported in the Federal Supplement) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998)). "The burden of establishing jurisdiction lies with the party seeking to invoke th[e] Court's jurisdiction." *Bhullar v. United States*, 27 CIT 532, 535, 259 F. Supp. 2d 1332, 1334 (2003) (citing *Old Republic Ins. Co. v. United States*, 14 CIT 377, 379, 741 F. Supp. 1570, 1573 (1990)).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "For the purposes of a motion to dismiss, the material allegations of a complaint are taken as admitted and are to be liberally construed in favor of the plaintiff(s)." *Humane Soc'y of the U.S. v. Brown*, 19 CIT

[1] Commerce asserts that it did not mail the *Scope Ruling* at that time "due to an apparent misunderstanding." Def.'s Mot. at 2.

[2] In its motion to dismiss *Medline I*, Commerce states multiple times that Medline filed *Medline II* in a timely fashion following the mailing of the *Scope Ruling*. *See* Def.'s Mot. at 2, 3.

[3] All further references to the Tariff Act of 1930 will be to the relevant provisions of Title 19 of the United States Code, 2006 edition, and all applicable supplements thereto.

1104, 1104, 901 F. Supp. 338 , 340 (1995) (citing *Jenkins v. McKeithen*, 395 U.S. 411, 421–22 (1969)).

DISCUSSION

An action challenging a final scope ruling by Commerce must be filed "[w]ithin thirty days after . . . the date of mailing" of that scope ruling. 19 U.S.C. § 1516a(a)(2)(A)(ii). If a party does not satisfy the terms of section 1516a(a)(2)(A)(ii), this Court lacks jurisdiction over that party's claim. *See NEC Corp. v. United States*, 806 F.2d 247, 248 (Fed. Cir. 1986) ("The proper filing of a summons to initiate an action in the Court of International Trade is a jurisdictional requirement."). "Since section 1516a(a)(2)(A) specifies the terms and conditions upon which the United States has waived its sovereign immunity in consenting to be sued in the Court of International Trade, those limitations must be strictly observed and are not subject to implied exceptions." *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1312 (Fed. Cir. 1986). The Court's jurisdiction over this action turns on whether the email to Medline's counsel on December 27, 2012 constituted a "mailing" within the meaning of section 1516a(a)(2)(A)(ii).

Medline argues that "th[is] Court has jurisdiction over at least one of [*Medline I* and *Medline II*]." Pl.'s Resp. at 3. Medline states that it "is unaware of any court decision holding that email notification does or does not satisfy 19 U.S.C. § 1516a(a)(2)(A)(ii)." *Id.* at 3–4. Given this fact and in light of Commerce's representations concerning the legal effect of the December 27, 2012 email, Medline asks the court to stay Commerce's motion and consolidate *Medline I* with *Medline II*. *Id.* at 4. Medline insists that this result "spares Medline the necessity of filing a costly and unnecessary appeal of an adverse jurisdictional ruling in [*Medline I*], just to protect itself from possible jurisdictional challenges in [*Medline II*]." *Id.*

Medline has not met the burden of establishing this Court's jurisdiction over *Medline I*. In light of its obligation to construe the terms of section 1516a(a)(2)(A) strictly, *see Georgetown Steel*, 801 F.2d at 1312, the court refuses to extend the definition of "mailing" to include email messages. *See Bond St., Ltd. v. United States*, 31 CIT 1691, 1695, 521 F. Supp. 2d 1377, 1381 (2007) (holding that a fax was not a "mailing" within the meaning of 19 U.S.C. § 1516a(a)(2)(A)(ii)); *cf. Tyler v. Donovan*, 3 CIT 62, 65–66, 535 F. Supp. 691, 693–94 (1982) (mailed notification of a final determination was insufficient to trigger filing period when statute required publication in the Federal Register). Although email is a widespread means of communication, Medline has not demonstrated that an email is sufficient to commence the filing period under section 1516a(a)(2)(A)(ii). Accordingly,

the thirty-day period for Medline to appeal the results of the *Scope Ruling* was triggered by the January 28, 2013 mailing of the *Scope Ruling* to Medline's counsel. *See* 19 U.S.C. § 1516a(a)(2)(A)(ii). Because Medline filed *Medline I* prematurely, the court must dismiss for lack of subject matter jurisdiction.[4] *See W. Union Tel. Co. v. FCC*, 773 F.2d 375, 381 (D.C. Cir. 1985) (dismissing for lack of jurisdiction where plaintiff filed petition for review before the 28 U.S.C. § 2344 filing window opened); *Bond St.*, 31 CIT at 1695, 521 F. Supp. 2d at 1381. Although the court is wary of granting Commerce's motion given the alleged misrepresentations to Medline's counsel, this concern is tempered by the fact that Medline initiated *Medline II* in a timely fashion following the January 28, 2013 mailing of the *Scope Ruling*. *See* Def.'s Mot. at 2, 3.

Also before the court are Medline's cross-motions to stay Commerce's motion to dismiss, *see* Pl.'s Mot. Stay, No. 13–00031, Dkt. No. 19 at 1, and to consolidate *Medline I* with *Medline II*. *See* Pl.'s Mot. Consolidate, No. 13–00031, Dkt. No. 18 at 1. In light of the court's decision to dismiss *Medline I* for lack of subject matter jurisdiction, these motions are denied as moot. *See Hitachi Home Elecs. (Am.), Inc. v. United States*, 34 CIT __, __, 704 F. Supp. 2d 1315, 1322 (2010), *aff'd* 661 F.3d 1343 (Fed. Cir. 2011) (denying plaintiff's cross-motion for consolidation as moot when dismissing for lack of subject matter jurisdiction).

CONCLUSION

For the foregoing reasons, Medline's complaint is dismissed without prejudice due to lack of subject matter jurisdiction, and Medline's cross-motions to stay and to consolidate are denied as moot.

ORDER

In accordance with the above, it is hereby

ORDERED that defendant's motion to dismiss is **GRANTED** ; and it is further

ORDERED that plaintiff's complaint (Dkt. No. 10) in this action is dismissed without prejudice; and it is further

ORDERED that plaintiff's cross-motion to consolidate (Dkt. No. 18) is **DENIED**; and it is further

ORDERED that plaintiff's cross-motion to stay (Dkt. No. 19) is **DENIED.**

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[4] Because the court does not have subject matter jurisdiction over *Medline I*, the court will not rule on whether Medline stated a claim in its complaint.

Dated: May 30, 2013
New York, New York

/s/ Nicholas Tsoucalas
NICHOLAS TSOUCALAS
SENIOR JUDGE