U.S. Customs and Border Protection

Slip Op. 10–86

CLEARON CORPORATION and OCCIDENTAL CHEMICAL CORPORATION, Plaintiffs, v. UNITED STATES, Defendant, and ARCH CHEMICALS, INC. and HEBEI JIHENG CHEMICAL CO., LTD., Defendant–Intervenors.

Before: Richard K. Eaton, Judge:
Court No. 08–00364

[Defendant's motion to dismiss denied.]

Dated: August 9, 2010

Gibson, Dunn & Crutcher LLP (*Daniel J. Plaine*, *J. Christopher Wood*, and *Andrea F. Farr*) for plaintiffs.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White*, *Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*David D'Alessandris*); Office of the Chief Counsel for Import Administration, United States Department of Commerce (*Brian Soiset*), for defendant.

OPINION AND ORDER

Eaton, Judge:

Introduction

This case is before the court on a motion to dismiss, pursuant to USCIT Rule 12(b)(1), of defendant the United States, acting on behalf of the United States Department of Court No. 08–00364 Page 2 Commerce ("Commerce"). Defendant's motion seeks the dismissal of Count 3 of plaintiffs' complaint in its entirety, and the dismissal of Counts 1 and 2 as they pertain to Hebei Jiheng Chemical Corporation ("Jiheng"). Def.'s Mot. to Dismiss in Part as Moot ("Def.'s Mot.") 1. If Commerce's motion is granted, Jiheng will be dismissed from the case.

By their complaint, Clearon Corporation and Occidental Chemical Corporation (collectively, "plaintiffs" or "Clearon") contest certain aspects of Commerce's final results in the second administrative review of the antidumping duty order on chlorinated isocyanurates covering the period June 1, 2006 through May 31, 2007. Compl. ¶ 3; *see also* Chlorinated Isocyanurates from the People's Republic of China, 73 Fed. Reg. 62,249 (Dep't of Commerce Oct. 20, 2008) (amended final

results of antidumping duty administrative review) (the "Final Results"). Plaintiffs are domestic producers of chlorinated isocyanurates seeking to increase Jiheng's dumping margins found in the Final Results. *See* Compl. ¶ 5.

The basis for defendant's motion is that the portions of the complaint involving Jiheng's merchandise have been rendered moot because the merchandise was liquidated by operation of law in accordance with 19 U.S.C. § 1504(d) (2006), commonly referred to as the deemed liquidation provision. Def.'s Mot. 1. According to defendant, plaintiffs' failure to serve their injunction on named government officials at Commerce and United States Customs and Border Protection ("Customs" or "CBP") rendered the injunction order incapable of preventing a deemed liquidation. Def.'s Mot. 3. For the reasons set forth below, defendant's motion to dismiss is denied.

Background

On June 24, 2005, following an investigation, Commerce published an antidumping duty order on chlorinated isocyanurates. Chlorinated Isocyanurates from the People's Republic of China, 70 Fed. Reg. 36,561 (Dep't of Commerce June 24, 2005) (notice of antidumping duty order) (the "Order"). On July 26, 2007, at the request of certain foreign producers, exporters, and domestic producer Clearon, Commerce commenced the second periodic review of the Order pursuant to 19 U.S.C. § 1675(a)(1) and 19 CFR § 351.213(b). Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 72 Fed. Reg. 41,057 (Dep't of Commerce July 25, 2007). On September 10, 2008, Commerce published the final results of the review, later amended on October 20, 2008. Chlorinated Isocyanurates from the People's Republic of China, 73 Fed. Reg. 52,645 (Dep't of Commerce Sept. 10, 2008); Final Results, 73 Fed. Reg. at 62,249. Importantly, as a result of this publication, the suspension of liquidation that had previously been in effect as a result of the review was lifted. *See*, *e.g.*, *Int'l Trading Co. v. United States*, 281 F.3d 1268, 1272 (2002) ("*Int'l Trading*") (holding that "[t]he statutory scheme governing suspension of liquidation supports the . . . conclusion that suspension of liquidation [is] removed when the final results of the administrative review [are] published in the Federal Register").

Following publication of the Final Results, Clearon commenced this lawsuit to contest the results of the review. On November 12, 2008, Clearon, with defendant's consent, sought an injunction against liquidation, and on November 13, 2008, the court granted the injunc-

tion. Def.'s Mot. 2; *Clearon Corp. v. United States*, Court No. 08–00364, at 1–2 (Nov. 13, 2008) (injunction order) (the "Injunction"). Among other things, the Injunction provided that it would enjoin liquidation of plaintiffs' merchandise that remained:

> unliquidated as of 5:00 p.m. on the fifth business day after the day on which a copy ofthis preliminary injunction *is personally served by Plaintiffs' counsel by hand on the following individuals or their delegates* :
>
> Attn: Ann Sebastian, APO Director,
> Department of Commerce, Room 1870
> International Trade Administration, Import Administration,
> 14th Street and Constitution Avenue, N.W.,
> Washington, DC 20230; and
>
> Hon. W. Ralph Basham, Commissioner of Customs,
> Attn: Alfonso Robles, Esq., Chief Counsel, Bureau of Customs and Border Protection, Room 4.4-B,
> 1300 Pennsylvania Avenue, N.W.,
> Washington, DC 20229

Injunction at 1–2 (emphasis added). While the Injunction was served on defendant's counsel, it was never served on either of the named officials. Def.'s Mot. 3.

The case then proceeded in the usual fashion until December 14, 2009 when defendant filed its motion to dismiss, claiming that all of Jiheng's merchandise subject to the second administrative review had been deemed liquidated pursuant to 19 U.S.C. § 1504(d), and as a result, the court had no jurisdiction to hear unfair trade duty claims related to the Company's merchandise. Def.'s Mot. 4.

Standard of Review

"The party seeking to invoke this Court's jurisdiction has the burden of establishing such jurisdiction." *Autoalliance Int'l, Inc. v. United States*, 29 CIT 1082, 1088, 398 F. Supp. 2d 1326, 1332 (2005) (citations omitted). A case becomes moot when it has "lost its character as a present, live controversy of the kind that must exist if we are to avoid advisory opinions on abstract propositions of law." *Hall v. Beals*, 396 U.S. 45, 48 (1969) (citations omitted). This requirement of an actual controversy exists at all stages of an action. *Steffel v. Thompson*, 415 U.S. 452, 461 n.10 (1974).

Discussion

I. Contentions of the Parties

Defendant's primary argument is that because plaintiffs failed to serve the Injunction on Ms. Sebastian at Commerce and Mr. Basham at Customs, the document did not effect a suspension of liquidation that would prevent a deemed liquidation. Def.'s Mot. 3. Defendant further insists that, by operation of law, deemed liquidation of Jiheng's merchandise occurred on April 20, 2009. Def.'s Mot. 3. According to defendant, this deemed liquidation mooted Clearon's case as to Jiheng's merchandise, thus denying the court subject-matter jurisdiction to hear the substantive claims with respect to that merchandise. Def.'s Mot. 4. Thus, defendant argues that:

> The clear terms of the injunction state that the injunction will take effect "on the fifth business day after the day on which a copy of this preliminary injunction is personally served by Plaintiffs' counsel by hand" on Commerce. The injunction was not served, personally or otherwise, upon Commerce and CBP [Customs]. Thus, nothing enjoined the lifting of the suspension of liquidation during the nearly 14 months since publication of the *Amended Final Results* . . . .
>
> In this case, the removal of suspension of liquidation, as well as notice to CBP of that removal, occurred when the *Amended Final Results* were published in the Federal Register on October 20, 2008. Thus, the entries at issue in this case became liquidated by operation of law on April 20, 2009.

Def.'s Mot. 6–7 (citations omitted).

Clearon, on the other hand, insists that the motion should be denied, primarily because:

> [T]he absence of any prejudice to Defendant or any other party from the alleged service defect places this case squarely within the ambit of the harmless error rule. . . . Under these circumstances, the Court should give effect to the clear intent and agreement ofthe parties and the order of this Court that the entries subject to the appeal would been joined and deny Defendant's motion to partially dismiss Plaintiffs' claims as moot.

Memo. of Clear on Corp. and Occidental Chem. Corp. in Opp. to Def.'s Part. Mot. to Dismiss ("Pls.' Resp.") 2.

II. Suspension of Liquidation and Injunction

Suspensions of liquidation and court-ordered injunctions are important tools used in the statutory scheme providing for the application of the proper duties under our unfair trade regime.[1] The suspension of liquidation is terminated, however, when final results of an investigation are published in the Federal Register so that Customs may liquidate the merchandise at the final rate. *Int'l Trading*, 281 F.3d at 1272; *see also* 19 U.S.C. § 1673e(a) (providing that an antidumping duty order should set forth the antidumping duty rate). Often, however, a party will request a periodic review to test the applicability of the rate to entered merchandise. *See* 19 U.S.C. § 1675(a)(2)(c) (providing that the final results of an administrative review should set forth the determination of antidumping duty rates that "shall be the basis for the assessment of countervailing or antidumping duties" on the subject entries). Liquidation is suspended during the review so the liquidation will take place in accordance with a review's result. *See* 19 U.S.C. § 1673b(d)(2).

When the results of a review are challenged in this Court, a party will typically seek to further halt liquidation by requesting an injunction. 19 U.S.C. § 1516a(c)(2) ("The United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise covered by a determination of the . . . administering authority . . . upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances."). The purpose of the injunction is to prevent liquidation and to preserve merchandise for liquidation at the rate finally determined following judicial review.

Were an injunction not entered, Customs would be free to actually liquidate the merchandise pursuant to 19 U.S.C. § 1500(c)-(d), which

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[1] The United States uses a "retrospective" assessment system where the importer makes a cash deposit of the estimated dumping duties when the subject merchandise enters the United States, but the actual duty is not necessarily determined until after entry, and is not paid until the entries are liquidated by Customs. 19 C.F.R. § 351.212(a) (2009); 19 C.F.R. §§ 141.101,103. If no request for a review is made, Commerce instructs Customs to liquidate the entries at the estimated antidumping duties at the time of entry (the "entered rate"). 19 C.F.R. § 351.212(c)(i). If a timely request for review is made, Commerce publishes the notice of initiation of the review in the Federal Register and commences the review, during which time liquidation is suspended. 19 C.F.R. § 351.212(c)(2); 19 C.F.R.§ 351.221(b); *see also American Permac, Inc. v. United States*, 10CIT 535, 539, 642 F. Supp. 1187, 1191 (1986) ("Because 19 U.S.C.§ 1675(a)(2) expressly calls for the retrospective application of antidumping review determinations . . . suspension of liquidation during the pendency of a periodic antidumping review is unquestionably 'required by statute[].'"). Following the review, Commerce publishes the final results of the review, and the entries are liquidated in accordance with those final results, unless there is an appeal to this Court. 19 C.F.R. § 351.221(b).

provides that the "Customs Service shall . . . fix the final amount of duty to be paid on such merchandise . . . [and] liquidate the entry . . . of such merchandise . . . ."

III. Deemed Liquidation

If no injunction is entered and Customs does not act, however, another provision comes into play. By statute, entries of merchandise not liquidated by Customs within six months of the removal of suspension of liquidation are deemed liquidated at the entered rate:

> Any entry (other than an entry with respect to which liquidation has been extended under subsection (b) [relating to an extension of the six month period by the Secretary of Commerce] of this section) not liquidated by the Customs Service within 6 months after receiving such notice shall be treated as having been liquidated at the rate of duty, value, quantity, and amount of duty asserted by the importer of record . . . .

19 U.S.C. § 1504(d).

Thus, for a deemed liquidation to take place, three conditions must be met: "(1) the suspension of liquidation that was in place must have been removed; (2) Customs must have received notice of the removal of the suspension; and (3) Customs must not liquidate the entry at issue within six months of receiving such notice." *Fujitsu Gen. Am., Inc. v. United States*, 283 F.3d 1364, 1376 (Fed. Cir. 2002) ("*Fujitsu*"). Because they take place by operation of law, Customs plays no role in effectuating deemed liquidations.

IV. Mootness

The "mootness doctrine" results from the case or controversy requirement found in Article III of the United States Constitution. *See* 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice and Procedure § 3533 (3d ed. 2008). In the context of an unfair trade case, courts have generally found that once entries have been liquidated, there is no case or controversy with respect to the duty rate to be applied to them. As a result, liquidation moots a court challenge to the duty rate imposed in an administrative review. "Once liquidation occurs, it permanently deprives a party of the opportunity to contest Commerce's results for the administrative review by rendering the party's cause of action moot." *SKF USA Inc. v. United States*, 28 CIT 170, 173, 316 F. Supp. 2d 1322, 1327 (2004) (citing *Zenith Radio Corp. v. United States*, 710 F.2d 806, 809–10 (Fed. Cir. 1983) ("*Zenith*")); *see also Fujitsu*, 283 F.3d at 1376. This applies to entries deemed liquidated by operation of 19 U.S.C. §

1504(d). *Ames True Temper v. United States*, 34 CIT __, __, __ F. Supp. 2d __, __, Slip Op. 10–33 at 6 (Mar. 30, 2010) (citation omitted).

V. Special Provision of CIT Injunctions

Consent injunctions in the Court of International Trade generally contain two special provisions not normally found in other injunction orders. In ordinary practice, it is the duty of the lawyer for the party being enjoined to inform those who might violate the injunction of its existence, e.g., officers of a corporation. *See, e.g.*, USCIT Rule 65(d)(2) (stating that an injunction binds various categories of individuals working for or with the parties "who receive actual notice of it by personal service or otherwise"); *Anthony Marano Co. v. MS-Grand Bridgeview, Inc.*, No. 08 C 4244, 2009 WL 1904403, at *3 (N.D. Ill. July 1, 2009) (providing that the enjoined party, whose employees violated a preliminary injunction, cannot claim that the "notice of the injunction 'was not fully transmitted' to all of [its employees]" when its counsel has been notified of the injunction).

Starting sometime after *Zenith*,[2] however, it became common in this Court for a consent injunction to contain language requiring the party that obtained the injunction to serve it on officers of the United States government. The agreed upon reason for this service was to give actual notice sufficient to prevent Commerce and Customs from taking any inadvertent action to actually liquidate the subject merchandise while the injunction was in force. Pls.' Resp. 5. At oral argument, defendant's counsel explained that because these agencies are large, the correct person must be served to ensure proper compliance with an injunction. Tr. of Civ. Cause for Or. Arg. at 6:1–7.

The other special provision often found in consent injunctions in this Court is the five-day grace period. In accordance with this provision, a consent injunction does not become effective until "the fifth business day after the day on which a copy of [the] preliminary injunction is personally served by Plaintiffs' counsel by hand" on the specified individuals at Commerce and Customs. *See, e.g.*, Injunction at 1. This provision has recently been the subject of litigation. *See Agro Dutch Indus. Ltd. v. United States*, 589 F.3d 1187, 1189 (Fed. Cir. 2009) ("*Agro Dutch*").

[2] This case, which is generally the initial point of reference for cases dealing with injunctions in the context of unfair trade laws, held that liquidation of entries of merchandise subject to administrative review renders court challenges moot, and therefore, a domestic manufacturer challenging the result of the review would suffer irreparable harm if liquidation were not enjoined. *Zenith*, 710 F.2d at 810. Hence, the court established a "per se right to a preliminary injunction enjoining liquidation of unliquidated entries pending final judicial review of administrative review determinations." *NMB Sing. Ltd. v. United States*, 24 CIT 1239, 1242 n.4, 120 F.Supp. 2d 1135, 1138 n.4 (2000) (citing *Zenith*).

VI. *Agro Dutch*

In *Agro Dutch*, this Court granted a consent injunction that included the five-day grace period. Thus, in accordance with its terms, the injunction would not take effect until five days after it was served on the specified individuals at Commerce and Customs. 589 F.3d at 1189. The Federal Circuit noted that the purpose of the grace period was "to ensure against subjecting Customs officials to contempt sanctions for an inadvertent liquidation." *Id.* at 1193. The *Agro Dutch* injunction was served on the named officials. *Id.* at 1189. Customs, however, liquidated the entries during the five-day grace period. *Id.*

Because Commerce acted to liquidate during the grace period, nothing in the terms of the injunction prevented the liquidation from taking place. Nonetheless, both this Court and the Federal Circuit found that the "original understanding and intent of the court and the parties" that the entries be preserved for liquidation at the final rate overrode the lesser intention that there should be a safe harbor period. *Id.* at 1192, 1194. The Federal Circuit emphasized the importance of "effecting the intent of the parties and the court to prevent a premature liquidation while judicial review is ongoing." *Id.* at 1193–94.

In reaching its decision, the *Agro Dutch* court stressed the equitable power of a Court of International Trade judge and the importance of complying with the parties' original intent:

> The trial court's discretion is not limited to the correction of clerical or typographical errors but encompasses the correction of errors needed to comport the order with the original understandings and intent of the court and the parties.
>
> . . . [I]t was the purpose of the injunction and the understanding and intent of all the parties to suspend liquidation pending a decision on the merits of [plaintiff's] challenge. . . .
>
> . . . .
>
> While finality is an important goal, the interest in finality must give way in the face of a more compelling interest in this case: namely, effecting the intent of the parties and the court to prevent a premature liquidation while judicial review is ongoing. . . . No valid interest in finality is served by foreclosing judicial review in a case such as this one, where the parties and trial court agreed that finality was not warranted, and where an injunction was entered for the very purpose of preventing the antidumping duty from becoming final.

Id. at 1192–94.

VII. The Injunction Was In Effect at the Time of Deemed Liquidation

Here, the Injunction was entered by this Court on November 13, 2008, and Customs claims that deemed liquidation took place on April 20, 2009. Def.'s Mot. 2–3. As in *Agro Dutch*, the parties agreed to a special term in the Injunction, i.e., the requirement that Clearon serve Commerce and Customs. As noted, the purpose of this service was to reduce the chance of these entities' taking action to liquidate the subject merchandise. It is important to keep in mind, however, that the notice resulting from service on the named officials was designed to prevent either Commerce or Customs from taking any action that would result in an actual liquidation. No party claims, nor could it, that this service would put either agency on notice with respect to any action it might take to effectuate a deemed liquidation. This is because, as has been seen, a deemed liquidation is the result of the operation of law upon the satisfaction of several conditions. *Fujitsu*, 283 F.3d at 1376. Under the circumstances of the case, neither Commerce nor Customs was empowered to act in any way in furtherance of a deemed liquidation. An examination of the preconditions for a deemed liquidation will serve to illustrate why this is the case.

The first condition is that the "suspension required by statute or court order is removed." 19 U.S.C. § 1504(d). As noted, this lifting of the suspension of liquidation took place when Commerce published the Final Results. *See Int'l Trading*, 281 F.3d at 1272. In other words, the only action that Commerce is authorized to take leading up to a deemed liquidation took place here, and always takes place, prior to a party's seeking an injunction against liquidation in this Court. Thus, the service of the Injunction on Commerce, as provided for in the document, had no meaning under these circumstances, because Commerce was powerless to take further action that would result in a deemed liquidation. Likewise, Customs could take no act nor make any finding to further a deemed liquidation because it had no power to do so. Thus, with respect to a deemed liquidation, the service requirement at issue here merely demands a meaningless act.

With this in mind, the court finds that the holding in *Agro Dutch* directs the outcome of this case. Indeed, as compelling as the case was in *Agro Dutch* for reforming the injunction order to eliminate the five-day grace period, here, the case for dispensing with the service requirement is even more compelling. In *Agro Dutch,* the five-day provision was designed to address precisely the set of facts that

actually came to pass—that is, the liquidation of merchandise during the grace period. 589 F.3d at 1189. As has been noted, the provision at issue in *Agro Dutch* specifically placed no bar on actual liquidation during the five-day period. *Id.* In other words, the parties agreed, and the court ordered, that a liquidation during this period would remain undisturbed. Nonetheless, the Federal Circuit found that it was the primary "intent of the parties and the court to prevent a premature liquidation while judicial review is ongoing" and therefore, authorized the court to use its equitable powers to eliminate the grace period provision. *Id.* at 1193–94.

Here, the service provisions were designed to provide notice sufficient to stop the served agencies from inadvertently taking steps to liquidate the entries of subject merchandise while the injunction was in effect. Pls.' Resp. 5. It is important to keep in mind, however, that an actual liquidation, not a deemed liquidation, was the object of the provision. As has been seen, in this case, neither served official could take lawful action to effectuate a deemed liquidation. Thus, the service provision served no purpose with respect to preventing a deemed liquidation.

Thus, as in *Agro Dutch*, the primary intention of the parties was to stop, during the pendency of the lawsuit, a liquidation, deemed or otherwise. As such, the court is required to give meaning to the parties' primary intention that no liquidation should take place, and use its equitable powers to eliminate the notice provision. *See Agro Dutch*, 589 F.3d at 1192 (providing that "[t]he trial court's discretion is not limited to the correction of clerical or typographical errors but encompasses the correction of errors needed to comport the order with the original understandings and intent of the court and the parties").

Conclusion

For the foregoing reasons, the court denies the defendant's motion to dismiss. Further, the court amends the Injunction to eliminate the service requirement and thus, finds that the Injunction served to suspend the liquidation of Jiheng's merchandise by action of law pursuant to 19 U.S.C. § 1516a(c)(2). As a result, Counts 1 and 2 of Clearon's complaint as they pertain to Jiheng's merchandise and Count 3 in its entirety are not moot.

Dated: August 9, 2010
New York, New York

/s/ Richard K. Eaton
RICHARD K. EATON

Slip Op. 10–87

TIANJIN MAGNESIUM INTERNATIONAL CO., LTD., Plaintiff, v. UNITED STATES, Defendant, and US MAGNESIUM LLC, Defendant-Intervenor.

Before: TSOUCALAS, Senior Judge
Public Version
Consol. Court No. 09–00012

Held: The Department of Commerce's final results of antidumping administrative review for pure magnesium from the People's Republic of China is affirmed in part and remanded in part.

Dated: August 9, 2010

Riggle & Craven (David A. Riggle, David J. Craven, and Shitao Zhu) for Plaintiff Tianjin Magnesium International Co., Ltd.

Tony West, Assistant Attorney General; Jeanne E. Davidson, Director; Patricia M. McCarthy, Assistant Director, Commercial Litigation Branch, United States Department of Justice (David S. Silverbrand and Patryk J. Drescher) for Defendant United States.

King & Spalding, LLP (Stephen A. Jones, Jeffrey B. Denning, and Jeffrey M. Telep) for Defendant-Intervenor, US Magnesium LLC.

OPINION

Tsoucalas, Senior Judge

Introduction

Plaintiff Tianjin Magnesium International Co., Ltd., ("TMI") and Defendant Intervenor US Magnesium LLC ("USM") each move for judgment on the agency record pursuant to USCIT R. 56.2, challenging the final determination of the Department of Commerce (the "Department" or "Commerce") in *Pure Magnesium from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 76,336 (Dep't Commerce Dec. 16, 2008) ("*Final Results*").

Plaintiff asserts that Commerce acted arbitrarily, capriciously, and not in accordance with law when it revoked its previous decision to defer administrative review by one year and also caused TMI irreparable harm when it failed to provide notice of the rescission. Plaintiff further claims that the Department incorrectly calculated the surrogate financial ratios. *See* Mem. in Supp. of the Mot. for J. on the Agency R. Submitted by Pl. TMI ("TMI's Br."); *see also* Def.'s Resp. in Opp'n to Pl.'s and Def. Intervenor's Mots. for J. Upon the Agency R. ("Def.'s Br."); USM's Resp. to TMI's Br. in Supp. of Mot. for J. on the Agency R. ("USM's Resp."); Reply of Pl. TMI ("TMI's Reply"). Defendant Intervenor moves that Commerce's actions were not supported by substantial evidence and in accordance with law when it (1) as-

sessed the surrogate value for TMI's magnesium byproduct; (2) used Indian domestic data to assign a surrogate value for dolomite; (3) failed to select the best available financial statement to value the financial ratios; and (4) refused to apply a combination rate to TMI. *See* USM's R. 56.2 Confidential Br. in Supp. of Mot. for J. on the Agency R. ("USM's Br."); *see also* Resp. Br. of TMI to the R. 56.2 Mot. of USM ("TMI's Resp."); Reply Br. of USM ("USM's Reply").

Procedural History

In accordance with Section 751 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1675 (2006)[1] and 19 C.F.R. § 351.213(b), Commerce published notice of an opportunity to request administrative review for exporters or producers covered by the antidumping duty order for pure magnesium from the People's Republic of China ("PRC") during the period of review from May 1, 2006, through April 30, 2007 (the "POR"). *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity to Request Administrative Review*, 72 Fed. Reg. 23,796 (Dep't Commerce May 1, 2007). Pursuant to that announcement, both TMI and Economic Consulting Services, LLC ("ECS"), an agent of USM, requested review of TMI's exports. *See* PR 2.[2] Plaintiff also asked that the review be deferred for one year and consolidated with the next administrative review ("TMI's deferral request"). *See* PR 3.

On June 29, 2007, the Department initiated administrative review with respect to another respondent, Shanxi Datuhe Coke & Chemicals Co., Ltd., ("Datuhe") and, in the same notice, granted TMI's deferral request.[3] *See Initiation of Antidumping and Countervailing Duty Administrative Reviews, Request for Revocation in Part and Deferral of Administrative Review*, 72 Fed. Reg. 35,690 (Dep't Commerce June 29, 2007). However, several months later, the Department proceeded to initiate administrative review with respect to TMI. *See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 73 Fed. Reg. 4,829 (Dep't Commerce Jan. 28, 2008).[4] On June 9, 2008, the Department

[1] Further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 U.S.C. Similarly, citations to the U.S.C. or C.F.R. are to the 2006 editions.

[2] Citations to the public record are designated "PR" and the confidential record "CR."

[3] Datuhe is not a party to this action.

[4] TMI sought to enjoin administrative review of its entries, invoking the CIT's residual jurisdiction under 28 U.S.C. § 1581(i). This Court denied TMI's claims as unripe for judicial review. *See Tianjin Magnesium Int'l Co., v. United States*, 32 CIT, 533 F.Supp. 2d 1327 (2008).

published its preliminary determination. *See Pure Magnesium from the People's Republic of China: Preliminary Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 32,549 (Dep't Commerce June 9, 2008) ("*Preliminary Results*"). Later that year, Commerce issued the *Final Results*, incorporating by reference an internal issues and decisions memorandum ("Decision Mem."). *See* PR 119.

This consolidated action ensued. In the meantime, Defendant sought leave of the Court to purportedly correct ministerial errors affecting TMI's dumping margin, which was denied because of the Department's failure to adequately prove that the corrections it intended to effect were in fact "ministerial". Notwithstanding USM's June 4, 2009, motion for the Court's reconsideration, the Court conclusively determined that the Department's acts the *Final Results* were intentional.

Jurisdiction & Standard of Review

The Court exercises jurisdiction under 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii). The Court will uphold Commerce's determination unless "unsupported by substantial evidence on the record, or otherwise not in accordance with law." § 1516a(b)(1)(B)(i). This standard requires that Commerce thoroughly examine the record and "articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc., v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed. 2d 443 (1983) (internal quotation omitted). Substantial evidence is "more than a mere scintilla." *Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229, 59 S.Ct. 206, 83 L.Ed. 126 (1938). It means "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Longkou Haimeng Mach. Co. v. United States*, 33 CIT , ; 617 F.Supp. 2d 1363, 1366 (2009) (*quoting Huaiyin Foreign Trade Corp. (30) v. United States*, 322 F.3d 1369, 1374 (Fed. Cir. 2003)).

Discussion

A. Initiation of Administrative Review

In accordance with 19 C.F.R. § 351.213(c),[5] TMI requested a one year postponement of its administrative review, serving its deferral

[5] Section 351.213(c) provides:
The Secretary may defer the initiation of an administrative review, in whole or in part, for one year if:
(i) The request for administrative review is accompanied by a request that the Secretary defer the review, in whole or in part; and
(ii) None of the following persons objects to the deferral: the exporter or producer for which deferral is requested, an importer of subject merchandise of that exporter or

request on the Department and on USM's legal counsel of the previous review, King & Spalding, LLP. *See* PR 3. Commerce granted TMI's deferral request, noting that it received no timely objections. *See* 72 Fed. Reg. at 35,690, 92. However, shortly thereafter, ECS wrote a letter protesting the fact that it was not served with TMI's deferral request and asking Commerce to permit an objection out of time. *See* PR 6. Once the objection was filed, Commerce granted ECS the extension and initiated review of TMI, effectively rescinding its previous postponement of TMI's administrative review. *See* PR 17; *Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request For Revocation in Part*, 72 Fed. Reg. 4,829 (Dep't Commerce Jan. 28, 2008).

TMI urges that it satisfied the regulatory directive to serve the deferral request "on the petitioner"[6] when it completed service on King & Spalding. Plaintiff further maintains that serving ECS would have been improper since ECS engaged in the unauthorized practice of law by filing documents containing legal arguments before Commerce. *See* TMI's Br. at 15. Additionally, TMI was aware that King & Spalding was USM's counsel in the previous administrative review. Since communication through a party's attorney is mandated when a licensed attorney knows that the other party is represented by counsel, TMI claims that serving ECS would have risked an ethical breach. *See id.* at 14 19. TMI also stresses that Commerce's regulations do not require service on more than one representative of the petitioner, nor had the Department issued a service list at that time. *See id.* at 14. Further, Plaintiff avers that it had "no certain knowledge" that USM had any other representative. *Id.*

Lastly, TMI maintains that it was reasonably entitled to rely on Commerce's original determination, duly published in the *Federal Register*. Prior to revoking that deferral, claims Plaintiff, the Department was obligated to provide notice and an opportunity to comment, without which TMI was unduly burdened and deprived of its due process rights. *See id.* at 21. Considering the sheer volume of information that had to be processed within the constraints of the statute of limitations, TMI asserts that it was unprepared to participate in an administrative review, thus suffering substantial injury. *See id.* at 20 25.

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producer, a domestic interested party and, in a countervailing duty proceeding, the foreign government.

[6] A party requesting administrative review "must serve a copy of the request . . . on each exporter or producer specified in the request and on the petitioner by the end of the anniversary month or within ten days of filing the request for review, whichever is later." 19 C.F.R. § 351.303(f)(3)(ii).

While TMI's claims may be valid, they are rendered moot. 28 U.S.C. § 2637(d) provides that "the Court of International Trade shall, where appropriate, require the exhaustion of administrative remedies." By failing to raise this issue at the administrative level TMI has foreclosed an avenue of possible relief and precluded review at this forum. Although the decision to apply exhaustion principles in trade cases is not mandatory, this Court "generally takes a strict view of the requirement that parties exhaust their administrative remedies before the Department of Commerce in trade cases." *Corus Staal BV v. United States*, 502 F.3d 1370, 1379 (Fed. Cir. 2007); *See also Norsk Hydro Can., Inc. v. United States*, 472 F.3d 1347, 1356 n.17 (Fed. Cir. 2006). Commerce's regulations augment the guidance of the pertinent statute and case law, unequivocally requiring TMI to raise these arguments administratively. *See* 19 C.F.R. § 351.309(c)(2) ("[t]he case brief must present all arguments that continue in the submitter's view to be relevant to the Secretary's final determination . . . including any arguments presented before the date of publication of the preliminary determination").

TMI does not dispute that it failed to raise this issue to the agency. Rather, TMI contends that its claim fell outside the parameters of section 351.309(c)(2). Since the administrative review was already initiated, TMI reasons that its deferral request was irrelevant to the Department's final determination of the antidumping duty rate. *See* TMI's Reply at 9. Plaintiff states "it is clear that Commerce had made a decision granting an extension of time and rescinded the deferral, which matter could not be remedied administratively" and "[t]he facts of the record make it clear that Commerce would not change its position in the final results as the review had, in fact, already been conducted." *Id.* at 7.

Futility is indeed an exception to the exhaustion doctrine. *See Gerber Food (Yunnan) Co. v. United States*, 33 CIT , , 601 F.Supp. 2d 1370, 1381 (2009). This exception, however, is a narrow one. An inadequate administrative remedy is where the agency is incapable of providing relief. *See Statistical Phone Philly v. NYNEX Corp.*, 116 F.Supp. 2d 468, 480 (2000). The mere fact that an adverse decision may have been likely does not excuse a party from satisfying statutory or regulatory requirements to exhaust administrative remedies. *See Commc'ns Workers of Am. v. Am. Tel. & Tel. Co.*, 40 F.3d 426, 433 (D.C.Cir. 1994).

Plaintiff's argument is not compelling. TMI fails to cite authority for the proposition that Commerce cannot overrule its own decision, once made. Plaintiff assumed that raising its contentions to Commerce would have been pointless, however it is not plainly obvious

that the Department would not have been amenable to TMI's deferral request claims. It is also inconsistent for Plaintiff to assert that invoking this issue before the Department would have been irrelevant to Commerce's final determination and then proceed to petition this Court to invalidate these same *Final Results*. The fact that Commerce was the agency that initiated TMI's administrative review supports addressing related arguments directly to the decision making body. Lastly, TMI deprived Commerce an opportunity to reconsider the matter and state the reasoning for its determination. *See Unemployment Comp. Comm'n of Alaska v. Aragon*, 329 U.S. 143, 155, 67 S.Ct. 245, 91 L.Ed. 136 (1946); *See also Gerber Food*, 601 F.Supp. 2d at 1379. The Department could have set forth its position in a detailed manner that would facilitate judicial review. As a result, the Court is placed in the position of expending judicial resources for a dispute that might have been resolved earlier.

It would not have been futile for Plaintiff to have raised its claim regarding deferral of administrative review to Commerce. Plaintiff did not exhaust its administrative remedies nor does an exception apply on these facts. In an antidumping case, where "'Congress has prescribed a clear, step by step process for a claimant to follow, . . . the failure to do so precludes [the claimant] from obtaining review of that issue in the Court of International Trade.'" *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT 627, 645, 342 F.Supp. 2d 1191, 1206 (2004) (*quoting JCM, Ltd. v. United States*, 210 F.3d 1357, 1359 (Fed. Cir. 2000)). Accordingly, the Court is precluded from substantively addressing TMI's claim that Commerce erroneously initiated administrative review.

B. Calculation of Normal Value

Ordinarily, normal value is the price at which the subject merchandise is sold in the exporting country. However, nations operating under non market economy ("NME") principles invalidate the Department's normal methodologies for price comparisons because of governmental control. *See Preliminary Results* at 32,553. Thus, Commerce constructs surrogate values from the factors of production that go into producing the merchandise and then extrapolates normal value from that information. *See* 19 U.S.C. §§ 1677b(c)(1)(B), (3); *Dorbest Ltd. v. United States*, 30 CIT 1671, 1678, 462 F.Supp. 2d 1262, 1268 (2006).

Valuation of the factors of production must be based "on the best available information" of values prevailing in a surrogate country that the Department finds is both economically comparable to the NME country in question and a significant producer of the merchan-

dise in question. *See* §§ 1677b(c)(1), (4); *See also Dorbest*, 30 CIT at 1675 ("[t]he term 'best available' is one of comparison, i.e., the statute requires Commerce to select, from the information before it, the best data for calculating an accurate dumping margin"). Commerce's regulations specify that it normally uses publicly available information. *See* § 351.408(c)(4). Beyond this preference, the Department's general practice is to consider the quality, specificity, and contemporaneity of the financial statement, as well as whether its overall experience is representative of the respondent's operation. *See* Dorbest, 30 CIT at 1716.

Since PRC was determined by Commerce to be a NME, the Department chose India as the surrogate country. *See Final Results* at 76,337. Thus, Commerce's task was to assess the "prices or costs" for the factors of production of pure magnesium in India in an attempt to construct a hypothetical market value of that product in the PRC. *See Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1377 78 (Fed. Cir. 1999).

1. Valuation of Dolomite

Commerce determined that it would base the surrogate values, in general, on contemporaneous import data from the World Trade Atlas® ("WTA").[7] *See Preliminary Results* at 32,554. Despite that decision, the Department concluded that the WTA was not the best available information to value dolomite, a raw material consumed in the production of the subject merchandise. This determination was based on its finding that "internationally traded dolomite is likely to be a different quality product than the dolomite used for magnesium production." Decision Mem. at cmt. 1. Specifically, Commerce concluded that "internationally traded dolomite is likely to be [a] high end high quality product."[8] *Id.* Accordingly, Commerce based the surrogate value on the average purchase price of dolomite reflected in the financial statements of two domestic Indian companies. *See id.*

Commerce reached its decision, in part, on the preceding administrative review's finding that the volume of dolomite imports is mi-

[7] The WTA is an online database tracking globally traded commodities. It enables users to determine the value of a specific product and identify countries that the product is being imported from or exported to using all levels of the HTS. *See* http://www.gtis.com/english/GTIS WTA.html (last visited Aug. 9, 2010).

[8] Commerce reasoned that (1) dolomite is generally a low-value high-bulk commodity, which does not normally lend itself to long transport; (2) dolomite that is traded internationally is likely to be in the high-end value-added range; (3) the WTA data set represents internationally traded dolomite values; therefore (4) the WTA primarily represents high-end, value-added dolomite; (5) TMI's dolomite is a high-bulk low-value commodity product; thus (6) the type of dolomite used by TMI is unlikely to be shipped internationally; and (7) the WTA data set is unlikely to be representative of TMI's dolomite. *See* Decision Mem. at cmt. 1.

nuscule compared to Indian domestic production, in addition to the finding that the WTA data represents a very small quantity compared to other values on record in that proceeding. *See Pure Magnesium from the People's Republic of China: Final Results of 2004 2005 Antidumping Duty Administrative Review*, 71 Fed. Reg. 61,019 (Dep't Commerce Oct. 17, 2006), Issues & Decision Memorandum at cmt. 1 ("*2004 2005 Review*"). USM asserts that the Department's reliance on the *2004 2005 Review* are misguided since circumstances of this review differ significantly. *See* USM's Br. at 22. First, Defendant Intervenor contends that there has been a substantial increase in trade volume. USM specifically points to the fact that dolomite imports during the *2004 2005 Review* were only 53 Metric Tons ("MT") whereas the volume of imports during the POR totaled 12,603 MT. *See id.* at 24, 26. This larger quantity of traded dolomite is more representative of all types of dolomite and suggests that the WTA may include some low value dolomite. *See id.* at 24 25, 28. Additionally, USM claims that this data undermines the Department's overall conclusion that dolomite is not frequently traded on the international market.

Commerce has an obligation to evaluate the relative accuracy of domestic and import data in valuing factors of production. *See Yantai Oriental Juice Co. v. United States*, 26 CIT 605, 617 (2002). Commerce specifically addressed USM's claims, stating that a "significant increase in the trade volume since the previous review period fail to rebut the conclusion that we again derive from the [evidence]." Decision Mem. at cmt. 1. Despite an increase in volume, Commerce reasonably determined that generally low import statistics of dolomite indicate that India's requirements are satisfied domestically. Moreover, the Department found TMI's dolomite consumption ratio to be approximately the same as during the *2004 2005 Review*, "indicating that TMI continued to use low value high bulk dolomite to produce pure magnesium." *Id.* These conclusions comport with court precedent establishing that using import data to value factors of production may not be reasonable when it is unlikely that the domestic industry would use imports and where domestic data is available. *Dorbest*, 30 CIT at 1688 89.

Defendant Intervenor attempts to utilize values from the Infodrive data on the record to corroborate the WTA and establish that it includes low value product. USM asserts that the dolomite, which TMI described as "crude uncalcined dolomite block," is classified under 2518.1000, HTS, as "dolomite not calcined or sintered." *See* USM's Br. at 24. According to USM, the Infodrive data further iden-

tifies 2518.1000 as "Dolomite Block(s)" or "Dolomite in Bulk," thus supporting the imports as consisting of crude, unprocessed dolomite. *See* USM's Br. at 25. Therefore, Defendant Intervenor infers, contrary to the Department's conclusion, that some of the dolomite shipped internationally in blocks or bulk are comprised of low value.

However, with regard to this argument, Commerce found that "Petitioner has not put forth any evidence to support its contention that dolomite shipped in 'bulk' or 'blocks' internationally are of high bulk, low value commodity product." Decision Mem. at cmt. 1. Although this Court has held that Infodrive India data can be "illuminating as to the nature of the product" being valued within a specific tariff subheading, Dorbest, 30 CIT at 1698, the Department specifically stated that:

> We examined the *Infodrive* data on the record and found that the *Infodrive* data only describes the physical characteristics of the imported dolomite as "dolomite in bulk" and "dolomite blocks", and there is no record evidence to conclude that dolomite shipped in "bulk" or "blocks" is a low value commodity. Thus, we are not pursuaded [sic] that the data from *Infodrive* establishes that the shipments in the WTA data are of low value commodity product.

Decision Mem. at cmt. 1. Therefore, Commerce found that USM's argument fell short of establishing the necessary link that dolomite shipped in bulk is a low value commodity, thus represented adequately by the WTA data. The weight that the Department should afford the Infodrive data is a factual question, which is most appropriate for the technical expertise of the Department. *See Dorbest*, 30 CIT at 1676. The Court defers to the determination of the Department as the "master of antidumping law." *Thai Pineapple Pub. Co. v. United States*, 187 F.3d 1362, 1365 (Fed. Cir. 1999).

Finally, USM asserts that the Department deviated from its general preference to use WTA data. *See* USM's Br. at 23. Defendant Intervenor seems to conclude that since the WTA import data generally satisfies Commerce's established preferences governing the selection of data sources, it follows that the Department prefers to use it, unless the WTA data is unreliable or distorted. *See id.* USM relies on *Dorbest*, in which the Department rejected WTA data as the best available information opting instead to use Monthly Statistics of Foreign Trade in India, which was publicly available, contemporaneous and had been used in previous investigations but also included all Indian imports. *Dorbest*, 30 CIT at 1687. USM interprets *Dorbest* as illustrating Commerce's preference in situations where it is faced

with a choice between using data that fails to capture all of the inputs used by the NME producer and between data that broadly comprises all of the producer's inputs but includes some inapplicable data, the Department will choose the overinclusive data. *See* USM's Br. at 23 (*citing Dorbest*, 30 CIT at 1687).

It may be true that Commerce's practice is to use WTA data when selecting among import data sources. However, when the Department has a choice between domestic data and import statistics, Commerce's preference is to use domestic data. *See generally Hebei Metals & Minerals Imp. & Exp. Corp. v. United States*, 29 CIT 288, 299, 366 F.Supp. 2d 1264, 1273 (2005) ("A domestic price is preferred for the calculation of surrogate values by prior practice, policy, and logic"); *Rhodia Inc. v. United States*, 25 CIT 1278, 1287, 185 F.Supp. 2d 1343, 1352 (2001) ("Commerce has a stated preference for the use of the domestic price over the import price, all else being equal"). Further, a mere preference can never overcome Commerce's paramount obligation under the statute to use the best available information to calculate dumping margins as accurately as possible. *See Rhone Poulenc, Inc. v. United States* , 899 F.2d 1185, 1191 (Fed. Cir. 1990). A surrogate value must be "as representative of the situation in the NME country as is feasible." *Nation Ford Chem. Co. v. United States*, 21 CIT 1371, 1375, 985 F.Supp. 133, 137 (1997).

Here, the Department attempted to capture TMI's experience by carefully considering the particular facts of the industry and made a reasoned determination that the WTA data did not represent the best information based on its conclusion that TMI's dolomite is not traded internationally. Commerce examined trade publications in order to determine the type of dolomite traded internationally; analyzed the prices paid by Indian producers for dolomite compared with the dolomite average unit value in the WTA data; employed Infodrive data at USM's request to further clarify the dolomite included in the WTA data set; and compared consumption levels for TMI from the prior period of review against the POR at issue. Additionally, the Department considered its prior precedent. None of this is contrary to any preference for WTA data by Commerce. The Court also notes that Defendant Intervenor complains of the Department's failure to use WTA data without affirmatively alleging that there are flaws in the domestic financial statement employed or demonstrating that the WTA data will provide a more accurate picture, comparatively speaking. Commerce persuasively rejected USM's contentions.

The Court's role is not to "evaluate whether the information Commerce used was the best available, but rather whether a reasonable mind could conclude that Commerce chose the best available infor-

mation." *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F.Supp. 2d 1323, 1326 (2006). As the finder of fact, the Department had discretion to choose between these data sets and its conclusion does not violate the boundaries set by section 1677b.

2. Valuation of TMI's Magnesium Byproduct

Commerce's practice is to offset the normal value calculation for a respondent whose manufacturing process generates a byproduct that it either sells or reuses in the production of the subject merchandise. *See* 19 C.F.R. § 351.401. The Department ultimately granted such a credit for Plaintiff's byproduct, classifying it under 8104.11, HTS, "Magnesium and articles thereof, including waste and scrap: Unwrought magnesium: Containing at least 99.8 percent by weight of magnesium."[9] *See Final Results* at 76,337; PR 121 at attach. 1; PR 122 at attach. I(i). USM challenges this classification, contending instead that TMI's production process generates a low value waste residue that is best classified under 2620.40, HTS, as "Slag, ash and residues (other than from the manufacture of iron or steel), containing arsenic, metals or their compounds: Containing mainly aluminum." Alternatively, USM submits that 8104.20 would have been a more appropriate choice than 8104.11.[10] *See* USM's Reply at 1 2. Subheading 8104.20, HTS, encompasses "Magnesium and articles thereof, including waste and scrap: Waste and scrap."[11] *See* PR 82 at attach. 1; PR 84 at attach. 1.

USM posits that different production methods of creating the subject merchandise generate scrap with differing levels of magnesium, consequently affecting their classification. *See* USM's Br. at 14. During the POR, TMI had [

]. *See* CR 6 at D2, D3. TMI's [

[9] "Unwrought" includes metal, whether or not refined, in the form of ingots, blocks and similar manufactured primary forms but does not cover rolled, cast or sintered forms which have been machined or processed otherwise than by simple trimming, scalping or descaling. *See* Section XV, Additional U.S. Note 1, HTS.

[10] Despite this Court unequivocally ruling on two occasions that Commerce intentionally valued TMI's magnesium byproduct under subheading 8104.11, HTS,USM insists that the Department made a ministerial error in the Final Results. *See* USM's Br. at 14 n.17; USM's Reply at 1 n.3. Based on this assumption, USM refers to 8104.20, HTS, as the classification that Commerce "intended to select for this factor." USM's Br. at 14 n.17. The Court again rejects this belabored argument and proceeds to determine whether the Department's valuation of TMI's magnesium byproduct under 8104.11 is in accordance with law and supported by substantial evidence.

[11] The HTS defines "waste and scrap" as the results of the "manufacture or mechanical working of metals, and metal goods definitely not usable as such because of breakage, cutting-up, wear or other reasons." Section XV, Note 8(a), HTS.

]. *See id.* at D 3, D 4, Ex. D1 A. [

]. *See* PR 34 at D 3. [
]. *See* CR 6 at D 3; D 4; Ex. D 1A. TMI's [
] *See* CR 6 at D 3, D 4, Exs. D1 B, D 11; CR 4 at 18. [ ]. *See* USM's Br. at 14 15; CR 6 at D 3; Ex. D 1B. [

]. *See* CR 12 at 16; CR 6 at D 3; Ex. D 1B. The parties here do not contest that [
]. *See* PR 122; Decision Mem. at cmt. 3.

The [ ] fail to support the Department's ultimate determination assigning the same HTS provision "regardless of whether the scrap constituted a purchased input or by product." PR 121 at 2 3. Commerce stated in its analysis memorandum of TMI for the Final Results that:

> In the Preliminary Results, we valued magnesium scrap using the Indian WTA data for HTS 8104[.]20. We valued magnesium scrap using HTS 8104[.]20 regardless of whether the scrap constituted a purchased input or by product. However, after the Preliminary Results, both Petitioner and TMI argued that HTS 8104[.]11, unwrought magnesium containing 99.8 percent magnesium, more closely reflects the type of magnesium scrap used in the production of pure magnesium. Thus, we valued magnesium scrap using this HTS number from the WTA for the [POR].

Id. (footnotes omitted). The Department thus determined as a factual matter that the value for TMI's [
].

USM claims that [ ] byproduct output is a sludge comprised of flux and impurities containing only about ten percent magnesium, unlike the [
]. In support of this assertion, USM submitted expert testimony in two affidavits. *See* PR 97 at Exs. 1 and 2. The first, Cameron Tissington, USM's Vice President of Sales and Marketing, explains the low market value for magnesium waste byproduct and the specific experience of magnesium producers from the PRC. According to Tissington, [

]. *See* PR 97 at Ex. 2. Tissington also concludes that the residue created during the pidgeon process has too low a value to be classified under magnesium waste and scrap. *See* PR 97 at Ex. 2. USM's other affidavit was by Dr. Ramaswami Neelameggham, Technical Development Scientist at USM and a professional metallurgist with over thirty years experience. Dr. Neelameggham does not consider the residue produced by the pidgeon process to be magnesium scrap, "as it contains too little magnesium." PR 97 at Ex. 1. Rather, "it is in the nature of a slag." *Id.*

USM proffers that 2620.40, HTS is the most appropriate subheading to classify TMI's magnesium byproduct. According to USM, the propriety of 2620.40, HTS, is supported by Commerce's consistent past finding that aluminum products are comparable to magnesium. *See* USM's Br. at 17. Record evidence establishes that Commerce considered and rejected Heading 2620 with respect to respondent Datuhe's magnesium byproduct, concluding that Heading 8104 was more exact. Commerce stated, in pertinent part:

> there is no record evidence which indicates that the values for aluminum residue, zinc ash, or brass dross are more specific to magnesium residue than HTS [8104.20.00] which covers "Magnesium Waste and Scrap." Unlike the values of aluminum residue, zinc ash and brass dross proposed as surrogate values, the value for "Magnesium Waste and Scrap" relates to magnesium and not to a different material.

Decision Mem. at cmt. 8.[12] Thus, the Department determined that the provisions relating directly to magnesium were generally more specific than those of Heading 2620 and accordingly were the best information available to value Datuhe's magnesium byproduct. USM contends that [

] to produce the subject merchandise, consume the same raw material inputs, and generate the same scrap byproducts. USM's Br. at 21 22; USM's Reply at 5 6. However, it is not clear, based on record information, that Datuhe and TMI's [

] used the same production process thus the Court cannot utilize the Department's reasoning.

Next, USM asserts that the Harmonized Commodity Description and Coding System Explanatory Notes ("ENs") precludes classification of TMI's magnesium byproduct under Heading 8104. *See* USM's Br. at 14 16. EN 81.04 specifically excludes "slag, ash and residues from the manufacture of magnesium (heading 26.20)." Defendant

[12] The Department erroneously referenced 8014.20.00 instead of HTS Subheading 8104.20.00.

Intervenor asserts that, as a matter of law, Commerce must credit "the unambiguous text of relevant explanatory notes absent persuasive reasons to disregard it" and accordingly classify TMI's magnesium byproduct under 2620.40. USM's Reply at 4.

In contrast to Customs classification cases where determining the proper classification is paramount, antidumping cases involve the HTS merely to approximate the cost of a factor of production. *See Dorbest*, 30 CIT at 1725. Further, it has been established that ENs are only persuasive and not binding authority. *See, e.g., Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994); *Michael Simon Design, Inc. v. United States*, 501 F.3d 1303, 1307 (Fed. Cir. 2007). On the other hand, it is well settled that "substantiality of evidence must take into account whatever in the record fairly detracts from its weight." *Hynix Semiconductor Inc. v. United States*, 29 CIT 995, 999, 391 F.Supp. 2d 1337, 1342 (2005) (internal quotation omitted). Commerce's analysis does not address USM's arguments regarding the ENs, yet an examination of the ENs accompanying the subheadings appear to support Defendant Intervenor's argument. Furthermore, such an analysis would buttress Commerce's statutory duty to use the best available information.

The antidumping statute does not prescribe a method for calculating byproduct offsets instead leaving the decision to the technical expertise of the Department. Commerce's goal is to "acquire an accurate reading of the actual costs of a company operating in a state controlled economy." *Tehnoimportexport v. United States*, 15 CIT 250, 254, 766 F.Supp. 1169, 1174 (1991). Thus, the Department is prevented from using information that may cause inaccuracies or distortions. In reviewing the record and arguments for both sides, the Court finds that the administrative record does not support such a high value for the magnesium byproduct at issue. For the Department, the decision not to differentiate between the magnesium input and byproduct was not reasonable because it did not first establish an adequate connection between them. The Department assumed, rather than demonstrated that the input and byproduct were identical. In the absence of such a finding, Commerce has no basis to conclude that Heading 8104 constituted the best available information on the record. This issue is accordingly remanded to the Department in order for it to further explain its reasoning. Commerce failed to adequately explain its decision to value the magnesium byproduct at issue here under HTS classification 8104.11, as unwrought magnesium containing at least 99.8% by weight. In light of the above analysis, the Court holds that Commerce's findings were not reached

by reasoned decision making supported by a stated connection between the facts found and the choice made.

3. Surrogate Financial Ratios

To capture indirect costs and recreate the full experience of the respondent, section 1677b(c)(1) directs Commerce to supplement the factors of production with "an amount for general expenses and profit plus . . . other expenses." The value that Commerce assigns to these indirect costs is known as the surrogate financial ratios, which, put simply, reflect a percentage of overhead; selling, general and administrative expenses ("SG&A"); and profit expenses. *See Dorbest*, 30 CIT at 1715 16 n.36.

Prior to the Preliminary Results, the parties submitted financial statements of four companies, including aluminum producers Madras Aluminum Co. Ltd. ("Malco"), Hindalco Industries Ltd. ("Hindalco"), National Aluminum Co. Ltd. ("Nalco"), and Sterlite Industries (India) Ltd. ("Sterlite"). *See* Preliminary Results at 32,555. Before the Final Results, an additional twelve were placed on the record, including Hindustan Zinc, Ltd., ("Hindustan"). *See* Decision Mem. at cmt. 6. Commerce evaluated all sixteen statements but ultimately determined that Malco's financial statement constituted the best available information upon which to base the financial ratios because it found that Malco is profitable, has contemporaneous data, does not use countervailable subsidy programs, and produces a comparable product. *See id.* at cmt. 6(B).

Commerce rejected the financial statement of zinc producer Hindustan although it has also previously held zinc to be comparable to magnesium.[13]However, this finding was not the sole support for the Department's conclusion since the Department "still would not use the [zinc financial statements] for [various] reasons." *See* Decision Mem. at cmt. 6(E). In the case of Hindustan, the Department disfavored the fact that its financial statement reported no raw material consumption. *See id.* USM counters that, logically speaking, it is impossible to produce primary zinc without consuming any raw materials and Hindustan's raw material costs are included within its reported mining expenses. This is because Hindustan mines, rather than purchases, the raw material inputs used in its manufacture of zinc. *See* USM's Br. at 35. Thus, according to USM, Hindustan's financial statement, read closely, does not contain the flaws alleged by Commerce.

[13] TMI agrees that Commerce correctly rejected Hindustan on the alternate ground that Hindustan is related to Sterlite, who receivedcountervailable subsidies. *See* TMI's Resp. at 25.

USM further contends that Commerce contradicts *Wuhan Bee Healthy Co. v. United States*, 31 CIT 1182 (2007), by eliminating Hindustan's financial statement while accepting Malco's. *See* USM's Reply at 12 13. In *Wuhan Bee Healthy*, a surrogate producer bought raw honey from members of its cooperative before processing and selling the product. Although zero was listed in the surrogate producer's financial statement, Commerce went beyond the reported line item to formulate a raw material cost. Defendant Intervenor finds Commerce's decision arbitrary because of the Department's willingness to construct a line item in *Wuhan Bee Healthy* yet was unwilling to do so for Hindustan. *See id.*

USM becomes more frustrated given Commerce's inconsistent treatment of integrated operations. Malco generates some of its own energy, which in turn caused its financial statement to reflect lower costs. USM asserts that nothing distinguishes Hindustan's mining of raw materials from Malco's report of energy generation: the financial statement of both companies reflect integrated operations. *See* USM's Br. at 36. As such, USM maintains that Commerce's elimination of Hindustan was discordant with Commerce's acceptance of Malco's financial statement.

The Court disagrees. The Department properly used its standard methodology to consider both the line item of raw material cost and integrated operations. Since Hindustan's financial statement "did not otherwise explain how it accounted for its direct material consumption," Commerce could not assess the "validity of its material consumption during the POR." Decision Mem. at cmt. 6(E). The fact that Hindustan mines, rather than purchases, raw materials does not fully explain why Hindustan listed zero *consumption*. It would be unreasonable for Commerce to construct a value for Hindustan's raw material consumption. Moreover, in direct contrast to Defendant Intervenor's assertion, the very cases that USM cite affirm the Department's practice to accept financial statement information on an "as is" basis. On its face, Hindustan's financial statement reported zero whereas Malco's statement contained a value, albeit a below market rate. "In situations in which a statute does not compel a single understanding . . . 'our duty is not to weigh the wisdom of, or to resolve any struggle between, competing views of the public interest, but rather to respect legitimate policy choices made by the agency in interpreting and applying the statute.'" *Lasko Metal Prods., Inc. v. United States*, 43 F.3d 1442, 1446 (Fed. Cir. 1994) (*citing Suramerica de Aleaciones Laminadas, C.A. v. United States*, 966 F.2d 660, 665 (Fed. Cir. 1992)). Commerce was consistent in its policy not to deconstruct financial statements.

However, the Court reaches a different conclusion with respect to the Department's analysis of the Malco financial statement. Malco's statement had just a nine month closing rather than the usual twelve month period. *See* USM's Br. at 30. USM asserts that using an abbreviated closing period is inherently unreliable and a full year of data would be most representative of a company's full production experience. *See* USM's Reply at 13 14. Defendant Intervenor cites to both agency rulings and Court decisions acknowledging a preference to use a full year of operations, which the Department subsequently counters by arguing that each case acknowledges Commerce's deviation from standard practice would be reasonable where the evidence compels such a determination.[14] *See* USM's Br. at 30 31; Def's Resp. at 25.

The sole exception of Commerce employing a financial statement covering less than a year involved the same nine month Malco statement at issue in this case. *See Magnesium Metal from the People's Republic of China: Final Results of Antidumping Duty Administrative Review*, 73 Fed. Reg. 40,293 (Dep't Commerce July 14, 2008). Otherwise, no other precedent demonstrates that a nine month period is adequate. Although the Department does not have an explicit preference to use a full year of financial statements, it has certainly been its practice. *See Furfuryl Alcohol*, 60 Fed. Reg. at 22,560 61 ("[T]he Department generally looks to a full year period in computing [SG&A expenses for costs of production and constructed value]"). Commerce must apply its criteria in a consistent and uniform manner, otherwise its selection could become arbitrary and capricious. *See Dorbest*, 30 CIT at 1716.

USM points to several indications of possible distortion in Malco's financial statement. First, Malco experiences erratic production levels throughout the year for its products. For example, Malco's aluminum ingot production was over four hundred percent greater than the prior twelve month period. *See* USM's Br. at 32. Further, Malco commissioned a dry scrubbing unit during the nine month period, causing a disruption in production operations that may have affected

[14] *See* Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From Thailand, 60 Fed. Reg. 22,557, 22,560 (Dep't Commerce May 8,1995) ("Furfuryl Alcohol") (the respondent failed to demonstrate why it should deviate from its normal practice of using annual financial data where the respondent attempted to report SG&A based on a six months instead of a twelvemonth period); *Bethlehem Steel Corp. v. United States*, 24 CIT 375, 383 (2000) (Commerce had discretion to use two years of financial statements where the POR covered substantially more than one year); Stainless Steel Sheet and Stripin Coils from Mexico; Final Results of Antidumping Duty Administrative Review, 74 Fed. Reg. 6,365 (Dep't Commerce Feb. 9, 2009), Issues & Decision Memorandumat cmt. 5 ("In certain instances, an unusual fact pattern may present itself where it may be appropriate to deviate from the Department's normal practice").

its profits. *See id.* at 33. Finally, the cost of raw materials tend to fluctuate, and many expenses, such as insurance and bonus payments, are incurred sporadically throughout the fiscal year. For example, the management salaries in Malco's truncated statement were only half of the amount incurred in the prior twelve month period. *See id.*

Commerce determined that the nine month closing remedied any irregularities because Malco made "year end adjustments," specifically intended to address such distortions. Commerce explicitly reasoned:

> [W]e disagree with Petitioner's argument that MALCO's financial statements are incomplete. According to the information on page 55 of MALCO's audited financial statements, MALCO changed its accounting year from July to June to April to March in fiscal year 2007 2008. Therefore, MALCO's 2006 2007 fiscal year included the nine month period of July 2006 to March 2007, after which MALCO had a nine month closing. As a result, these audited financial statements include all the appropriate year end adjustments even though they cover a nine month period. Therefore, we are satisfied that MALCO's financial statements are complete.

Decision Mem. at cmt. 6(B).[15] However, such "year end adjustments" do not sufficiently address distortions, nor do they account for events that occurred during the missing three month period. *See* USM's Reply at 13. USM asserts that "year end adjustments" are a means for accountants to identify and match revenues and expenses for the period incurred and to determine a company's assets and liabilities on a specific date. *See id.* Malco's financial statement itself, in the Notes on Accounts section, specifically states that, due to the nine month closing, "the figures are not comparable with those of the previous year." PR 64 at Ex. 10. Commerce "cannot use a surrogate value if it is also distorted, otherwise defeating the purpose of using a surrogate value rather than the actual export value." Goldlink Indus., 30 CIT at 629.

Commerce's conclusion that Malco's audited financial statement reflects all the appropriate year end adjustments is speculative. The

[15] Commerce cites Malco's financial statement to support this conclusion. *See* Decision Mem. at cmt. 6(B). However, the page Commerce refers to merely states the financial quarter results, publication dates andannual accounts, and states that "[Malco] has changed its accounting year from July-June to April-March from the financial year 2007–08 and hence for the present financial year 2006–07, the Company will have nine months' closing." PR 64 at Ex. 10.

Department makes a leap in logic of why adjusting the fiscal year dates from July to June and April to March, causing an abbreviated accounting year of nine months, *resulted in* the appropriate year end adjustments. A declaration that accounting year 2006 2007 was considered closed after nine months does not indicate that it was a representative sample of the sporadic costs that emerge during different times of a fiscal year. Nowhere does Commerce suggest that, for accounting purposes, a fiscal year can be less than a typical twelve month annual time period.

Considering Malco's allegedly flawed financial statements, Commerce's rejection of aluminum producers Nalco and Hindalco as surrogates is equally confounding to USM. *See* USM's Br. at 33 34. Commerce eliminated these financial statements due to its policy not to "rely on financial statements where there is evidence that the company received counter vailable subsidies" and there exists "other sufficient reliable and representative data on the record for purposes of calculating the surrogate financial ratios." Decision Mem. at cmt. 6(C). Although the Department has repeatedly held that financial statements of a company that is receiving subsidies does not constitute the best available information, when the circumstances warrant, Commerce has employed financial statements exhibiting receipt of subsidies. *See id.* In such situations, Commerce "must explain its determination that [the] financial ratios are not distorted by the subsidies it received." Goldlink Indus., 30 CIT at 629. The subsidization of the two producers was *de minimis* yet they were only afforded brief consideration because of Malco. *See* Oral Arg. Tr. at 31.

The Court acknowledges that its review is limited to sustaining Commerce if one could reasonably conclude that Commerce chose the best available information, even if the Court would have chosen other data. However, there is no clear indication that Malco's flawed financial statement is significantly better than the rejected surrogates. Commerce failed to meet its obligation to satisfactorily explain its decision. c Thus, based on the arguments provided here, a reasonable mind would be unable to conclude that the Department chose the best available information and that Commerce's decision was supported by substantial evidence. The Court remands this issue to Commerce to further explain its determination in detail. In light of this remand to Commerce regarding the surrogate financial statements used to derive the financial ratios, the Court reserves judgment regarding subsidiary aspects of Commerce's calculation of the financial ratios since the Department's re examination of the financial statements may affect this outcome.

C. Combination Rate

Since country wide cash deposit rates in NMEs can vary considerably from separate company rates, Commerce attempted to prevent circumvention of high cash deposit rates by firms diverting exports through intermediaries with lower rates. A combination rate involves specific pairs of exporters and producers in situations where a specific producer supplied the merchandise which was then exported by the firm in question during the POR. *See* 19 C.F.R. § 351.107(c). TMI was assessed a separate cash deposit rate of 0.63%, a significant difference from the country wide PRC rate of 108.26%. *See Final Results* at 76,337.

USM contends that Commerce should have assigned a combination cash deposit rate for these circumstances because [

], an action termed "funneling."[16] USM claims that [

] created the need for a combination cash deposit rate. *See* USM's Br. at 37.

Commerce generally refrains from issuing combination rates for administrative reviews. *See* Decision Mem. at cmt. 10. The preamble to the Department's regulations expresses that "if sales to the United States are made through an NME trading company, we assign a non combination rate to the trading company." *Id.* Further, the Department has discretion in administering combination rates. *See* § 351.107(b) ("the Secretary *may* establish a 'combination' cash deposit rate" (emphasis added)).

USM cites to *Final Results of Antidumping Duty Administrative Review: Certain In Shell Raw Pistachios From Iran*, 70 Fed. Reg. 7,470 (Dep't Commerce Feb. 14, 2005) ("*Pistachios From Iran*"), the sole example where Commerce issued a combination rate in an administrative review. However, Commerce explicitly distinguishes *Pistachios From Iran* and the facts of the case at bar. First, the exporter in *Pistachios From Iran* sold its product exclusively to the United States whereas no record evidence establishes that Plaintiff does so. *See* Decision Mem. at cmt. 10. Second, TMI "is a well established exporter that has participated in previous reviews" unlike the exporter in *Pistachios From Iran*, who, was participating in a new shipper review. *Id.* These departures were significant enough in the eyes of the Department to forego a combination rate.

[16] See CR 13 at Ex. 1 [ ].

USM submits that the Department's limited use of combination rates is arbitrary, since no clear rationale distinguishes Commerce's refusal to employ them during administrative reviews as opposed to new shipper reviews. *See* USM's Reply 14 15. However, Commerce has published a policy bulletin regarding combination rates in new shipper reviews, as well as one for combination rates in new antidumping investigations. *See* Policy Bulletin 03.2 (Dep't Commerce Mar. 4, 2003); Policy Bulletin 05.1 (Dep't Commerce Apr. 5, 2005). The Department's policy is paramount because no law has been established directly addressing the procedure for issuing combination rates or limiting the agency's power. Commerce has broad discretion to determine when and how to administer combination rates. *See US Magnesium, LLC v. United States*, 31 CIT 988, 992 (2007). We must defer to Commerce's interpretation "based upon the recognition that 'Commerce's special expertise in administering the antidumping law entitles its decisions to deference from the courts.'" *Allegheny Ludlum Corp. v. United States*, 27 CIT 1034, 1040, 276 F.Supp. 2d 1344, 1350 (2003) (*citing Ta Chen Stainless Steel Pipe Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002)).

USM requests a preemptive measure on the chance an antidumping violation will be committed, based solely on hearsay at this point in time. The only indication substantiating USM's argument is [

]. While it is clear that [

], no evidence of actual funneling exists on the record. Unfortunately for USM, the Court's review of Commerce's determination is limited to the record of the underlying proceeding. *See* §§ 1516a(a)(2)(B)(iii), (b)(2)(A).

The Court cannot force Commerce to alter its combination rate policy for administrative reviews. Even if the Department were to broaden its application of combination rates in the future, the matter remains solely in the discretion of Commerce. *See US Magnesium*, 31 CIT at 992; *see also Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 65, 124 S.Ct. 2373, 159 L.Ed. 2d 137 (2004) (holding that an agency can be compelled to act but a court cannot dictate what that action must be). The Court will not strong arm Commerce into rendering a premature decision, nor does it have the authority to declare agency policy.

In addition to its established practice of not administering combination rates, Commerce consistently applied its prior rulings as a benchmark to deem the combination rate unnecessary under these circumstances. *See* Decision Mem. at cmt. 10. Therefore, Commerce acted well within its authority. While particular circumstances may

create the need for a combination rate, this discretion is completely within the purview of Commerce and is evaluated on a case by case basis. *See Tung Mung Dev. Co. v. United States*, 26 CIT 969, 979, 219 F.Supp. 2d 1333, 1343 (2002).

The Court holds that Commerce acted within its authority when it did not issue a combination rate for TMI. USM has failed to prove that Commerce did not act in accordance with law and substantial evidence. Thus, the Court dismisses Defendant Intervenor's motion on this issue.

Conclusion

For the foregoing reasons, Commerce's final results of antidumping administrative review for pure magnesium from the PRC is affirmed in part and remanded in part.

Dated: August 9, 2010
New York, New York

/*s*/ *Nicholas Tsoucalas*
NICHOLAS TSOUCALAS
SENIOR JUDGE

Slip Op. 10–88

SHANDONG MACHINERY IMPORT & EXPORT COMPANY Plaintiff, v. UNITED STATES, Defendant, and AMES TRUE TEMPER and COUNCIL TOOL COMPANY, INC., Def.-Ints.

Before: Richard K. Eaton, Judge
Court No. 07–00355

[Department of Commerce's remand results remanded]

Dated: August 11, 2010

Hume & Associates LLC (*Robert T. Hume*) for plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*,Director; *Patricia M. McCarthy*, Assistant Director, Civil Division, Commercial Litigation Branch, United States Department of Justice (*Michael D. Panzera*); Office of Chief Counsel for Import Administration, United States Department of Commerce (*Shana Hofstetter*), of counsel, for defendant.

Wiley Rein LLP (*Timothy C. Brightbill* and *Maureen E. Thorson*), for defendant-intervenor Ames True Temper.

Kelley Drye & Warren (*Eric McClafferty* and *John M. Herrman II*), for defendant-intervenor Council Tool Company, Inc.

OPINION AND ORDER

Eaton, Judge:

Introduction

This matter is before the court after remand to the Department of Commerce ("Commerce" or the "Department"). *See* Final Results of Redeterm. Pursuant to Court Remand (Dep't of Commerce Jan. 7, 2010) ("Remand Results"). The Remand Results address the antidumping duty rate applied to hammers/sledges exported by plaintiff Shandong Machinery Import & Export Company ("SMC") in the fifteenth administrative review of antidumping duty orders covering heavy forged hand tools ("HFHTs") from the People's Republic of China ("PRC") for the period of review beginning on February 1, 2005, and ending on January 30, 2006 ("POR"). *See* HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 72 Fed. Reg. 51,787 (Dep't of Commerce Sept. 11, 2007) (final results) and the accompanying Issues and Decision Memorandum (Dep't of Commerce Sept. 4, 2007) ("Issues & Dec. Mem.") (collectively, "Final Results").[1]

In the Final Results, Commerce found that plaintiff failed to rebut the non-market economy ("NME") presumption of government control.[2] As a result, Commerce applied a country-wide antidumping duty rate ("PRC-wide rate") to SMC's exports. *See* Issues & Dec. Mem. at Comment 1; HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 72 Fed. Reg. 10,492 (Dep't of Commerce Mar. 8, 2007) ("Prelim. Results"). Commerce assigned, as the PRC-wide rate, using adverse facts available, 45.42 percent for hammers/sledges. Final Results, 72 Fed. Reg. at 51,787. In selecting a PRC-wide rate for hammers/sledges, Commerce used the 45.42

[1] United States imports of HFHTs are subject to individual antidumping duty orders covering separate categoriesof goods, including hammers/sledges. Final Results, 72 Fed.Reg. at 51,787.

[2] A non-market economy includes "any foreign country that the administering authority [Commerce] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise." 19 U.S.C. § 1677(18)(A) (2006); *Shandong Huarong Gen. Group Corp. v. United States*, 28 CIT 1624, 1625 n.1, Slip Op. 04–117 (2004) (not reported in the Federal Supplement).

"Any determination that a foreign country is a nonmarket economy country shall remain in effect until revoked by the administering authority." 19 U.S.C. § 1677(18)(C)(i) (2006). The PRC has been determined to be an NME country. The Department has treated the PRC as a non-market economy country in all past antidumping investigations. *Zhejiang Native Produce & Animal By-Products Imp. and Exp. Corp. v. United States*, 27 CIT 1827, 1834n.14, Slip Op. 03–151 (2003) (not reported in the Federal Supplement) (citations omitted).

percent rate calculated as the best information available ("BIA")[3] rate during a 1991 less than fair value ("LTFV") investigation of the China National Machinery Import & Export Corporation. *See* Issues & Dec. Mem. at Comment 3; HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 56 Fed. Reg. 241 (Dep't of Commerce Jan. 3, 1991) (final results).

Plaintiff SMC challenged the Final Results in this Court. *See Shandong Machinery Imp. & Exp. Co. v. United States*, 33 CIT __, Court No. 07–355, Slip Op. 09–64 (June 24, 2009) (not reported in the Federal Supplement) ("*Shandong I*"). In *Shandong I*, the court sustained the Department's findings that a) SMC was not entitled to a separate rate because it failed to demonstrate that it was not owned or controlled by the PRC; and b) adverse facts available ("AFA")[4] should be applied to the PRC-wide entity, including SMC.[5] However, the court remanded the rate assigned to hammers/sledges after finding that Commerce failed to corroborate the 45.42 percent rate because it was based on information that was not verified. *Shandong I*, 33 CIT at __, Slip Op. 09–64 at 19–20; *see* HFHTs, Finished or Unfinished, With or Without Handles, From the PRC, 56 Fed. Reg. at 241. The court found:

> Rather than using verified information, the Department used information submitted by the petitioner. Specifically, Commerce calculated an average of the margins contained in the petition for each class or kind of merchandise, as adjusted for calculation errors in the petition. Therefore, Commerce took no steps to corroborate the information during the LTFV investigation.

Shandong I, 33 CIT at __, Slip Op. 09–64 at 20 (citation omitted). Accordingly, the court found that the 45.42 percent rate was not reliable. *Id*. at ___, Slip Op. 09–64 at 20 ("Consequently, the 45.42 percent rate is not reliable, and the court directs Commerce, on remand, to assign a different rate to hammers/sledges that has been

[3] BIA is the predecessor to the use of adverse facts available. In the Statement of Administrative Action of the Uruguay Round Agreements Act of 1994, Pub. L. No. 103–465, 108 Stat. 4809 (1994), Congress explained that the Uruguay Round amended the prior law, which "mandate[d] use of the best information available (commonly referred to as BIA) if a person refuse[d] or [was] unable to produce information in a timely manner or in the form required." H.R. Doc. No. 103–316 (1994) at 868, reprinted in 1994 U.S.C.C.A.N. 4040, 4198. *Shandong Huarong Mach. Co. v. United States,* 30 CIT 1269, 1282 n.9, 435 F. Supp.2d 1261, 1274 n.9 (2006).

[4] When periodically reviewing and reassessing antidumping duties for an uncooperative party, Commerce "may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available." 19 U.S.C. § 1677e(b).

[5] The *Shandong I* court also sustained the margins assigned to the other hand tools at issue.

corroborated according to its reliability and relevance to the country-wide entity as a whole.") (internal quotation omitted).

On January 7, 2010, Commerce issued its Remand Results. In the Remand Results, Commerce applied a new PRC-wide rate of 109.16 percent based on a single transaction margin from SMC's 2004–2005 administrative review, i.e., the fourteenth administrative review. *See* Remand Results at 11; Def.'s Resp. Comments Remand Determ. ("Def.'s Resp.") 3; *see also* Remand Results at 8 ("The Department next examined the transaction-specific rates of SMC from the most recent prior reviews, as SMC is part of the PRC-wide entity."). Plaintiff now challenges the Remand Results. *See* Pl.'s Comments Final Results Redeterm. Pursuant to Court Remand ("Pl.'s Comm."). Defendant-intervenors Ames True Temper and the Council Tool Company, Inc. support the Remand Results. *See* Ames True Temper's Comments Supp. Final Results Redeterm. Pursuant to Court Remand ("Ames' Comm."); Def.-Int. Council Tool Co.'s Comments Final Results Redeterm. Pursuant to Court Remand ("Council Tool's Comm.").

The court has jurisdiction pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006). For the following reasons, the court remands the rate for hammers/sledges to Commerce for further findings consistent with this opinion.

Standard of Review

When reviewing Commerce's final antidumping determinations, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law . . . ." 19 U.S.C. § 1516a(b)(1)(B)(i).

Discussion

I. Legal Framework

In seeking a PRC-wide rate based on AFA, the Department may use information derived from the petition, a final determination in the investigation, any prior administrative review, or any other information placed on the record. *See* 19 U.S.C. § 1677e(b); Statement of Admin. Action accompanying the Uruguay Round Agreements Act, H.R. Rep. 103–316 at 870, reprinted in 1994 U.S.C.C.A.N. 4040, 4199 (stating that secondary information is "information derived from the petition that gave rise to the investigation or review, the final determination concerning the subject merchandise, or any previous review under [19 U.S.C. § 1675] concerning the subject merchandise").

Where, as here, Commerce relies on secondary information such as calculated rates from previous reviews, rather than information obtained in the course of a current investigation or review, the Department must "to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c); *see* 19 C.F.R. § 351.308(d). To corroborate secondary information, Commerce must "examine whether the secondary information to be used has probative value." *See* 19 C.F.R. § 351.308(d). Probative value means that the rate must be both a) reliable and b) relevant. *See Ferro Union, Inc. v. United States*, 23 CIT 178, 202, 44 F. Supp. 2d 1310, 1333 (1999) ("*Ferro Union*").

II. Remand Results

On remand, Commerce first examined the weighted average rates calculated for hammers/sledges in preceding segments of this proceeding and found that the highest calculated rate was 34.56 percent. Def.'s Resp. 8 (citing Remand Results at 8). Commerce determined that this rate, which was a partial AFA rate for SMC, would be inappropriate as an AFA margin for the PRC-wide entity because assigning the 34.56 AFA rate "to the PRC-entity would also lead to the PRC-wide entity exporters, including SMC, obtaining a more favorable result by failing to cooperate than if they had cooperated fully." Remand Results at 7–8. Commerce thus turned to an examination of the transaction-specific antidumping margins of SMC's sales calculated from the fourteenth administrative review. Def.'s Resp. 8 (citing Remand Results at 8).

These transaction-specific margins ranged from zero to 348 percent. Def.'s Resp. 8 (citation omitted). Commerce first stated that these transaction-specific margins could be used to corroborate the 45.42 AFA rate applied in the Final Results,[6] but that, because the court had instructed it to select a "different" rate, Commerce selected 109.16 percent, SMC's "single transaction-specific margin calculated in the prior review that is closest to and exceeds the original 45.42 percent AFA rate." Remand Results at 9–10.

Commerce states that in choosing the 109.16 percent rate it has: (1) demonstrated that it was a calculated rate reflecting SMC's commercial activities from the prior year's administrative review; (2) explained that the rate is based on verified information from the same company; (3) determined that "the rate has not been found either

[6] Specifically, Commerce states: "Since more than 98 percent of the positive individual transaction margins from the *2004–2005 Final Results* are higher than 45.42 percent, using individual transaction margins from the *2004–2005 Final Results* provides a sufficient basis to find the 45.42 percent rate has probative value and, thus, is corroborated within the meaning of the statute." Remand Results at 9 (citation omitted).

unsupported by substantial evidence nor contrary to law by any court"; and (4) noted the data have not been challenged by any record evidence. Def.'s Resp. 9 (citing Remand Results at 10–11). While Commerce's efforts seemed designed to corroborate the rate as to SMC itself, the Department nonetheless found that the 109.16 percent rate was an appropriate AFA PRC-wide rate.

In response, plaintiff argues, *inter alia*, that the margin is not supported by substantial evidence or otherwise in accordance with law, and that the rate is punitive. *See* Pl.'s Comm. 9–14.

III. The Hammers/Sledges Rate Selected on Remand is Aberrational and Punitive

The court finds that the selected rate is aberrational and punitive.[7] The Federal Circuit teaches that an AFA rate must be "a reasonably accurate estimate of the respondent's actual rate, albeit with some built-in increase intended as a deterrent to non-compliance." *F.LLI De Cecco Di Fillippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) ("*De Cecco*"). That the Department's new rate of 109.16 percent goes beyond the Federal Circuit's guidance can be seen from the Department's previous findings in this case. Specifically, Commerce determined in the Final Results that the 45.42 percent rate it chose was sufficient to ensure future compliance:

> The Department's practice when selecting an adverse rate from among the possible sources of information is to ensure that the margin is sufficiently adverse so "as to effectuate the purpose of the facts available role to induce respondents to provide the Department with complete and accurate information in a timely manner."

See Issues & Dec. Mem. at Comment 3 (citation omitted). If a rate of 45.42 percent has been found by Commerce to fulfill the goal of ensuring compliance, then a rate of over twice as much must necessarily be punitive. "[T]he purpose of [the statute governing adverse inferences] is to provide respondents with an incentive to cooperate, not to impose punitive, aberrational, or uncorroborated margins." *De Cecco*, 216 F.3d at 1032; *see Timken Co. v. United States*, 26 CIT 1072, 1076, 240 F. Supp. 2d 1228, 1234 (2002), *aff'd*, 354 F.3d 1334 (Fed. Cir. 2004)(in choosing a margin, Commerce must "appropriately balanc[e] th[e] goal of accuracy against the risk of creating a punitive

[7] Because the court finds the rate to be aberrational and punitive, and thus must be remanded, it need not address plaintiff's other arguments as to the inadequacies of the selected rate.

margin"); *Gallant Ocean (Thailand) Co., Ltd. v. United States*, 602 F. 3d 1319, 1324 (Fed. Cir. 2010).

Conclusion

The court therefore remands this matter to Commerce to determine a non-punitive PRC-wide rate for hammers/sledges. In its Remand Results, Commerce states that it is able to corroborate the 45.42 percent rate:

> the Department believes that had the Court permitted the Department another opportunity to corroborate the 45.42 percent [rate] we would have concluded that these individual transaction margins from the administrative review of SMC, covering the period February 1, 2004, through January 31, 2005, corroborate the 45.42 percent rate applied to the country-wide entity as a whole.

Remand Results at 8–9 (citation omitted). If Commerce is capable of corroborating the 45.42 percent rate, then it may endeavor to do so on remand. The Department shall be mindful, however, that whatever rate it finds must be in accord with its previous finding that the rate of 45.42 percent is sufficient to ensure compliance. Should the Department wish, it may reopen the record and calculate an AFA rate to be applied to the PRC-wide entity for sales of hammers/sledges, with an additional amount to deter future non-compliance.

The remand results shall be due on December 10, 2010; comments to the remand results shall be due on January 31, 2011; and replies to such comments shall be due on February 22, 2011.

Dated: August 11, 2010
New York, New York

/*s*/ *Richard K.Eaton*
RICHARD K. EATON

Slip Op. 10–89

UNITED STATES OF AMERICA, Plaintiff, v. WILFRAN AGRICULTURAL INDUSTRIES, INC., Defendant.

Before: Gregory W. Carman, Judge
Court No. 07–00231

[*Service of process was proper and established jurisdiction over Defendant.*]

Dated: August 11, 2010

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Roger Allen Hipp*), for Plaintiff.

OPINION & ORDER

CARMAN, JUDGE:

Introduction

The government filed suit against Wilfran Agricultural Industries, Inc. ("Wilfran") seeking to recover penalties and duties for violation of section 592 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1592. (Doc. No. 4: First Amended Complaint ("Compl.") ¶ 1.) Proof of service was filed on October 31, 2007. (Doc. No. 7 ("Service Affidavit").) Wilfran did not answer the complaint, and the Clerk of Court entered Wilfran's default on February 12, 2008. (Doc. No. 22.) During the course of reviewing the government's subsequent motion for the entry of default judgment (Doc. No. 23), the Court found the record unclear as to whether process was properly served upon Wilfran.

Proper service of process being essential for the Court to exercise personal jurisdiction, the Court requested briefing of the issue. The government submitted a memorandum of law (Doc. No. 27 ("First Service Mem.")), accompanied by a sworn declaration by government counsel which supplemented the Service Affidavit with additional facts regarding service of process upon Wilfran ("Service Decl."). In response to a request by the Court for supplementary briefing, the government also submitted a supplemental memorandum of law. (Doc. No. 30 ("Suppl. Service Mem.").) Defendant did not answer the complaint or submit any papers.

Having reviewed the record and the law, the Court determines that Plaintiff's service of process upon Defendant was proper under USCIT Rule 4. The Court thus may properly exercise personal jurisdiction over Defendant.

Factual Background

I. *Service of Process*

In the Service Affidavit filed by Plaintiff's counsel on October 31, 2007, counsel indicated that, on October 26, 2007, "I personally delivered copies of the summons and first amended complaint" to the home of William W. Franks, who, "[a]ccording to records maintained by the Pennsylvania Department of State . . . is the president of Wilfran." (Service Affidavit at 1.) The facts surrounding the service of process, described in the Service Affidavit and elaborated upon in the Service Declaration, are as follows.

Counsel could not confirm the current validity of the home address of Mr. Franks or office address of Wilfran listed on the Pennsylvania Department of State Records, but was able to determine Mr. Franks's home and business addresses "[b]ased upon online searches." (Service Decl. at 1–2.) Counsel went to Mr. Franks's home address and left a copy of the summons and complaint with Mr. Franks's wife, Anne Franks, who identified herself and accepted the papers. (Service Affidavit at 1, Service Decl. at 2.) Counsel then "also personally delivered copies of the summons and complaint to Mr. Franks at his place of business," where "Mr. Franks refused to accept delivery." (Service Affidavit at 1.)

Counsel states that when he arrived at Mr. Franks's place of business, "I informed the employee who greeted me at the door that I had a personal delivery for William Franks." (Service Decl. at 2.) Counsel was then escorted to the desk of a man who identified himself as Mr. Franks. (*Id.*) Counsel states, "I identified myself and stated that I was serving the summons and first amended complaint upon Wilfran." (*Id.*) When counsel tried to hand a copy of the papers to Mr. Franks, Mr. Franks "refused to accept the papers." (*Id.*) Mr. Franks informed Plaintiff's counsel that "his wife had telephoned him to tell him that I had given her" copies of the papers, then "told me that he considered me to be trespassing, and that if I did not leave the premises immediately, he would telephone the police." (*Id.* at 2–3.) Plaintiff's counsel states, "I placed the papers in my briefcase and left the premises." (*Id.* at 3.)

On November 15, 2007, Mr. Franks, through counsel, filed a motion to intervene in this suit. (Doc. No. 8 ("Mot. to Intervene").) The motion noted that the government intended to satisfy any judgment obtained against Wilfran by filing a separate action to collect that judgment from Mr. Franks. (*Id.* at ¶ 3 (citing Doc. No. 6, Notice of Filing of Amended Complaint).) Mr. Franks argued that he would therefore face "potential liability should judgment be entered against Wilfran,"

which allegedly could not adequately represent Mr. Franks's interests because it has "no assets" and "discontinued its business operations in April 2000 and has been liquidated." (*Id.* at ¶¶ 4, 5.) Mr. Franks's counsel asserted that "Plaintiff filed its First Amended Complaint in this action on October 26, 2007, *and served it on Wilfran Agricultural on the same date*." (*Id.* ¶ 7 (emphasis added).) Counsel attached Mr. Franks's proposed "Answer to the First Amended Complaint" to the motion to intervene. (*Id.*, Attach. 6.) That answer asserted the affirmative defenses that Plaintiff's complaint failed to state a claim upon which relief could be granted and failed to name an indispensable party (Mr. Franks). (*Id.*, Attach. 6 at 2.) The motion was denied by order entered December 13, 2007. (Doc. No. 13.)

Mr. Franks thereafter filed a letter with the Court, dated January 27, 2008. (Doc. No. 19 ("Franks Letter").) Mr. Franks's letter (which was unsworn) stated, in relevant part:

> I will attempt to clarify Wilfran's position to defend or not to defend itself, and *to raise a related question involving [government counsel]'s inclusion of William W [sic]Franks on an amended complaint, as he accuses William Franks of "operating Wilfran as his 'alter ego' and [sic]severally liable to the US...."*
>
> ...
>
> Wilfran did not conduct business from William Franks' residence, *the address listed as Wilfran's "principal address" on the complaint*.
>
> ...
>
> Almost three years after the Treasury Department had concluded their [sic] investigation and removed William Franks from the matter, saying "no further action will be taken against him;"[1] and 8 years after Wilfran ceased to exist, [government counsel] *Roger Hipp arrived at the home of William and Anne Franks to serve suit against Wilfran. Several days later, Mr.Hipp sent a Notice of Filing through the US Postal Service, against William Franks as Wilfran's "alter ego" with Wilfran's "principal address" listed as William Franks' home.*

(*Id.* at 1–3 (emphasis added).)

[1] It is undisputed that Customs determined that Mr. Franks did not personally violate 19 U.S.C. § 1592, and informed him by letter that Customs would not pursue penalties against Mr. Franks personally. The letter from Customs, dated March 17, 2005, is attached to the Franks Letter. Although Mr. Franks was initially named as a Defendant in this suit, on October 26, 2010 Plaintiff amended its complaint to remove Mr. Franks as a defendant, and the Clerk of Court issued a new summons. Plaintiff's counsel purportedly served Mr. Franks that same day.

II. *Mr. Franks's Status as Corporate Officer*

On October 29, 2007, government counsel saved Wilfran's business entity record from the Pennsylvania Department of State website as a permanent document. (Service Decl. at 1.) That record lists Wilfran's status as active as of October 29, 2007, and provides a single corporate officer, "William W. Frank" [sic], listed with the title of "President." (*Id.*, Attach.)

In the Franks Letter, Mr. Franks stated that Wilfran "was closed eight years ago, in April or May of 2000. Acting on advice from [an attorney], Wilfran simply stopped doing business. [The attorney] advised that . . . Wilfran would cease to exist in approximately three years time." (Franks Letter at 1.) Attached to the Franks Letter was a copy of a declaration by Mr. Franks, dated December 1, 2003, in which he stated that he "was President of Wilfran . . . . [which] discontinued operations in April 2000 and has been liquidated." (Franks Letter, Attach. 2 at ¶¶ 1, 3.)

Discussion

The question here is whether Plaintiff's counsel succeeded in bringing Wilfran within this Court's jurisdiction by personally attempting to hand the summons and first amended complaint to Wilfran's president, who refused to accept the papers. Answering yes, the Court holds that the exercise of personal jurisdiction over Wilfran in order to consider Plaintiff's motion for entry of a default judgment is proper.

I. *Contentions of the Parties*

Plaintiff contends that its counsel satisfied the requirements of USCIT Rules 4(g)(1)(A) & 4(d)(1), as well as Pa. R. Civ. P. 424, when its counsel handed a copy of the papers to Mr. Franks, Wilfran's president, on October 26, 2007.[2] (Service Mem. at 2, Suppl. Service Mem. at 2, 3 n.1.) Plaintiff argues that Mr. Franks did not defeat service by refusing to accept the documents when government counsel attempted to hand them over. Plaintiff admits that it has located no Pennsylvania case directly on point. (Suppl. Service Mem. at 2.)

[2] Plaintiff admits that counsel's service of the summons and first amended complaint on Anne Franks at the Franks's home did not establish jurisdiction. (Suppl. Service Mem. at 3 ("we are not contending that service of process occurred when we delivered the papers to Mr. Franks's home and left them with his wife.")) This is consistent with the bar on substituted service in Pa. R. Civ. P. 424 (quoted *infra*) and the interpretation in a Pennsylvania court decision which has been accepted as the standard rule by a leading treatise on the Pennsylvania Rules of Civil Procedure. *Dunham v. Gen. World Sales & Serv., Inc.*, 87 Pa. D. & C. 605 (Pa. Ct. Comm. Pleas, Montgomery County 1953) (holding that service on corporate officer's wife at family home did not establish jurisdiction over corporation under materially equivalent prior Pennsylvania rule) (*cited in* 2 Goodrich Amram 2d § 424:3 (2010)).

While citing Pennsylvania cases that establish that an *individual* cannot defeat service by knowingly refusing to accept papers from a process server (Service Mem. at 2–4), Plaintiff could locate no Pennsylvania case explicitly extending that principle to service on a *corporation* (Suppl. Service Mem. at 2). Plaintiff asserts, however, that "[t]here is no reason to believe that Pennsylvania courts would depart from what appears to be a universal American rule that service is accomplished when the person to be served refuses personal delivery of process." (Suppl. Service Mem. at 2 (citing cases).)

Plaintiff also argues that the Franks Letter acknowledges that Mr. Franks received notice of service and that government counsel went to the Franks's home to serve the lawsuit, and, by discussing the case in detail, reveals that Wilfran received actual notice of the contents of the lawsuit. (Suppl. Service Mem. at 4–5.)

Defendant has not taken part in these proceedings, although all filings after the summons and complaint have been served upon the corporation's president pursuant to USCIT R. 5.

II. *Relevant Service Rules*

Proper service of the summons and complaint under the relevant procedural rules is required before a federal court may exercise personal jurisdiction over a defendant. *United States v. Ziegler Bolt & Parts Co.*, 111 F.3d 878, 880 (Fed. Cir. 1997) (citing *Omni Capital Int'l Ltd. v. Rudolf Wolff & Co.*, 484 U.S. 97, 104 (1987)). The USCIT Rules govern whether service is proper in a case before this Court, but the Court may also look to interpretations of analogous Federal Rules of Civil Procedure for guidance due to their similarity. *Id.* at 880 and footnote 1.

The USCIT Rules state, in relevant part, that the summons and complaint in an action may be served upon a corporation in a judicial district of the United States as follows:

> (A) in the manner prescribed by Rule 4(d)(1) for serving an individual or
>
> (B) by delivering a copy of the summons and the complaint to an officer, [or] a managing or general agent . . . .

USCIT R. 4(g)(1). The "manner . . . for serving an individual" referred to in USCIT R. 4(g)(1)(A) permits service by "following state law for serving a summons in an action brought in courts of general jurisdiction in the state where service is made[.]" USCIT R. 4(d)(1). The law of the forum of service here requires, in relevant part, service to be effected by "handing a copy to . . . an executive officer, partner or

trustee of the corporation," and bars service upon an adult at the recipient's abode ("[s]ubstituted service"). Pa. R. Civ. P. 424.[3]

III. *Service Was Proper Under USCIT Rule 4(g)(1)(B)*

A. Service of Process Was Proper Here

The effect of a corporate officer's refusal to accept service of the summons and complaint on behalf of a corporation under USCIT R. 4(g)(1)(B) appears to be a question of first impression in this Court.[4] Plaintiff has not identified, and the Court has not located, a prior CIT case in which a corporate officer refused to accept the summons and complaint during attempted service.

The Court holds that government counsel's actions, as described in the Service Decl. and Suppl. Service Decl., constituted proper service of process upon Wilfran under USCIT R. 4(g)(1)(B). Government counsel attempted to hand the summons to Mr. Franks, who had identified himself and who knew government counsel's purpose was to serve a lawsuit on Wilfran. In the face of Mr. Franks's refusal to accept the papers and threat to call the police if government counsel did not leave immediately, counsel need not have attempted to physically compel Mr. Franks's acceptance. *See Dai Nippon Printing Co., Ltd. v. Melrose Pub. Co., Inc.*, 113 F.R.D. 540, 544 (S.D.N.Y. 1986) (upholding service under Fed. R. Civ. P. 4 and N.Y. Civ. Prac. L. § 311 where the process server went to the address on defendant corporation's stationery and spoke to an officer who "was uncooperative and refused to accept what the process server had told him were 'legal papers for the corporation'" because "[t]he process server acted reasonably when she left the process on the receptionist's desk . . . and clearly attempted to comply with the law" and defendant could not "rely on technicalities" to defeat service.) The Court finds that, in the present circumstances, government counsel's actions satisfied USCIT

[3] Pennsylvania law appears not to require domestic corporations to designate an agent for service of process or to accept service via the Pennsylvania Department of State.

[4] Prior CIT decisions regarding service of process have resolved issues such as whether grounds exist to extend the time for service of process (*see United States v. Rodrigue*, 33 CIT ___, 645 F. Supp. 2d 1310 (2009) and *United States v. World Commodities Equip. Corp.*, 32 CIT ___, 2008 Ct. Intl. Trade LEXIS 31 (2008); whether service of process may be made upon a lawyer for the party where the lawyer is not authorized to accept service, and whether continued participation in the litigation waived the defendant's objection to that service (*see United States v. Ziegler Bolt and Parts Co.*, 19 CIT 507, 883 F. Supp. 740 (1995), *aff'd Zeigler*, 111 F.3d 878); and whether a New York corporation was properly served where the corporate officer who accepted service of process had purportedly ceased working for the corporation prior to service (*see United States v. W. Weber Co., Inc.*, 25 CIT 490, 146 F. Supp. 2d 910 (2001)).

R. 4(g)(1)(B), permitting service "by delivering a copy of the summons and the complaint to an officer" of the defendant corporation.

B. The Court Is Persuaded That No Other Concerns Militate Against Finding Valid Service of Process

1. *Due Process*

The Court does not believe that any constitutional Due Process issues were created when government counsel returned the service papers to his briefcase, rather than attempting to physically compel Mr. Franks to accept them. Due Process concerns might have arisen if government counsel's actions were insufficient to give Wilfran sufficient notice regarding the lawsuit—if, for example, government counsel had deprived Wilfran of actual knowledge of the contents of the lawsuit by failing to leave the papers on Mr. Franks's desk or the floor of his office.[5] Such is not the case here, however. Government counsel not only informed Mr. Franks of the nature of the suit as he served the papers, but Mr. Franks's detailed discussion of the contents of the first amended complaint in both his motion to intervene and in the Franks Letter makes plain that Wilfran received actual knowledge not only of the existence of the lawsuit, but also of the specific contents of the complaint.

2. *Mr. Franks's Role As President of Wilfran at the Time of Service*

Although the Court notes that neither Wilfran nor Mr. Franks have directly contested Mr. Franks's suitability as a recipient of process,[6] it is worth taking a moment to address Mr. Franks's unsworn assertions that Plaintiff's counsel did not attempt to serve him until "8 years after Wilfran ceased to exist." (Franks Letter at 3.) It might be inferred from this statement that Mr. Franks was not the president of Wilfran, and therefore was an improper subject for service upon Wilfran, in October 2007.

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[5] See, i.e., *Kmart Corp. v. County of Clay*, 711 N.W.2d 485, 489 (Minn. 2006) (contrasting plaintiffs's insufficient service by mere deposit of papers on the outside of the homes of the defendants with the proper service in *Nielsen v. Braland*, 119 N.W.2d 737 (1963) (where "defendant was in close proximity to the processor server, was touched with summons, and the summons was laid in a place easily accessible to him") and *Carlson v. Cohen*, 223 N.W.2d 810 (1974) (where plaintiff placed the papers "under the windshield wiper of a defendant's car as the defendant attempted to evade service in the driveway of her home")).

[6] To the contrary, Mr. Franks's counsel stated, in support of Mr. Franks's motion to intervene, that the government had served Wilfran on October 26, 2007—implying that Mr. Franks viewed the purported service of Wilfran on that date as valid. (Mot. to Intervene at ¶ 7.)

The Court rejects this notion because it accepts as reliable the sworn Service Affidavit of Plaintiff's counsel and the accompanying record of the Pennsylvania Department of State, indicating that Wilfran remained an active Pennsylvania corporation when counsel attempted to hand the summons and amended complaint to Mr. Franks in October 2007. (*See* Service Decl. Attach.) Mr. Franks's letter and declaration do not adequately refute the Service Affidavit and Department of State record; while Mr. Franks assumes that Wilfran ceased to exist as a result of having ceased operations, he provides no factual basis for that conclusion.

IV. ***Service of Process Under Pennsylvania Law***

While Plaintiff argued that service of process in this case was also proper under Pennsylvania law, Plaintiff conceded that it could find no Pennsylvania case directly addressing the precise issue of whether service is effective where a corporate officer refuses to accept personal delivery of the papers and the process server does not leave the papers in the corporate officer's immediate vicinity. The Court's own research has also failed to turn up any applicable Pennsylvania cases. The Court therefore declines to advance a novel interpretation of Pennsylvania law, and rests instead on the validity of service under the USCIT Rules. *See Baja Devs. LLC v. Loreto Partners*, 2010 WL 1758242 at *8 (D. Ariz. 2010) (declining to consider whether service complied with state law where personal service was made upon a corporate officer pursuant to Fed. R. Civ. P. 4(h)(1)(B), the Federal Rule of Civil Procedure parallel to USCIT R. 4(g)(1)(B)).

Conclusion

For the foregoing reasons, the Court holds that, under USCIT R. 4(g)(1)(B), Plaintiff properly served the summons and amended complaint upon Wilfran when government counsel attempted to deliver the papers to Mr. Franks at his workplace on October 26, 2007. It is therefore

ORDERED that the stay of Plaintiff's Motion for Default Judgment is vacated.

Dated: August 11, 2010
New York, NY

/s/ Gregory W. Carman
GREGORY W. CARMAN, JUDGE