Slip Op. 09–22

KYD, INC., Plaintiff, v. UNITED STATES, Defendant, and POLYETHYLENE RETAIL CARRIER BAG COMMITTEE, HILEX POLY CO., LLC, and SUPERBAG CORPORATION, Defendant-Intervenors.

Before: WALLACH, Judge
Court No.: 07–00456

PUBLIC VERSION

[Plaintiff's Motion for Judgment on the Agency Record is DENIED and the Agency's Determination is AFFIRMED.]

Dated: March 26, 2009

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King & Spalding LLP (*Joseph W. Dorn*, *Stephen A. Jones*, *Daniel L. Schneiderman*, and *Elizabeth E. Duall*) for Defendant-Intervenors Polyethylene Retail Carrier Bag Committee, Hilex Poly Co., LLC, and Superbag Corporation.

OPINION

Wallach, Judge:

I
INTRODUCTION

This action arises out of the administrative review of an antidumping duty order conducted by the United States Department of Commerce ("Commerce"). Plaintiff KYD, Inc. ("KYD") challenges two decisions made by Commerce during the course of the challenged review. First, KYD contends that Commerce erred when it selected King Pac Industrial Co., Ltd. ("King Pac") as a mandatory respondent. Second, KYD contends that Commerce erred when it assigned,

based on the application of adverse facts available,[1] a 122.88% assessment rate for importations by KYD, a domestic entity, from King Pac, an unrelated foreign producer of the subject merchandise.[2]

This court has jurisdiction pursuant to 28 U.S.C. § 1581(c). Because Commerce's decisions are supported by substantial evidence and otherwise in accordance with law, Commerce's determination in *Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review*, 72 Fed. Reg. 64,580 (November 16, 2007) ("*Final Results*") is affirmed.

II
BACKGROUND

Commerce entered an antidumping duty order on certain polyethylene retail carrier bags from Thailand in 2004. *Antidumping Duty Order: Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 48,204 (August 9, 2004) ("AD Order"). In 2006, Commerce published notice of the opportunity to request an administrative review of the AD Order for the period of review beginning August 1, 2005 and ending July 31, 2006. *Antidumping or Countervailing Duty Order, Finding or Suspended Investigation; Opportunity to Request Administrative Review*, 71 Fed. Reg. 43,441, 43,442 (August 1, 2006). In response to this notice, domestic interested parties, and Defendant-Intervenors in the instant action, the Polyethylene Retail Carrier Bag Committee, Hilex Poly Co., LLC, and Superbag Corporation (collectively, "Defendant-Intervenors"), requested administrative review of 17 producers and/or exporters of polyethylene retail carrier bags from Thailand. Letter from Stephen A. Jones, King & Spalding LLP, to Hon. Carlos Gutierrez, Secretary of Commerce, U.S. Department of Commerce (August 31, 2006), Public Record ("P.R.") 3, Defendant's Public Appendix, Tab 1.

In September 2006, Commerce undertook the administrative review for all 17 companies for which a review was requested. *Initiation of Antidumping and Countervailing Duty Administrative Reviews*, 71 Fed. Reg. 57,465, 57,466 (September 29, 2006). Commerce

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[1] The United States Department of Commerce ("Commerce") uses the term "adverse facts available" to refer to two separate procedures: (1) the use of "facts otherwise available" when information requested by Commerce is either unavailable or deficient, 19 U.S.C. § 1677e(a); and (2) the use of "adverse inferences" in selecting from the facts otherwise available when a party fails to cooperate by not acting to the best of its ability, 19 U.S.C. § 1677e(b). *Jinan Yipin Corp. v. United States*, 526 F. Supp. 2d 1347, 1353 n.7 (CIT 2008).

[2] Plaintiff KYD, Inc. ("KYD") does not challenge Commerce's decision to calculate King Pac Industrial Co., Ltd's ("King Pac") dumping margin on the basis of adverse facts available because it acknowledges that King Pac did not participate in the administrative review. Motion for Judgment on the Agency Record Submitted Pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade ("Plaintiff's Motion") at 12 n.3. Instead, KYD raises arguments with respect to the specific adverse facts available ("AFA") rate selected and applied.

requested that these companies provide information regarding the quantity and value of their sales to the United States during the applicable period of review. Memorandum from Laurie Parkhill, Office Director, to Thomas Schauer, Senior Import Trade Compliance Analyst, U.S. Department of Commerce, AD/CVD Operations, Office 5, Re: Polyethylene Retail Carrier Bags from Thailand – Respondent Selection (November 9, 2006), Confidential Record ("C.R.") 11, Defendant's Confidential Appendix, Tab 1 ("*Respondent Selection Memo*") at 1. After receiving responses from all 17 companies, Commerce determined that it did not have sufficient resources to complete an administrative review for each of the companies for which a review was requested. *Id.* at 1–3. Thereafter, Commerce selected as mandatory respondents the four companies that it determined represented the greatest possible export volume. *Id.* at 4–5.

King Pac was among the four mandatory respondents selected. *Id.* Commerce then sent an antidumping duty questionnaire to King Pac. Letter from Laurie Parkhill, Office Director, AD/CVD Enforcement, U.S. Department of Commerce, to James R. Simoes, Esq., Hunton & Williams (November 9, 2006), P.R. 31, Defendant's Public Appendix, Tab 5. Six weeks later, Commerce advised King Pac by letter that it had not received a response and offered to extend the deadline for submission of the requested information. Letter from Laurie Parkhill, Office Director, AD/CVD Enforcement, U.S. Department of Commerce, to Pattida Julasaksrisakul, King Pac Industrial Co., Ltd. (December 21, 2006), P.R. 46, Defendant's Public Appendix, Tab 6. In July 2007, Commerce placed in the Administrative Record for the challenged review a memorandum to the file incorporating two documents: (1) a memorandum dated January 16, 2004, explaining Commerce's determination to assign an 122.88% adverse facts available ("AFA") rate to Zippac Co., Ltd. ("Zippac") in the initial investigation[3]; and (2) a memorandum dated August 31, 2006, explaining its decision to assign that same AFA rate to King Pac in the first administrative review of the AD Order.[4] Memorandum from Hermes

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[3] Zippac Co., Ltd. ("Zippac") was assigned an AFA rate in the initial investigation because it failed to respond to Commerce's questionnaire. Memorandum from Richard Rimlinger, Program Manager, to Laurie Parkhill, Office Director, AD/CVD Enforcement 3, U.S. Department of Commerce (January 16, 2004), at 3, appended to Memorandum from Hermes Pinilla, International Trade Compliance Analyst, AD/CVD Operations, Office 5, U.S. Department of Commerce, to The File (July 2, 2007), C.R. 48, Defendant's Confidential Appendix, Tab 2, P.R. 98, Defendant's Public Appendix, Tab 7 (collectively, "*AFA Memo*"). Commerce determined that the 122.88% AFA rate assigned to Zippac was properly corroborated by source documentation from third parties. *Id.* This rate was ultimately applied to Zippac at the conclusion of the investigation. *Notice of Final Determination of Sales at Less than Fair Value: Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 34,122, 34,122–25 (June 18, 2004).

[4] After finding that King Pac "did not act to the best of its ability" during the first administrative review, Commerce preliminarily determined that the 122.88% AFA rate applied to Zippac in the initial investigation was relevant to King Pac because Zippac sold all of the

Pinilla, International Trade Compliance Analyst, AD/CVD Operations, Office 5, U.S. Department of Commerce, to The File, and attachments thereto (July 2, 2007), C.R. 48, Defendant's Confidential Appendix, Tab 2, P.R. 98, Defendant's Public Appendix, Tab 7 (collectively, "*AFA Memo*").

Subsequently, Commerce published the preliminary results of this second administrative review. *Polyethylene Retail Carrier Bags from Thailand: Preliminary Results of Antidumping Duty Administrative Review and Intent to Rescind in Part*, 72 Fed. Reg. 37,718 (July 11, 2007) ("*Preliminary Results*"). In the *Preliminary Results*, Commerce stated that it would assign an AFA rate to King Pac because it never responded to the antidumping questionnaire. *Id.* at 37,720. Commerce selected the rate of 122.88% which had been assigned to Zippac in the initial investigation and to King Pac after the first administrative review. *Id.* Commerce determined that the AFA rate remained both reliable and relevant. *Id.*

KYD filed a case brief challenging Commerce's selection of King Pac as a mandatory respondent as well as Commerce's corroboration, and ultimate imposition, of the AFA rate. Case Brief of KYD, Inc. before the U.S. Department of Commerce, Case No. A–549–821, Administrative Review of Polyethylene Retail Carrier Bags from Thailand for the period August 1, 2005 to July 31, 2006 (August 10, 2007), C.R. 49, Defendant's Confidential Appendix, Tab 3, P.R. 110, Defendant's Public Appendix, Tab 9 ("KYD Administrative Case Brief"). Commerce rejected KYD's arguments. *See* Memorandum from Stephen J. Claeys, Deputy Assistant Secretary for Import Administration, to David M. Spooner, Assistant Secretary for Import Administration, U.S. Department of Commerce, Re: Issues and Decision Memorandum for the Antidumping Duty Administrative Review of Polyethylene Retail Carrier Bags from Thailand for the Period of Review August 1, 2005, through July 31, 2006 (November 8, 2007), P.R. 122, Defendant's Public Appendix, Tab 11 ("*Final Decision Memo*") cmt. 1, at 2–4 (selection of mandatory respondents), and cmt. 2, at 3–7 (imposition of AFA rate). King Pac was assigned a final AFA rate of 122.88%. *Final Results*, 72 Fed. Reg. at 64,581.

III
STANDARD OF REVIEW

The court must uphold a determination by Commerce resulting from an administrative review of an antidumping duty order unless

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products it produced to King Pac for export sale and King Pac was Zippac's only customer. Memorandum from Richard Rimlinger, Program Manager, to Laurie Parkhill, Office Director, Office 5, AD/CVD Enforcement, U.S. Department of Commerce (August 31, 2006), at 5, 6–7, appended to *AFA Memo*. The final results of that review reflected Commerce's decision to assign a 122.88% AFA rate to King Pac. *Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review*, 72 Fed. Reg. 1,982, 1,983 (January 17, 2007). That decision was affirmed by the court in *Universal Polybag Co., Ltd. v. United States*, 577 F. Supp. 2d 1284, 1298–1301 (CIT 2008).

it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i); *Carpenter Tech. Corp. v. United States*, 510 F.3d 1370, 1373 (Fed. Cir. 2007).

The substantial evidence test "requires only that there be evidence that a reasonable mind might accept as adequate to support a conclusion." *Cleo Inc. v. United States*, 501 F.3d 1291, 1296 (Fed. Cir. 2007) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477, 71 S. Ct. 456, 95 L. Ed. 456 (1951)). While the court must consider contradictory evidence, "the substantial evidence test does not require that there be an absence of evidence detracting from the agency's conclusion, nor is there an absence of substantial evidence simply because the reviewing court would have reached a different conclusion based on the same record." *Id.* (citing *Universal Camera Corp.*, 340 U.S. at 487–88); *see also Am. Silicon Techs. v. United States*, 261 F.3d 1371, 1376 (Fed. Cir. 2001); *U.S. Steel Group v. United States*, 96 F.3d 1352, 1357 (Fed. Cir. 1996).

To determine whether Commerce's interpretation and application of the antidumping statute at issue "is in accordance with the law," the court must conduct the two-step analysis articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984). Under the first step of the *Chevron* analysis, the court must ascertain "whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Wheatland Tube Co. v. United States*, 495 F.3d 1355, 1359 (Fed. Cir. 2007) (citing *Chevron*, 467 U.S. at 842–43).

The court reaches the second step of the *Chevron* analysis only "if the statute is silent or ambiguous with respect to the specific issue." *Id.* (citing *Chevron*, 467 U.S. at 843). Under this second step, the court must evaluate whether Commerce's interpretation "is based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. The agency's construction need not be the only reasonable interpretation or even the most reasonable interpretation. *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450, 98 S. Ct. 2441, 57 L. Ed. 2d 337 (1978). The court must defer to Commerce's reasonable interpretation of a statute even if it might have adopted another interpretation if the question had first arisen in a judicial proceeding. *Id.* (citations omitted).

IV
DISCUSSION

KYD challenges Commerce's selection of King Pac as a mandatory respondent and Commerce's selection and application of the 122.88%

AFA rate to King Pac's entries of the subject merchandise.[5] These determinations are upheld. Commerce's selection of King Pac as a mandatory respondent in the challenged review is in accordance with the methodology outlined in the relevant statute, 19 U.S.C. § 1677f–1. Commerce's corroboration, and ultimate imposition, of the AFA rate is both in accordance with law and supported by substantial evidence.

A
Commerce's Selection Of Mandatory Respondents Is In Accordance With Law

KYD contends that Commerce's selection of mandatory respondents should have been limited, in the first instance, to those "foreign manufacturers that both requested a review and were the subject of a request for review by the domestic industry." *See* Motion for Judgment on the Agency Record Submitted Pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade ("Plaintiff's Motion") at 34. Moreover, KYD contends that because King Pac's dumping margin was previously calculated on the basis of adverse facts available, "if Commerce did not elect to go with the [four] respondents for which there was a consensus about review, Commerce should have selected the respondent with the [fifth] largest volume . . . if [it] deemed that the volume of sales without King Pa[c] would be insufficient." *Id.* at 36. This proposal would require Commerce to adopt a "crude quantity and value test" to assess whether the entity for which there was "consensus" about review was "comparable in size" to the entity for which there was no such "consensus." *Id.* at 36–37. KYD does not cite to any authority in support of either its proposed "consensus" methodology or its "crude quantity and value test" for mandatory respondent selection. *See id.* at 34–37. Neither of KYD's proposals is consistent with the methodology contemplated by the relevant statute.

Pursuant to 19 U.S.C. § 1677f–1(c), Commerce must calculate an individual margin for each known producer and exporter unless "it is not practicable" to do so "because of the large number of exporters or producers involved in the investigation or review." 19 U.S.C.

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[5] KYD asserts that certain determinations made by Commerce during the course of the administrative review "were not supported by substantial evidence on the agency record and were not otherwise in accordance with law." Plaintiff's Motion at 2. This is consistent with the standard of review set forth in 19 U.S.C. § 1516a(b)(1)(B)(i) and, as discussed in Section III, is the framework within which the court evaluates the challenged determinations. KYD's additional assertion that "Commerce acted in an arbitrary and capricious fashion and not in accordance with law when it calculated a 122.88% assessment rate for importations by KYD from King Pa[c] . . . based on the use of [a]dverse [f]acts [a]vailable," *id.*, is not consistent with the "substantial evidence" standard of review applicable here. In any event, the "arbitrary and capricious" standard is more deferential than the "substantial evidence" standard. *See Consol. Fibers, Inc. v. United States*, 535 F. Supp. 2d 1345, 1352–54 (CIT 2008) (citing *In re Gartside*, 203 F.3d 1305, 1312–13 (Fed. Cir. 2000)).

§ 1677f–1(c)(1)–(2); *see* Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103–316 ("SAA")[6] at 872 (1994), *reprinted in* 1994 U.S.C.C.A.N. 4040, 4200. If it is not practicable to calculate individual dumping margins for each producer and/or exporter, Commerce is authorized by statute to limit its examination to either a "statistically valid" sample of exporters/producers or to those "exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined." 19 U.S.C. § 1677f–1(c)(2)(A)–(B); SAA at 872, 1994 U.S.C.C.A.N. at 4200–01.

Here, Commerce determined that it had sufficient resources to review only four companies. *Respondent Selection Memo* at 3. Commerce then selected as mandatory respondents the four largest exporters/producers of polyethylene retail carrier bags from Thailand, which collectively accounted for more than 90 percent of total imports of the subject merchandise. *Id.* at 4. King Pac was one of the four entities selected, as it was among the four largest producers. *Final Decision Memo* cmt. 1, at 3. Commerce's methodology for selecting mandatory respondents was entirely in accordance with the methodology prescribed by the statute. It is irrelevant that King Pac did not request a review of itself. It is also irrelevant that Commerce applied adverse facts available when calculating King Pac's dumping margin in the previous administrative review.

B
Commerce's Selection And Imposition Of The AFA Rate Is Supported By Substantial Evidence and In Accordance With Law

KYD argues that the AFA rate selected by Commerce is inappropriate for three reasons. First, KYD argues that the AFA rate was not corroborated properly. To that end, KYD asserts that the AFA rate was neither corroborated by an independent source, as required by statute, Plaintiff's Motion at 12–17, nor shown to be reliable and relevant, *id.* at 17–22. Second, KYD argues that the AFA rate is "[u]nduly [p]unitive." *Id.* at 23 (emphasis omitted), 23–30. Third, KYD argues that because it is an "innocent importer," it should receive a different assessment rate for its imports of King Pac merchandise than the AFA rate assigned to King Pac. *Id.* at 30, 30–33.

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[6] The Uruguay Round Agreements Act was signed into law on December 8, 1994. The Act approved the new WTO Agreement, and the agreements annexed thereto, resulting from the Uruguay Round of multilateral trade negotiations conducted under the auspices of the General Agreement on Tariffs and Trade. 19 U.S.C. § 3511(a)(1). The Statement of Administrative Action approved by Congress to implement the Agreements is regarded as "an authoritative expression by the United States concerning the interpretation and application of the Uruguay Round Agreements and [the Uruguay Round Agreements] Act in any judicial proceeding in which a question arises concerning such interpretation or application." 19 U.S.C. § 3512(d).

1

Commerce Corroborated The AFA Rate With Independent Information And Properly Determined That It Was Both Reliable And Relevant

KYD's arguments regarding the propriety of Commerce's corroboration are predicated on the fact that the AFA rate selected was derived from the petition. Plaintiff's Motion at 12, 17. Information derived from the petition is characterized as "secondary information." SAA at 870, 1994 U.S.C.C.A.N. at 4199. When Commerce uses secondary information, it "shall, to the extent practicable, corroborate that information from independent sources that are reasonably at [its] disposal." 19 U.S.C. § 1677e(c). In order to corroborate secondary information, Commerce must find that "the secondary information to be used has probative value." SAA at 870, 1994 U.S.C.C.A.N. at 4199. Commerce evaluates whether secondary information has probative value by assessing its reliability and relevance. *Mittal Steel Galati S.A. v. United States*, 491 F. Supp. 2d 1273, 1278 (CIT 2007) (citing *Ball Bearings and Parts Thereof from France, Germany, Italy, Japan, Singapore, and the United Kingdom: Final Results of Antidumping Duty Administrative Reviews*, 70 Fed. Reg. 54,711, 54,712–13 (September 16, 2005)).

KYD contends that Commerce should not have used the petition rate to establish the AFA rate because it was "corroborated with the same information in the petition which formed the basis for the allegation in the petition." Plaintiff's Motion at 15. According to KYD, such an interpretation "render[s] the corroboration provisions of the statute a nullity," *id.* at 15, and does not comport with the definition of "independent sources" provided in the SAA, *id.* at 15–16 (quoting SAA at 870, 1994 U.S.C.C.A.N. at 4199). KYD characterizes the information used by Commerce to corroborate the petition rate as "more akin to the 'unverified allegation' discussed in the SAA as an exemplar of information which is not reliable." *Id.* at 16 (quoting SAA at 870, 1994 U.S.C.C.A.N. at 4199).

Commerce "corroborated the petition rate with import statistics, a price quotation for various sizes of polyethylene retail carrier bags . . . commonly produced in Thailand, and affidavits from company officials from different Thai producers of the like product." *Final Decision Memo* cmt. 2, at 5. Both the SAA and the applicable regulation specifically provide that independent sources used to corroborate secondary information *may include* published price lists, official import statistics, customs data, and information obtained from interested parties during a particular investigation. SAA at 870, 1994 U.S.C.C.A.N. at 4199; 19 C.F.R. § 351.308(d). Commerce correctly concluded that "[t]he fact that these source documents were included in the petition does not disqualify them as independent sources." *Final Decision Memo* cmt. 2, at 5; *see Universal Polybag Co. v. United States*, 577 F. Supp. 2d 1284, 1300 (CIT 2008).

KYD also argues that the petition rate was not corroborated by a showing of reliability and relevance. Plaintiff's Motion at 17–22. The reliability of an AFA rate is assessed by determining whether the rate was reliable when first used. *See Tianjin Mach. Imp. & Exp. Corp. v. United States*, Slip Op. 07–131, 2007 Ct. Int'l Trade LEXIS 137, at *44 (August 28, 2007). The relevance of an AFA rate is measured against "past practices in the industry in question." *D & L Supply Co. v. United States*, 113 F.3d 1220, 1223–24 (Fed. Cir. 1997); *Shanghai Taoen Int'l Trading Co. v. United States*, 29 CIT 189, 197, 360 F. Supp. 2d 1339, 1346 (2008). Commerce has, however, corroborated the AFA rate by showing that it is both reliable and relevant.

With respect to reliability, KYD contends that "Commerce should have re-examined the petition data and compared the prices and values with those that were verified in the original investigation to determine if the petition rate had been discredited." Plaintiff's Motion at 19. According to KYD, because the petition rate is "43 times higher than the final 'all others' rate [in the initial investigation] . . . it has been discredited . . . and therefore is not a reliable source for the purpose of AFA." *Id.* (emphasis omitted).

The petition rate has not been discredited. To the contrary, it has been affirmed by this court in the previous administrative review of the AD Order, specifically with respect to the imposition of an AFA rate to entries made by King Pac. *See Universal Polybag*, 577 F. Supp. 2d at 1300. Moreover, as discussed above, this court has reaffirmed its holding in *Universal Polybag* that the petition rate was corroborated by independent sources. These findings demonstrate the reliability of the petition rate.

With respect to relevance, KYD argues that, contrary to Commerce's stated position that no information has been presented in this review that calls into question the relevance of the petition rate, "the large gap between the petition rate (122.88%) and the dumping margin (0.80%–5.6%) calculated by Commerce for all the cooperative respondents in all segments of this proceeding does, by itself, call into question" its relevance. Plaintiff's Motion at 20 (citing *Final Decision Memo* cmt. 2, at 6). According to KYD, "[t]he sole corroboration for relevance performed by Commerce was an attempt to bootstrap on the prior review by citing to the memo analyzing the reasonableness of the AFA rate in that review, but without providing any analysis of the reasonableness of the AFA rate in this review." *Id.* at 20–21 (citing *Final Decision Memo* cmt. 2, at 6). KYD asserts that because "not a single margin found for any entity in this review was within 40% of the AFA rate . . . Commerce cannot use the petition rate as the AFA rate for King Pa[c] in this review, as it has not been corroborated, and in fact cannot be corroborated, for relevance." *Id.* at 22.

Contrary to KYD's assertion, the AFA rate has been corroborated for relevance. That same rate was applied to King Pac in the first administrative review of the AD Order. *Polyethylene Retail Carrier*

Bags from Thailand: Final Results of Antidumping Duty Administrative Review, 72 Fed. Reg. 1,982, 1,983 (January 17, 2007). Commerce's application of that rate was affirmed by this court in *Universal Polybag*, 577 F. Supp. 2d at 1300–01. The court found that Commerce's application of "the highest prior rate assigned to a company in the King Pac group . . . [was] appropriate because the company upon which the rate is based, Zippac, is closely related to King Pac, and because it is within the discretion of Commerce to resort to the highest prior rate in the assumption that it is an accurate reflection of the current margins." *Id.* at 1300 (citing *Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1190 (Fed. Cir. 1990), and *Shanghai Taoen*, 29 CIT at 197).

KYD's assertion that "[w]hile the AFA rate may have been 'reasonable' in [the] prior review, it does not necessarily follow that it is 'reasonable' in this review," Plaintiff's Motion at 21, contradicts judicial pronouncements endorsing Commerce's selection of the highest prior margin when a respondent does not cooperate. The Federal Circuit has recognized that "[i]n cases in which the respondent fails to provide Commerce with the most recent pricing data, it is within Commerce's discretion to presume that the highest prior margin reflects the current margins." *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1339 (Fed. Cir. 2002); *see also Rhone Poulenc*, 899 F.2d at 1190 (finding that the presumption in favor of the highest prior rate "reflects a common sense inference that the highest prior margin is the most probative evidence of current margins because, if it were not so, the importer, knowing of the rule, would have provided *current* information showing the margin to be less"); *Shanghai Taoen*, 29 CIT at 197. Indeed, the Federal Circuit has recognized that the purpose of using the highest prior rate is, in part, to "produce[ ] an antidumping duty rate that bears some relationship to past practices in the industry in question." *D & L Supply*, 113 F.3d at 1223.

Commerce appropriately determined, within that framework, that the AFA rate remains relevant in this review. Commerce determined, in the prelimary investigation, that the source documents "reflected commercial practices" in the polyethlyene retail carrier bag industry and that, therefore, they were relevant to those mandatory respondents that did not participate in the investigation. *Preliminary Results*, 72 Fed. Reg. at 37,720 (citing *Notice of Final Determination of Sales at Less than Fair Value: Polyethylene Retail Carrier Bags from Thailand*, 69 Fed. Reg. 34,122, 34,123–24 (June 18, 2004) ("LTFV Investigation")). Commerce thereafter determined that the AFA rate remains relevant to King Pac because it was not contested by any interested party in the initial LTFV Investigation and has not been judicially discredited. *Final Decision Memo* cmt. 2, at 6. In addition, Commerce noted that "King Pac elected not to cooperate at all in this review, providing no information to refute the relevance of the [AFA] rate" selected. *Id.* Based on these determinations, it was reasonable

for Commerce to "conclude that King Pac has not altered its past pricing practices and that its previous rate is reflective of its current pricing practices and, therefore, has relevance in this administrative review." *Id.* cmt. 2, at 7; *see Shanghai Taoen*, 29 CIT at 198–99.

2
The AFA Rate Is Not Unduly Punitive In Nature

KYD asserts that Commerce should not have used the petition rate as the AFA rate because it does not reflect an estimate of King Pac's dumping margin and is therefore "[u]nduly [p]unitive" in nature. Plaintiff's Motion at 23 (emphasis omitted). According to KYD, "if an AFA rate is selected, such rate must reasonably reflect the rate that would have applied had the party cooperated with a *reasonable* additional amount to deter non-compliance." *Id.* (citing *Shandong Huarong Gen. Group Corp. v. United States*, Slip Op. 07–4, 2007 Ct. Int'l Trade LEXIS 3 (January 9, 2007)). Moreover, according to KYD, the AFA rate applied "should reasonably reflect a company's dumping activity during the *period of review* and not simply represent dumping of the subject merchandise by some unrelated entity over an amorphous period of time." *Id.* (citing *PAM, S.p.A. v. United States*, 495 F. Supp. 2d 1360 (CIT 2007).

With respect to the first prong of the *Shandong* test, whether the starting point for the AFA rate selected was the rate that would have applied had the party cooperated, KYD asserts that the all-others rate of .95% calculated for those respondents not selected for review is "a perfect substitute" for the rate that would have been applied if King Pac had cooperated. Plaintiff's Motion at 24. There is no basis for this assertion, as King Pac was in a different position than those respondents not selected for review. King Pac refused to cooperate in this review despite the fact that Commerce had applied an AFA rate of 122.88% in the first administrative review. *See Preliminary Results*, 72 Fed. Reg. at 37,720. Thus, it was reasonable for Commerce to infer that King Pac's actual dumping margin would not have been less than 122.88% because, if that were the case, King Pac "would have produced current information showing the margin to be less." *Rhone Poulenc*, 899 F.2d at 1190. Moreover, Commerce correctly stated that applying the all-others rate to King Pac "would allow King Pac to benefit significantly from its failure to cooperate in the instant review, contrary to [statutory] intent . . . as described in the SAA." *Final Decision Memo* cmt. 2, at 7.

With respect to the second prong of the *Shandong* test, whether the amount by which the "starting point" rate is augmented to deter non-compliance is reasonable, KYD asserts that "any rate based on AFA . . . should . . . be a low multiple (two, maybe three times) of the rate assigned to the non-selected respondents." Plaintiff's Motion at 29. In addition to citing the multiple of 1.3 to 2.5 applied in *Shandong*, *id.* at 26, KYD cites the 1:1 ratio for punitive damages es-

tablished in *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 171 L. Ed. 2d 570 (2008), for this proposition, Plaintiff's Motion at 28. Those cases are inapposite. In *Shandong*, the plaintiffs had received their own calculated rates in previous reviews and the challenged AFA rate selected was higher than the plaintiffs' previous rates. *Shandong*, 2007 Ct. Int'l Trade LEXIS 3, at *16–17. In any event, this court has already determined that *Shandong* does not provide a numerical limit and that Commerce "is unfettered by absolute numerical limitations" when selecting an AFA rate. *Universal Polybag*, 577 F. Supp. 2d at 1301. This court has also previously determined that *Exxon* is not relevant in this context. *See PAM, S.p.A. v. United States*, Slip Op. 08–94, 2008 Ct. Int'l Trade LEXIS 91 (September 9, 2008).

3

KYD Is Not Entitled To An Assessment Rate For Its Entries Of King Pac Merchandise That Is Different From The Margin Assigned To King Pac

KYD argues that "[a]n increase of duties resulting from a deposit rate of 2.80% to a liquidation rate [of] 122.88%" on an "innocent U.S. importer" is "inherently penal in nature." Plaintiff's Motion at 31. According to KYD, because it is "clear that no finding has been made that KYD has not cooperated . . . no adverse inference should be drawn to KYD based on the misconduct of [King Pac,] an unrelated third party."[7] Plaintiff's Reply at 4. In support of this proposition, KYD cites to both the statutory language authorizing the imposition of adverse inferences, 19 U.S.C. § 1677e(b), and to the regulation governing the calculation of assessment rates, 19 C.F.R. § 351.212(b). *Id.* at 4–5.

Neither of these citations support KYD's proposition. KYD is correct that 19 U.S.C. § 1677e(b) provides Commerce with the discretion to apply adverse inferences against an interested party if it "finds that [the] party has failed to cooperate by not acting to the best of its ability," and that 19 C.F.R. § 351.212(b) qualifies its instructions for the calculation of assessment rates with the word "nor-

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[7] Defendant-Intervenors in this action, Polyethylene Retail Carrier Bag Committee, Hilex Poly Co., LLC, and Superbag Corporation (collectively, "Defendant-Intervenors"), persuasively argued at oral argument that because KYD did not raise this argument in the administrative proceedings below (and that, in fact, KYD did not raise this argument until it filed its reply brief), KYD failed to exhaust its administrative remedies with respect to this argument. *See* 28 U.S.C. § 2637(d) (stating that this court "shall, where appropriate, require the exhaustion of administrative remedies"). The Federal Circuit has affirmed that "the application of 'exhaustion principles in trade cases is subject to the discretion of the judge of the Court of International Trade.' " *Agro Dutch Indus. Ltd. v. United States*, 508 F.3d 1024, 1029 (Fed. Cir. 2007) (citation omitted). In this case, it is not necessary to address Defendant-Intervenors' objection in detail because KYD's argument fails as a matter of law.

mally." However, KYD overlooks the fact that importers are responsible to pay the antidumping duties to which they are subject, including any increases over the deposit made upon entry for estimated antidumping duties. *See* 19 U.S.C. § 1673g(b)(4); 19 U.S.C. § 1675(a)(2)(C); 19 C.F.R. § 141.1(b)(1). Moreover, the discretion afforded by the regulation in calculating the assessment rate is just that, discretion. KYD has not demonstrated that the regulation is unreasonable, nor that "the 'normal' method for calculating [the assessment rate] is inapplicable" here. *See* Plaintiff's Reply at 5.

V
CONCLUSION

For the above stated reasons, Plaintiff's Motion for Judgment on the Agency Record Submitted Pursuant to Rule 56.2 of the Rules of the U.S. Court of International Trade is DENIED and Commerce's determination in *Polyethylene Retail Carrier Bags from Thailand: Final Results of Antidumping Duty Administrative Review and Partial Rescission of Antidumping Duty Administrative Review*, 72 Fed. Reg. 64,580 (November 16, 2007) is AFFIRMED.

Slip Op. 09–24

BAGS ON THE NET CORP., *Plaintiff,* v. UNITED STATES, *Defendant*, and POLYETHYLENE RETAIL CARRIER BAG COMMITTEE, HILEX POLY CO., LLC, and SUPERBAG CORPORATION, *Defendant-Intervenors.*

Court No. 08–00332

[Motion to dismiss for lack of subject matter jurisdiction granted.]

Dated: March 31, 2009

Peter S. Herrick, P.A. (*Peter S. Herrick*), for Plaintiff.

Michael F. Hertz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (Antonia R. Soares); *Thomas M. Beline*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; for Defendant.

King & Spalding, LLP (*Stephen A. Jones* and *Daniel L. Schneiderman*), for Defendant-Intervenors.

OPINION

RIDGWAY, Judge:

In this action, plaintiff Bags on the Net Corp. ("BOTN") contests the U.S. Department of Commerce's determination that a specific model of polyethylene bag manufactured in the People's Republic of China ("PRC") – which BOTN imports – is within the scope of the 2004 antidumping order covering polyethylene retail carrier bags

from the PRC. *See* Polyethylene Retail Carrier Bags from the People's Republic of China – Final Scope Determination of the Request from Bags on the Net, Inv. No. A–570–886 (July 14, 2008) (P.R. Doc. No. 9) ("Final Scope Determination").[1]

Pending before the Court is the Government's Motion to Dismiss this action for want of subject matter jurisdiction. *See generally* Defendant's Memorandum in Support of its Motion to Dismiss ("Def.'s Brief"); Defendant's Reply Memorandum in Support of its Motion to Dismiss ("Def.'s Reply Brief"). According to the Government, the court lacks jurisdiction because BOTN filed its summons more than 75 days after Commerce mailed the Final Scope Determination to BOTN's designated counsel of record – well beyond the statutory thirty-day deadline for commencing the action. 19 U.S.C. § 1516a(a)(2)(A)(ii) (2006); 28 U.S.C. § 1581(c); 28 U.S.C. § 2636(c).[2] The Government argues that this action must therefore be dismissed. The Defendant-Intervenors – domestic producers of polyethylene retail carrier bags – support the Government's motion. *See generally* Defendant-Intervenors' Reply to Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss ("Def.-Ints.' Response Brief").

Plaintiff BOTN opposes the Government's motion and maintains that the statutory thirty-day period for commencing an action in this court was never triggered, because Commerce never sent the Final Scope Determination directly to BOTN and instead mailed a copy only to BOTN's counsel of record. *See generally* Plaintiff's Memorandum of Law in Opposition to Defendant's Motion to Dismiss ("Pl.'s Response Brief").

For the reasons set forth below, the court lacks subject matter jurisdiction under 28 U.S.C. § 1581(c). Accordingly, the Government's Motion to Dismiss is granted, and this action is dismissed.

I. *Background*

In August 2004, Commerce published an antidumping duty order covering polyethylene retail carrier bags from the People's Republic of China. *See* Antidumping Duty Order: Polyethylene Retail Carrier Bags From the People's Republic of China, 69 Fed. Reg. 48,201 (Aug. 9, 2004) ("Antidumping Order").[3] In late May 2008, BOTN, through

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[1] The administrative record filed in this matter consists entirely of public documents. Citations to the administrative record are noted as Public Record Document ("P.R. Doc.") No. ____.

[2] All statutory citations herein are to the 2006 edition of the United States Code.

[3] According to the Antidumping Order, the polyethylene retain carrier bags ("PRCBs") covered by the order "may be referred to as t-shirt sacks, merchandise bags, grocery bags, or checkout bags," and are described as "non-sealable sacks and bags with handles (including drawstrings), without zippers or integral extruded closures, with or without gussets, with or without printing, of polyethylene film" of specified thicknesses and dimensions. The Anti-

its counsel, sought a ruling from Commerce as to whether a particular model of bag – which BOTN identified as "HOLIDAYINN-8410" – is within the scope of the Antidumping Order. *See generally* Scope Ruling Request (May 29, 2008) (P.R. Doc. No. 1) ("Request for Scope Ruling"). The first sentence of the Request for Scope Ruling stated: "This law firm [*i.e.*, the law firm of "Peter S. Herrick, P.A."] is representing Bags on the Net ("BOTN") in [this] matter." *See* Request for Scope Ruling at 1. The Request for Scope Ruling was signed by Mr. Herrick personally, with Roy Leon, Esq. of the same law firm identified as "Of Counsel." *See* Request for Scope Ruling at 1, 5.

Attached as Exhibit A to BOTN's Request for Scope Ruling was a document captioned "Appointment and Authorization of Attorney." Signed by the president of BOTN, the Appointment and Authorization of Attorney expressly and unequivocally designated the law firm of Peter S. Herrick, P.A. as BOTN's counsel of record for purposes including BOTN's scope inquiry proceeding:

> Peter S. Herrick, P.A. is hereby appointed, and authorized to act, as attorney at law for [BOTN] with respect to matters before the United States Customs and Border Protection and Department of Commerce.

Request for Scope Ruling, Exh. A ("Appointment and Authorization of Attorney").

Upon receipt of BOTN's Request for Scope Ruling, together with the Appointment and Authorization of Attorney, Commerce added BOTN's designated counsel of record to the agency's public service list for the newly-initiated scope inquiry proceeding. *See* Def.'s Reply Brief, Attachment.[4] On at least three occasions during the pendency

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dumping Order further explains that "PRCBs are typically provided without any consumer packaging and free of charge by retail establishments, *e.g.*, grocery, drug, convenience, department, specialty retail, discount stores, and restaurants, to their customers to package and carry their purchased products." Antidumping Order, 69 Fed. Reg. at 48,202.

Expressly excluded from the scope of the Antidumping Order are "(1) polyethylene bags that are not printed with logos or store names and that are closeable with drawstrings made of polyethylene film and (2) polyethylene bags that are packed in consumer packaging with printing that refers to specific end-uses other than packaging and carrying merchandise from retail establishments, e.g., garbage bags, lawn bags, trash-can liners." Antidumping Order, 69 Fed. Reg. at 48,202.

[4] Commerce's regulations provide for the establishment and maintenance of a public service list for each segment of a proceeding. Pursuant to those regulations, "to be included on the public service list for a particular segment, each interested party must file a letter of appearance," which must, *inter alia*, identify "the name of the firm, if any, representing the interested party in this segment of the proceeding." 19 C.F.R. § 351.103(d)(1) (2008). Commerce's regulations further require that "[e]ach interested party that asks to be included on the public service list for a segment of a proceeding must designate a person to receive service of documents filed in that segment." 19 C.F.R. § 351.103(d)(2) (2008).

As discussed above, in conformance with Commerce's regulations, BOTN's Request for Scope Ruling was filed on the letterhead of the law firm of Peter S. Herrick, P.A., and expressly stated that "[t]his law firm is representing Bags on the Net ("BOTN") in the refer-

of the proceeding, Commerce communicated directly with BOTN's designated counsel of record concerning the Request for Scope Ruling. *See* Commerce Memorandum to File Regarding Telephone Conversation with Counsel for BOTN (June 5, 2008) (P.R. Doc. No. 3) (memorializing June 4, 2008 phone conversation with BOTN's counsel of record); Commerce Memorandum to File Regarding Telephone Conversation with Counsel for BOTN (June 12, 2008) (P.R. Doc. No. 4) (memorializing June 11, 2008 and June 12, 2008 phone conversations with BOTN's counsel of record).

By notice dated July 14, 2008, Commerce advised BOTN of the agency's Final Scope Determination, which concluded that the polyethylene bag in question is covered by the Antidumping Order. *See* Polyethylene Retail Carrier Bags from the People's Republic of China – Final Scope Determination of the Request from Bags on the Net, Inv. No. A–570–886 (July 14, 2008) (P.R. Doc. No. 9) ("Final Scope Determination").[5] The notice was sent by certified mail to BOTN's counsel of record, the law firm of Peter S. Herrick, P.A., in accordance with Commerce's regulations. *See* Certified Mail Delivery Receipt addressed to Roy Leon, Esq., of the law firm of Peter S. Herrick, P.A. (P.R. Doc. No. 11); 19 C.F.R. §§ 351.225(d) (2008).[6]

Several months later, BOTN's counsel of record sent a letter to Commerce. *See* Pl.'s Response Brief, Exh. A. In that letter, dated September 25, 2008, BOTN's counsel acknowledged receipt of the copy of the Final Scope Determination which Commerce had mailed to the law firm in mid-July 2008. However, the September 25, 2008 letter further stated that "Bags on the Net has not received its copy of the referenced Final Scope Ruling through the mail." *Id.* The letter "request[ed] that Commerce mail directly to Bags On the Net its copy of the . . . Final Scope Ruling dated July 14, 2008," and –

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enced matter [Scope Ruling Request – A–570–886, A–557–813, A–549–821]." *See* Request for Scope Ruling at 1. In addition, as discussed above, the Appointment and Authorization of Attorney, which accompanied BOTN's Request for Scope Ruling and was signed by BOTN's president, specifically designated the law firm of Peter S. Herrick, P.A. as BOTN's counsel of record for purposes of the scope inquiry proceeding. *See* Request for Scope Ruling, Exh. A.

[5] In its briefs, the Government states that Commerce mailed the Final Scope Determination to BOTN's counsel of record on July 14, 2008. *See* Def.'s Brief at 2, 4; Def.'s Reply Brief at 2; *see also* Def.-Ints.' Response Brief at 1. However, documentation in the administrative record appears to indicate that the agency's ruling actually was mailed the following day – on July 15, 2008. *See* Certified Mail Delivery Receipt addressed to Roy Leon, Esq., of the law firm of Peter S. Herrick, P.A. (P.R. Doc. No. 11). In fact, it is immaterial whether Commerce mailed the notice to BOTN's counsel of record on July 14, 2008 or on July 15, 2008. Both dates are indisputably much more than thirty days before September 29, 2008 – the date on which the summons and complaint in this matter were filed.

[6] Commerce's regulations require that the agency "notify all persons on the Department's scope service list . . . of the final ruling" in a scope inquiry proceeding. *See* 19 C.F.R. § 351.225(d) (2008). As detailed in note 4 above, as BOTN's counsel of record, the law firm of Peter S. Herrick, P.A. was "designate[d] . . . to receive service of documents filed" in the scope inquiry proceeding at issue here. *See* 19 C.F.R. § 351.103(d)(2) (2008).

"presum[ing]" that Commerce would mail a copy of the ruling to BOTN "no later than Friday, September 26, 2008" – stated that counsel for BOTN intended to "use this date [*i.e.*, September 26, 2008] to file [BOTN's] summons and complaint." *Id.*

On September 29, 2008, more than 75 days after Commerce's July 14, 2008 notice apprising BOTN's counsel of record of the agency's Final Scope Determination, BOTN's counsel filed a summons and complaint commencing this action to challenge Commerce's ruling. *See* Summons (filed Sept. 29, 2008); Complaint (filed Sept. 29, 2008).

II. *Standard of Review*

The existence of subject matter jurisdiction is a threshold inquiry. *See, e.g., Steel Co. v. Citizens For A Better Environment*, 523 U.S. 83, 94–95 (1998). Where – as here – subject matter jurisdiction is challenged pursuant to USCIT Rule 12(b)(1), " 'the burden rests on plaintiff to prove that jurisdiction exists.' " *Pentax Corp. v. Robison*, 125 F.3d 1457, 1462 (Fed. Cir. 1997), *modified in part*, 135 F.3d 760 (1998) (*quoting Lowa, Ltd. v. United States*, 5 CIT 81, 83, 561 F. Supp. 441, 443 (1983), *aff'd*, 724 F.2d 121 (Fed. Cir. 1984)); *see also McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936); *Norsk Hydro Canada, Inc. v. United States*, 472 F.3d 1347, 1355 (Fed. Cir. 2006) (citation omitted).

Moreover, where a waiver of sovereign immunity is at issue, the language of the statute must be strictly construed, and any ambiguities resolved in favor of immunity. *See United States v. Williams*, 514 U.S. 527, 531 (1995); *Blueport Co., LLC v. United States*, 533 F.3d 1374, 1378 (Fed. Cir. 2008) (" '[A] waiver of the Government's sovereign immunity will be strictly construed, in terms of its scope, in favor of the sovereign.' ") (*quoting Lane v. Pena*, 518 U.S. 187, 192 (1996)).

III. *Analysis*

The proper filing of a summons and complaint is a jurisdictional prerequisite for the commencement of an action before the Court of International Trade. *See NEC Corp. v. United States*, 806 F.2d 247, 248 (Fed. Cir. 1986); *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1311 (Fed. Cir. 1986). "A civil action contesting a reviewable determination listed in [19 U.S.C. § 1516a] is barred unless commenced in accordance with the rules of [this court] within the time specified. . . ." 28 U.S.C. § 2636(c). For purposes of this case, the "time specified" is found in 19 U.S.C. § 1516a, which states that, within thirty days after the date of mailing of, *inter alia*, a final scope determination (such as the determination at issue here)[7]:

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[7] The thirty-day period prescribed in 19 U.S.C. § 1516a(a)(2)(A)(ii) governs the filing of actions in this court challenging Commerce's final scope determinations – *i.e.*, Commerce's

> an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Court of International Trade by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

19 U.S.C. § 1516a(a)(2)(A)(ii). *See also Georgetown Steel Corp.*, 801 F.2d at 1311–12 (concluding that 19 U.S.C. § 1516a(a)(2)(A) is "plain and unambiguous," and that, because that provision of the statute "specifies the terms and conditions upon which the United States has waived its sovereign immunity in consenting to be sued in the Court of International Trade, those limitations must be strictly observed and are not subject to implied exceptions"); *Bond Street, Ltd. v. United States*, 31 CIT ___, ___, 521 F. Supp. 2d 1377, 1379 (2007) (same).

The Government contends that, to comply with 19 U.S.C. § 1516a(a)(2)(A), BOTN's counsel of record was required to file a summons no later than August 13, 2008 – thirty days after July 14, 2008 (the date on which the Government states that Commerce mailed the Final Scope Determination to BOTN's counsel). *See* Def.'s Brief at 4; Def.'s Reply Brief at 2.[8] According to the Government, because BOTN's summons and complaint were not filed until September 29, 2008 – more than 75 days after Commerce mailed the Final Scope Determination to counsel for BOTN – this action must be dismissed for want of jurisdiction. *See* Def.'s Brief at 4; Def.'s Reply Brief at 2.

BOTN implicitly (if not explicitly) concedes that Commerce mailed the Final Scope Determination to its counsel of record in mid-July 2008; and, to the extent that it is relevant, BOTN implicitly (if not explicitly) concedes that its counsel timely received that copy of the Final Scope Determination. Moreover, there is no claim here that BOTN's counsel of record failed to advise BOTN of the issuance of the Final Scope Determination in a timely fashion.

Instead, BOTN advances essentially two interrelated arguments: (1) that the company did not authorize the law firm of Peter S. Herrick, P.A. – its counsel of record in the scope inquiry proceeding – to accept "service of process" for BOTN, and (2) that Commerce was re-

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determinations "as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order" – such as the Final Scope Determination at issue in the present case. 19 U.S.C. § 1516a(a)(2)(B)(vi); 19 U.S.C. § 1516a(a)(2)(A)(ii).

[8] As discussed in note 5 above, documentation in the administrative record appears to indicate that Commerce actually mailed the Final Scope Determination to BOTN's counsel of record on July 15, 2008 (rather than July 14, 2008). But the one day difference is immaterial here. The result of the analysis is the same.

quired to mail the Final Scope Determination directly to BOTN, such that the agency's mailing of that determination to BOTN's designated counsel of record in the proceeding did not trigger the statutory thirty-day period for commencing this action by filing a summons. *See* Pl.'s Response Brief at 3–4. Both arguments verge on the frivolous.

It is beyond cavil that the law firm of Peter S. Herrick, P.A. served as BOTN's counsel of record in the scope inquiry proceeding before Commerce, just as the same firm entered its appearance and is acting as counsel for BOTN in the instant action. As detailed in section I above, the president of BOTN expressly and unequivocally designated the law firm of Peter S. Herrick, P.A. to serve as BOTN's counsel of record for purposes including the underlying scope inquiry proceeding at issue here. *See* Request for Scope Ruling, Exh. A. Further, the very first sentence of BOTN's Request for Scope Ruling read: "This law firm [*i.e.*, the law firm of "Peter S. Herrick, P.A."] is representing Bags on the Net ("BOTN") in [this] matter." *See* Request for Scope Ruling at 1. And, on at least three occasions during the pendency of the scope inquiry proceeding, Commerce communicated directly with BOTN's designated counsel of record concerning BOTN's Request for Scope Ruling. *See* Commerce Memorandum to File Regarding Telephone Conversation with Counsel for BOTN (June 5, 2008); Commerce Memorandum to File Regarding Telephone Conversation with Counsel for BOTN (June 12, 2008).

Moreover, whether or not BOTN authorized the law firm of Peter S. Herrick, P.A. to accept "service of process" for the company is of no moment here, because it is equally clear beyond cavil that Commerce's mailing of the Final Scope Determination to BOTN's counsel of record did not constitute "service of process." Commerce was required by regulation to "notify all persons on the Department's scope service list . . . of the final ruling" – an obligation which it discharged as to BOTN by mailing a copy of the agency's Final Scope Determination to BOTN's counsel of record, the law firm of Peter S. Herrick, P.A. *See* 19 C.F.R. § 351.225(d) (2008); *cf.* 19 U.S.C. § 1516a(a)(2)(A)(ii) (requiring summons to be filed within thirty days of "the date of mailing" of, *inter alia*, a final scope determination). Commerce was not called upon to engage in "service of process," which is a distinctive procedural concept concerning the commencement of legal proceedings before a court through the service of a summons and complaint. *See generally* Def.-Ints.' Brief at 2 (*citing* Black's Law Dictionary, 6th ed. (1990) at 1368; USCIT R. 4; F. R. Civ. P. 4).[9]

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[9] *See, e.g.*, 3D Moore's Federal Practice § 4.02[1] (Matthew Bender 3d ed. 2008) (discussing F. R. Civ. P. 4, and explaining: "Service of process is one method a court uses to obtain in personam (or 'personal') jurisdiction over a party or property. In personam jurisdiction is the power of a court over a defendant. This chapter discusses the means by which a court obtains personal jurisdiction over a defendant (that is, service of process). . . . A court may

In short, BOTN does not dispute that the company authorized and empowered the law firm of Peter S. Herrick, P.A. to serve as its counsel of record in the scope inquiry proceeding before Commerce. Nor does BOTN dispute that Commerce mailed a copy of the Final Scope Determination to the company's designated counsel of record in mid-July 2008, as required by the statute. Under the circumstances, BOTN's claim that it never authorized its counsel of record to accept "service of process" for the company simply has no bearing on the issue presented here.

BOTN fares no better on its second argument. Asserting that the court in *Bond Street* "recognized that the mailing of the final determination to the importer is required by statute," BOTN underscores the fact that Commerce here "never mailed the Final Scope Ruling to BOTN." *See* Pl.'s Response Brief at 3. In effect, BOTN contends that Commerce's mailing of the Final Scope Determination did not suffice to start the thirty-day clock for commencement of an action in this forum. Invoking *Bond Street*, BOTN thus argues that – if the court does lack jurisdiction here – "it is based on the entire matter being *premature* based on the government's failure to mail [BOTN] a copy of the Final Scope Ruling and not because [this action] was *untimely filed*." *See* Pl.'s Response Brief at 3–4 (emphases added).

But BOTN's argument perverts the facts and the holding of *Bond Street*. Contrary to BOTN's claims, *Bond Street* did not hold that Commerce is required to mail final determinations directly to parties (rather than to their counsel of record). Indeed, *Bond Street* had no occasion to so hold, because the final determination in that case in fact was sent to the party at issue (not to counsel) – since, unlike BOTN in the agency proceeding in this case, the party at issue in *Bond Street* was not represented by counsel at the agency level.[10]

Contrary to BOTN's claims, *Bond Street* focused not on *the entity* to which Commerce should send a final determination, but – rather – on *the means* by which such a determination should be sent. Specifically, the issue in *Bond Street* was whether the statutory thirty-day period for commencing an action in this court was triggered where Commerce sent the final determination by facsimile, rather than by mail, as the statute provides. *See Bond Street*, 31 CIT at ___, 521 F. Supp. 2d at 1378–79. The court there held that facsimile transmission of the agency's final determination was not

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formally establish personal jurisdiction over a defendant by effecting service of process pursuant to the provisions of Rule 4. Thus, if service of process is deemed defective, the issuing court has failed to obtain personal jurisdiction over defendant.") (footnotes omitted).

[10] Close review of the administrative record filed in *Bond Street* confirms that, throughout the underlying agency proceedings there, Bond Street's president signed and served all of the company's submissions, and all submissions served on Bond Street were served on the company's president. Bond Street was not represented by counsel at the administrative level. *See Bond Street, Ltd. v. United States*, No. 07–00226 (CIT Aug. 14, 2007) (Administrative Record filed).

equivalent to mailing the determination, and that – because the language of the statute "specifies that a party may seek judicial review of a scope determination '[w]ithin thirty days after the date of mailing of a determination' " – facsimile transmission does not suffice to trigger the thirty-day period for commencement of an action. *See Bond Street*, 31 CIT at ___, ___, 521 F. Supp. 2d at 1379, 1381 (*quoting* 19 U.S.C. § 1516a(a)(2)(A)(ii)). Because the thirty-day period was never triggered, the court in *Bond Street* concluded that the plaintiff's summons had been prematurely filed. *See Bond Street*, 31 CIT at ___, ___, 521 F. Supp. 2d at 1379, 1381. The court therefore dismissed the case for lack of jurisdiction, without prejudice to refiling. *See Bond Street*, 31 CIT at ___, ___, 521 F. Supp. 2d at 1379, 1381; *see generally* Def.'s Reply Brief at 5–6 (analyzing facts and holding of *Bond Street*).

In sum, BOTN has pointed to nothing in *Bond Street* to substantiate BOTN's claim that Commerce is obligated to mail a copy of a final scope determination to a party (rather than, or in addition to, that party's counsel of record). Nor can BOTN do so. *Bond Street* is fundamentally inapposite here. And BOTN cites no other authority to support its bald assertion that Commerce erred in not serving BOTN itself with a copy of the agency's Final Scope Determination.[11]

Alluding to BOTN's letter dated September 25, 2008, the Government accuses BOTN of seeking "to paper-over jurisdictional defects with self-serving correspondence sent [40-plus] days after BOTN should have filed its summons." *See* Def.'s Reply Brief at 5. However, BOTN cannot "unilaterally rewrite Commerce's regulations, much less expand this Court's jurisdiction, which, as a waiver of sovereign immunity, must be strictly construed." *See id.* (citation omitted).

Under 19 U.S.C. § 1516a(a)(2)(A)(ii), BOTN was required to file its summons within thirty days after Commerce's Final Scope Determination was mailed to BOTN's counsel of record in mid-July 2008. BOTN's failure to file its summons within that thirty-day window precludes it from bringing this action.

IV. *Conclusion*

For all the foregoing reasons, the Government's Motion to Dismiss must be granted, and this action dismissed for lack of subject matter jurisdiction.

A separate order will enter accordingly.

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[11] The Government goes so far as to assert that, with BOTN represented by counsel, "it would have been inappropriate for Commerce to mail the Final Scope Determination directly to BOTN." *See* Def.'s Reply Brief at 4 (*citing* 19 C.F.R. §§ 351.103(d)(1)–(2)). In light of the holding here, there is no need to reach that argument.

Slip Op. 09–25

Thomas J. Aquilino, Jr., Senior Judge

GEORGETOWN STEEL COMPANY, LLC *et al.*, Plaintiffs, v. UNITED STATES, Defendant.

Court No. 02–00739

AMENDED JUDGMENT

The court having entered judgment dismissing this action pursuant to its slip opinion 05–43, 29 CIT 373 (April 1, 2005); and the plaintiffs having interposed a motion for rehearing; and the court having granted that motion to the extent of vacation of the judgment of dismissal herein pending entry of final judgment in Court No. 01–00955, a related action then *sub nom. Co-Steel Raritan, Inc. et al. v. U.S. Int'l Trade Comm'n*; and the court in conjunction with the grant of plaintiffs' motion having issued slip opinions 07–7, 31 CIT ___ (Jan. 17, 2007), and 07–165, 31 CIT ___ (Nov. 8, 2007), remanding that related matter to the defendant International Trade Commission; and that defendant having filed the results of that remand, which have been affirmed by the court pursuant to its slip opinion 08–130, 32 CIT ___ (Nov. 25, 2008), *sub nom. Gerdau Ameristeel U.S. Inc. et al. v. U.S. Int'l Trade Comm'n*; and the intervenor-defendant Saarstahl AG in the above–encaptioned action having now interposed a motion for summary judgment pursuant to the court's slip opinion 05–43 herein and the final judgment of affirmance entered in Court No. 01–00955 pursuant to slip opinion 08–130; and neither the plaintiffs nor the defendant or other intervenor-defendants having interposed any opposition to that motion; Now therefore, after due deliberation, it is

ORDERED that the motion of intervenor-defendant Saarstahl AG for summary judgment be, and it hereby is, granted; and it is further

ORDERED, ADJUDGED and DECREED that the judgment of dismissal of this action on April 1, 2005 be, and it hereby is, reinstated.

SLIP OP. 09–26

CONTINENTAL TEVES, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 03–00782

JUDGMENT

For the reasons stated in the record of these proceedings on April 1, 2009, and in the simultaneously filed unpublished memorandum of record, plaintiff has failed to prove that the entries at issue were valued in an unlawful manner to any extent by the United States so that any refund could be ordered by the court on the entries before it.

For the reasons stated on the record of these proceedings on March 31, 2009, and in the simultaneously filed unpublished memorandum of record, defendant United States has failed to prove further duties are owed on any of the entries at issue.

Accordingly, neither party shall take anything on account of this action.

It is hereby ORDERED that judgment is entered for plaintiff on defendant's counterclaim.

It is further ORDERED that judgment is entered for defendant on plaintiff's claim.