Decisions of the United States Court of International Trade

(Slip Op. 02–41)

GEORGE E. WARREN CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 97–07–01156

[Plaintiff moved for summary judgment on its claim that it was entitled to drawback of Harbor Maintenance Taxes ("HMTs") and Environmental Taxes ("ETs") incurred in connection with entries of petroleum products. Defendant moved to dismiss the action for lack of subject matter jurisdiction arguing that this Court only has jurisdiction under 28 U.S.C. § 1581(a) where there has been a denial of a valid protest, and in this case Plaintiff did not have grounds to file its protest since it did not request drawback of the HMTs and ETs in its original drawback claim. In the alternative, Defendant argued that this action should be dismissed for failure to state a claim upon which relief may be granted because the United States Court of Appeals for the Federal Circuit held in *Texport v. United States,* 185 F.3d 1291 (1999), that the HMT is not eligible for drawback, and the reasoning in *Texport* should also bar drawback of the ET. *Held:* (1) The Court has jurisdiction because Plaintiff exhausted its administrative remedies and an actual controversy exists which is fit for judicial review; (2) Based on the Federal Circuit's conclusions in *Texport*, the HMT is not eligible for drawback; (3) The ET is not imposed in a discriminatory manner against imports, but is a generalized federal tax on petroleum products to provide trust funds to pay the cleanup costs for hazardous waste sites and oil spills; therefore it lacks the nexus to importation required for drawback. Plaintiff's motion for summary judgment is denied, and Defendant's alternative arguments are treated as a cross-motion for summary judgment and granted.]

(Decided April 30, 2002)

Coudert Brothers (Steven H. Becker and *Christopher E. Pey)* and *Galvin & Mlawski (John J. Galvin),* of counsel, for Plaintiff.

Robert D. McCallum, Jr., Assistant Attorney General, *David M. Cohen,* Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice *(Henry R. Felix),* and *Chi S. Choy,* Assistant Chief Counsel, United States Customs Service, of counsel, for Defendant.

OPINION

MUSGRAVE, *Judge:* Plaintiff George E. Warren Corporation ("Warren") brings this action pursuant to 28 U.S.C. § 1581(a) seeking draw-

back of Harbor Maintenance Taxes ("HMTs")[1] and Environmental Taxes ("ETs")[2] incurred in connection with entries of unleaded gasoline in December, 1995 and motor fuel blending stock in January, 1996. In May and June, 1996 Warren exported similar merchandise, and on July 15, 1996 it filed drawback claims with Defendant the United States Customs Service ("Customs") pursuant to 19 U.S.C. § 1313(p), which provides for drawback based on substitution of finished petroleum derivatives. On its drawback request forms, the only dollar amounts Warren specifically claimed were attributable to "Column 1"[3] customs duties. Customs liquidated the drawback claims on October 4, 1996 and granted in-full the amounts claimed by Warren. Subsequently, Warren filed a timely protest challenging Customs' failure to also grant drawback of the HMTs and ETs associated with the entries. The protest was denied by Customs on the ground that "[t]he Harbor Maintenance Tax (HMT) is an incidental expense incurred upon a vessel entering a harbor and, as such, is not refundable under drawback." Protest No. 5301–97–100054 at Section VI. Warren then filed the present action contesting the denial of its protest.

Presently before the Court are Customs' motion to dismiss and Warren's motion for summary judgment. Customs argues that this Court only has jurisdiction under 28 U.S.C. § 1581(a) where there has been a denial of a valid protest, and in this case Warren did not have grounds to file a protest since it did not request drawback of the HMTs and ETs in its original drawback claim. Alternatively, Defendant argues that this action should be dismissed for failure to state a claim upon which relief may be granted because the United States Court of Appeals for the Federal Circuit ("Federal Circuit") conclusively determined in *Texport v. United States*, 185 F.3d 1291 (1999), that the HMT is not eligible for drawback, and the Federal Circuit's reasoning in *Texport* should also bar drawback of the ET. Conversely, Warren argues that it is entitled to summary judgment because the Federal Circuit erred in its *Texport* decision, and both the HMT and ET should, as a matter of law, be eligible for drawback.

For the reasons which follow, the Court concludes that it has jurisdiction to decide the merits of this action. Because there is no issue of material fact and because Customs' alternative arguments address the substantive merits of Warren's complaint, the Court treats Customs' al-

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[1] The HMT is a tax on port use calculated at a rate of 0.125 percent of the value of the commercial cargo. It was enacted pursuant to the Water Resources Development Act of 1986, Pub. L. No. 99–662, Title XIV, § 1402, 100 Stat. 4266 (1986), and is codified at 26 U.S.C. § 4461.

[2] The ET was an excise tax on crude oil received at a United States refinery and petroleum products entered into the United States for consumption, use, or warehousing imposed pursuant to 26 U.S.C. § 4611. The tax rate was the sum of the Hazardous Substance Superfund financing rate, 9.7 cents a barrel, and the Oil Spill Liability Trust Fund financing rate, 5 cents a barrel. The Hazardous Substance Superfund tax was applicable during the period "after December 31, 1986 and before January 1, 1996" and the Oil Spill Liability Trust Fund tax was applicable during the period "after December 31, 1989 and before January 1, 1995." 26 U.S.C. §§ 4611(e)(1) and (f)(1). Recently, legislation was introduced to reinstate both taxes. *See* H.R. 4060, 107th Cong. (2d Sess. 2002).

[3] "Column 1 duties" are the duties imposed by the Harmonized Tariff Schedule of the United States ("HTSUS") based on the classification of the merchandise within the HTSUS. In this instance, the merchandise was classified under HTSUS 2710.00.15 as "unleaded gas motor fuel, other" or HTSUS 2710.00.18 as "motor fuel blending stock." The general Column 1 duty rate for both of these provisions is 52.5 cents a barrel.

ternative arguments as a cross-motion for summary judgment pursuant to CIT Rule 56(b). The Court holds that the Federal Circuit's decision in *Texport* is controlling on the issue of whether the HMT is eligible for drawback. Furthermore, the Court concludes that the ET lacks the requisite nexus with importation to make it eligible for drawback. Therefore, Warren's motion for summary judgment is denied and Customs' motion to dismiss is granted as a motion for summary judgment.

I. JURISDICTION

Title 28, section 1581(a) of the United States Code provides that the Court of International Trade "shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest." In this action, it is undisputed that Warren filed a timely protest regarding drawback of the HMTs and ETs in question and Customs denied that protest on its merits. However, Customs argues that there was no actual "refusal to pay" a claim for drawback for Warren to protest because Customs paid in-full the amounts claimed by Warren on its drawback forms, and the protest was the first time Warren requested drawback of the HMTs and ETs. Defendant's Corrected Memorandum in Support of its Motion to Dismiss ("Def.'s Br.") at 6. Customs asserts that Warren's protest was merely an attempt to recover more drawback than it had initially requested. *Id*. Customs concludes that "[w]ithout a *bona fide* refusal to pay, there is no case or controversy and no basis for a protest that would confer jurisdiction upon this tribunal." *Id*.

Warren argues that its claim for drawback of the HMTs and ETs was implicit in its original drawback claim filed under 19 U.S.C. § 1313(p). Plaintiff's Response to Defendant's Motion to Dismiss ("Pl.'s Response to Def.'s Mot. to Dismiss") at 3–5. Warren notes that under 19 U.S.C. § 1514[4] it "has the right to contest Customs' liquidation of its drawback entry, or its refusal to pay [a] claim for drawback, *including the legality of all orders and findings entering into the same*." Pl.'s Response to Def.'s Mot. to Dismiss at 3 (emphasis added). Thus Warren contends that "[i]mplicit in Customs' grant of drawback of Column 1 customs duties is its decision not to pay drawback of the taxes and fees associated with the imported merchandise identified to the drawback claim." *Id*. (footnote omitted).

Moreover, Warren notes that 19 U.S.C. § 1313(p)(4)(B) was amended by § 2420(d) of the Miscellaneous Trade and Technical Corrections Act of 1999, Pub. L. No. 106–36, 113 Stat. 127,178–79 (1999), and now provides that "[t]he amount of drawback payable under this subsection

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[4] 19 U.S.C. § 1514 provides that:

(a) Finality of decisions; return of papers

[D]ecisions of the Customs Service, including the legality of all orders and findings entering into the same, as to—

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(5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;

(6) the refusal to pay a claim for drawback;

* * * * * * *

shall be final and conclusive upon all persons * * * unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade * * *.

shall not exceed the amount of drawback that would be attributable to the article * * * had the claim qualified for drawback under subsection (j).” Subsection (j) of 19 U.S.C. § 1313 is broader than the unamended subsection (p) and specifically provides for drawback of duties, taxes, and fees paid on imported merchandise. The 1999 amendment was to have retroactive effect and provided importers six months to file drawback claims pursuant to the amended statute that would otherwise be barred by the three year statute of limitations. Pub. L. No. 106–36, § 2420(e), 113 Stat. 127, 179. Warren did not file another drawback claim, and it argues that it was not required to do so under the statute and had no reason to do so since Customs denied its first protest on its merits and the present action was already summonsed into this Court. *See* Plaintiff’s Supplemental Brief (“Pl.’s Supplemental Br.”) at 5–13.

The Court agrees with Warren. As a fundamental matter, this Court’s jurisdiction over actions contesting the denial of a protest applies to all such appeals:[5] whether the claim is valid or not is a matter of law for this Court to decide. *See Swisher International, Inc. v. United States*, 205 F.3d 1358, 1364 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1036 (2000). In this instance, the dispositive question is whether Warren could have or should have explicitly claimed amounts of HMT and ET for drawback as a prerequisite for bringing this action. Although the parties dispute whether the customs regulations in effect in 1996 permitted Warren to make an express claim for drawback of the HMTs and ETs on its drawback claim forms, they agree that the 1999 amendments retroactively provided the right to raise this claim. Nevertheless, Customs contends that Warren should have filed a second drawback claim expressly for the HMT and ET amounts during the six month “sunset” period provided by the 1999 amendment. Defendant’s Response to Plaintiff’s Supplemental Brief (“Def.’s Response to Pl.’s Supplemental Br.”) at 7. In light of the fact that Customs had already ruled on the merits of such a claim in denying Warren’s protest, filing a second drawback claim would have been futile. Therefore, contrary to Customs’ assertion, the Court finds that Warren has, in effect, exhausted its administrative remedies and concludes that this action presents an actual controversy fit for judicial review.

II. Standard of Review

Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CIT Rule 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

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[5] This Court views with considerable disapprobation the ongoing, unrelenting attacks by the Justice Department on the jurisdiction of the Court of International Trade and suggests that the administration of justice would be served better by diligent lawyering rather than by attempts to subvert the judicial review process.

III. Drawback of Harbor Maintenance Taxes

In *Texport v. United States*, 185 F.3d 1291 (1999), the Federal Circuit found that 19 U.S.C. § 1313(j)(2) provides for drawback where "(1) the charge is 'any duty, tax, or fee assessed under Federal law'; and (2) the charge is assessed 'because of * * * importation.'" 185 F.3d at 1296. Applying these two conditions to the HMT, the court held that:

> Condition (1) is plainly satisfied here, so the dispositive question is whether the HMT is assessed "because of * * * importation." 19 U.S.C. § 1313(j)(2). This language, we think, is best read as limiting the scope of the charges eligible for drawback to only those with a substantial nexus to the importation of merchandise. We thus read the "because of * * * importation" clause to require a nexus between the assessed charges and the act of importation, and therefore preclude the grant of drawback to a duty, tax, or fee that is assessed in a nondiscriminatory fashion against all shipments utilizing ports. * * *
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> The HMT is a generalized Federal charge for the use of certain harbors. *See* 26 U.S.C. § 4461. It is intended to be assessed independently of whether the "port use" is for imports, exports, or other shipments; a shipment unloaded in Savannah is charged the same HMT whether its origin is San Francisco or Singapore. *See, e.g.,* 19 C.F.R. § 24.24(b)(1) (listing ports where HMT is assessed). Thus, it does not have the necessary nexus to the importation of goods to qualify it for drawback under section 1313(j)(2).

Id. at 1296–97.

In the present action, Warren argues that "the *Texport* decision is incorrect as a matter of fact and law, constitutes *dicta* and is inapplicable to the claims at bar." Plaintiff's Memorandum in Support of its Motion for Summary Judgment ("Pl.'s Br.") at 16. First, Warren argues that, contrary to the Federal Circuit's conclusion, "the HMT is inextricably linked to the process of importation." *Id.* In support of this assertion, Warren cites the Federal Circuit's finding in *United States Shoe Corp. v. United States,* 114 F.3d 1564 (Fed. Cir. 1997), aff'd., 523 U.S. 360 (1998), that:

> In the absence of the export act of loading the goods, and in the absence of the exporter's documents required for that act, the HMT would not be owed and no amount could be determined because the HMT is incurred at the time of loading, 26 U.S.C. § 4461(c)(2)(A), and is based on the value of the goods as determined by the standard commercial export documentation, 26 U.S.C. § 4462(a)(5)(A).

Pl.'s Br. at 16–17 (quoting 114 F.3d 1575). Warren argues that it is inconsistent for the court to find that the HMT is imposed because of exportation, but not because of importation. *Id.* at 17. Therefore, Warren concludes that the *Texport* holding should not control in this action. *Id.*

Warren also argues that the Federal Circuit's reasoning in *Texport* is flawed because it incorrectly states that HMT on domestic shipments is the same as shipments from foreign countries. *Id.* Specifically, the court stated that "a shipment unloaded in Savannah is charged the same

HMT whether its origin is San Francisco or Singapore," 114 F.3d at 1297, but Warren notes that the HMT for the shipment from San Francisco would be calculated based on the "standard commercial documentation" whereas the HMT for the shipment from Singapore would be calculated based on Customs' appraised value of the merchandise. Pl.'s Br. at 17. Therefore, Warren concludes, "the amount of HMT paid can, and in most cases will, differ" and "[t]o the extent that [the Federal Circuit's] holding that the HMT is not imposed because of importation is based upon this erroneous analysis, it should be disregarded as *dicta*." *Id*. at 18.

Warren's final argument is that the HMT should be treated as a duty, rather than a tax or fee, for purposes of determining whether it is eligible for drawback, and that as a duty it satisfies the statutory requirements. *Id*. at 18–26. Title 26, section 4462(f)(1) of the United States Code provides that "[e]xcept to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] * * * as if such tax were a customs duty." Warren asserts that "none of the applicable regulations provide that the HMT should not be treated as a duty;" thus it should be treated as a duty for all administrative and enforcement purposes. Pl.'s Br. at 19. As previously noted, in *Texport* the Federal Circuit held that drawback was available under 19 U.S.C. § 1313(j)(2) where "(1) the charge is 'any duty, tax, or fee assessed under Federal law'; and (2) the charge is assessed 'because of * * * importation.'" 185 F.3d at 1296. Warren argues that the "because of * * * importation" requirement applies to taxes or fees, but not to duties, because duties, by their very nature, are imposed on imports. Pl.'s Br. at 25–26.

Warren also argues that drawback is an administrative and enforcement provision of the customs laws. In support of this proposition, Warren compares the language of 26 U.S.C. § 4462(f)(1), quoted *supra*, to 19 U.S.C. § 58c(g)(2), regarding the Merchandise Processing Fee ("MPF"), which states:

> Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations, *other than those laws and regulations relating to drawback,* shall apply with respect to any fee prescribed under subsection (a) of this section * * * as if such fee is a customs duty.

Pl.'s Br. at 21 (quoting 19 U.S.C. § 58c(g)(2) (emphasis added)). Warren highlights the fact that the language of the MPF statute parallels the language of the HMT statute except that the MPF statute excludes "those laws and regulations relating to drawback" from "the administrative and enforcement provisions of customs laws." Pl.'s Br. at 21–22. Thus Warren concludes that, in the absence of an express exclusion, drawback is an administrative and enforcement provision of the customs laws. *Id*. at 23. Warren also notes that in *International Business Machine Corp. v. United States,* 201 F.3d 1367 (Fed. Cir. 2000), the Federal Circuit held "that the phrase 'administrative and enforcement'

* * * should be read 'broadly.'" Plaintiff's Brief in Reply to Defendant's Opposition to Plaintiff's Motion for Summary Judgment ("Pl.'s Reply Br.") at 7 (citing 201 F.3d at 1372).

Although Warren's arguments are interesting and well briefed, the Federal Circuit's holding in *Texport* that the HMT is not subject to drawback is, nevertheless, controlling on this issue. With respect to Warren's first two arguments, namely, that the HMT should logically have a substantial nexus to importation if it has one to exportation, and that the Federal Circuit erred, as a matter of law, in stating that the HMT is calculated in the same manner for foreign and domestic shipments, the doctrine of *stare decisis* leads this Court to follow the precedent of the Federal Circuit. *See* 18 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 134.02[2] (3d ed. 1997) ("The duty to follow the binding decisions of a higher authority does not depend on the correctness of those decisions."). Furthermore, regarding the Federal Circuit's statement that a foreign and domestic shipment, otherwise identical, would be charged the exact same amount of HMT, this Court concludes that the Federal Circuit's chief point in that section of its opinion was merely that the HMT is assessed on both imports and domestic shipments, not that it would be calculated in the same manner.

Texport and the plain meaning of 19 U.S.C. § 1313(j) are also dispositive of Warren's argument that the HMT should be treated as a duty instead of a tax for drawback purposes. Whether the HMT is regarded as a duty or a tax for determining its eligibility for drawback, and whether or not drawback is an administrative or enforcement provision,[6] the plain language of the statute creating the right to drawback of duties, taxes and fees, 19 U.S.C. § 1313(j), requires that the duty, tax, or fee be "imposed under federal law because of its importation." In *Texport*, the Federal Circuit considered the mechanics of how the HMT is imposed and concluded that it does not have the requisite nexus with importation to qualify for drawback under § 1313(j).[7] 185 F.3d at 1297. More importantly, while 26 U.S.C. § 4462(f)(1) provides that the HMT should be treated *as if* it were duty for administration and enforcement purposes, the HMT remains, in essence, a tax. *See Citgo Petroleum Corporation v. United States,* 25 CIT ____, 104 F. Supp. 2d 106, 107–108 (2000).

IV. DRAWBACK OF ENVIRONMENTAL TAXES

Warren argues that it is entitled to drawback of the ETs incurred in connection with the subject entries because the ETs are imposed "because of * * * importation" as required by 19 U.S.C. § 1313(j) and have the specific "nexus with importation" required by *Texport* since they are imposed in a discriminatory manner against imports. Warren notes that 26 U.S.C. § 4611(a), provides that the taxes are imposed on "petroleum

[6] Because the Court finds that the "because of * * * importation" requirement of 19 U.S.C. § 1313(j) applies to duties as well as taxes and fees, the Court does not reach the issue of whether drawback is an administrative or enforcement provision.

[7] In 1998, Customs amended its regulations, and 19 C.F.R. § 191.3(b)(1) now states that the HMT is not subject to drawback. Since this regulation was promulgated after the present action was commenced, it does not apply in this instance.

products *entered into the United States for consumption, use, or warehousing.*" Pl.'s Br. at 12 (emphasis in brief). Warren argues that "the phrase 'entered into the United States' is synonymous with importation;" therefore the "because of * * * importation" requirement of 19 U.S.C. § 1313(j) is satisfied. *Id.* at 12–13. Moreover, Warren argues that the ETs discriminate against imports because they apply to imported "petroleum products," but only domestic "crude oil." Plaintiff's Collective Response to Defendant's Corrected Briefs at 6. Therefore, Warren concludes that the ETs are distinguishable from the HMT, because they are not "assessed in a nondiscriminatory fashion against all shipments." *Id*. (quoting *Texport*, 185 F.3d at 1296).

Contrary to Warren's assertions, Customs argues that the ET, like the HMT, is not imposed because of importation, but is instead a generalized charge "to finance trust funds responsible for paying the cleanup costs for hazardous waste sites and oil spills" that is imposed in a nondiscriminatory manner on both imported petroleum products and domestic crude oil. Defendant's Corrected Memorandum in Support of its Opposition to Plaintiff's Motion for Summary Judgment ("Def.'s Br. in Opp'n to Pl.'s Mot. for Summ. J.") at 10 (citing H.R. Rep. No. 96–1016, pt. 2, at 5 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6151, 6153, and H.R. Rep. No. 99–727, at 204–05 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3607, 3733–34.). Customs explains the nondiscriminatory application of the ETs, stating that:

> Pursuant to 26 U.S.C. § 4611(a) & (b), ETs are imposed on domestic crude oil received at U.S. refineries, on petroleum products imported into the United States, and on domestic crude oil used in the United States or exported, provided the tax had not been imposed previously. The term "crude oil" includes crude oil condensates and natural gasoline. 26 U.S.C. § 4612(a)(1). The term "petroleum product" includes crude oil. *Id.* § 4612(a)(3). The legislative history to these statutory provisions further explains that the oil subject to tax is "crude oil, including crude oil condensate and natural gasoline" and that "petroleum products" include crude oil, crude oil condensate, natural and refined gasoline, refined and residual oil, *and any other hydrocarbon product derived from crude oil or natural gasoline* * * *" H.R. Rep. No. 96–1016, pt 2, at 4 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6151 (emphasis added).
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> Thus, contrary to Warren's claim that the ET leaves domestic petroleum products untaxed, the legislature recognized that domestic petroleum products would be "derived from crude oil or natural gasoline" that were [*sic*] already separately taxed. This reading of the legislative intent is further consistent with 26 U.S.C. § 4612(b), which assures that taxes are imposed only once on any petroleum product. *See* H.R. Rep. No. 96–1016, pt 2, at 5.

Defendant's Reply to Plaintiff's Collective Response to Defendant's Corrected Briefs at 8–9. Customs also asserts that it "had no role in collecting or imposing [the] ET" and "[t]he only link between the ET and importation was the timing of when ET was incurred." Def.'s Br. in Opp'n to Pl.'s Mot. for Summ. J. at 10–11. Thus, Customs concludes that

the ETs have only a remote nexus to importation which does not satisfy the "because of * * * importation" requirement of 19 U.S.C. § 1313(j) as interpreted by *Texport*.

The Court finds that the ETs are not subject to drawback. As Customs' has explained, the ET is a generalized charge assessed against all petroleum products, which is imposed on domestic products prior to refinement and imported petroleum products regardless of their level of refinement at the time they are entered. Since the ET is imposed in a nondiscriminatory manner on both imported and domestic petroleum products, the Court concludes that, like the HMT, it does not have "the necessary nexus to importation to qualify it for drawback under [19 U.S.C. §] 1313(j)(2)." *Texport,* 185 F.3d 1297.

V. CONCLUSION

For the foregoing reasons, Warren's motion for summary judgment is denied and Customs' motion to dismiss is granted as a cross-motion for summary judgment. Judgment shall enter accordingly.

(Slip Op. 02–42)

HUAIYIN FOREIGN TRADE CORP. (30), WORLDWIDE LINK, INC., CAPTAIN CHARLIE SEAFOOD WHOLESALE CO., USA, BOSTON SEAFOOD PROCESSORS, INC., GMRI, INC., AND OCEAN DUKE CORP., PLAINTIFFS *v.* U.S. DEPARTMENT OF COMMERCE, DEFENDANT, AND CRAWFISH PROCESSORS ALLIANCE, LOUISIANA DEPARTMENT OF AGRICULTURE & FORESTRY AND BOB ODOM, COMMISSIONER, DEFENDANT-INTERVENORS

Court No. 00–05–00240

Foreign exporter Plaintiff Huaiyin Foreign Trade Corporation 30 ("Huaiyin 30") and domestic importers (collectively "Plaintiffs") brought action challenging United States Department of Commerce's ("Commerce") findings on review of antidumping duty order covering freshwater crawfish tail meat from the People's Republic of China exported by Plaintiff Huaiyin 30. Plaintiffs moved, pursuant to USCIT R. 56.2, for judgment upon the agency record arguing that Commerce: (1) violated statutory and regulatory procedures by failing to provide Plaintiffs with adequate notice of and an adequate opportunity to participate in the review investigation; and (2) by issuing its Clarification of Message, caused United States Customs Service ("Customs") improperly to increase Plaintiff Huaiyin 30's cash deposit rate and wrongly apply it retroactively to Plaintiff Huaiyin 30's entries of merchandise. In addition, Plaintiffs claimed that payment by the United States Government of antidumping duties to domestic industry pursuant to 19 U.S.C. § 1675c(a) ("Byrd Amendment") changed antidumping statute from one remedial in nature into a statute that imposed a penalty and, therefore, Plaintiffs were entitled to full due process rights including a review proceeding as provided in the Administrative Procedure Act. United States ("Government"), on behalf of Commerce, argued that Commerce: (1) provided Plaintiffs with adequate notice of and an adequate opportunity to participate in the review investigation; and (2) properly clarified to Customs that Plaintiff Huaiyin 30 was not entitled to cash deposit based on antidumping duty margin of 91.5 percent. Finally, Government claimed payment of antidumping duties to domestic industry did not transform

antidumping regime into one that imposed a penalty and, therefore, Plaintiffs were not entitled to full due process rights including a review proceeding as provided in Administrative Procedure Act. United States Court of International Trade, Eaton, J., held: (1) Commerce provided Plaintiffs with adequate notice of pendency of administrative review, and adequate opportunity to participate in such review; (2) Commerce properly clarified to Customs that Plaintiff Huaiyin 30 was not entitled to cash deposit based on antidumping duty margin of 91.5 percent; and (3) payment of antidumping duties to domestic industry in accordance with Byrd Amendment did not transform antidumping regime into one that imposed a penalty.

[Plaintiffs' motion denied; final determination of Commerce sustained.]

(Decided April 30, 2002)

Garvey, Schubert & Barer (William E. Perry and *John C. Kalitka)* for Plaintiffs Huaiyin Foreign Trade Corporation (30), Worldwide Link, Inc., Captain Charlie Seafood Wholesale Co., USA, Boston Seafood Processors, Inc., GMRI, Inc., and Ocean Duke Corporation.

Robert D. McCallum, Jr., Deputy Assistant Attorney General; *David M. Cohen,* Director, United States Department of Justice; *Velta A. Melnbrencis,* Assistant Director, United States Department of Justice, Civil Division, Commercial Litigation Branch.

Adduci, Mastriani & Schaumberg, L.L.P. (James Taylor, Jr. and *John C. Steinberger)* for Defendant-Intervenors Crawfish Processors Alliance, Louisiana Department of Agriculture & Forestry and Bob Odom, Commissioner.

OPINION

EATON, *Judge:* This matter is before the court on the motion of Huaiyin Foreign Trade Corporation 30 ("Huaiyin 30"), Worldwide Link, Inc., Captain Charlie Seafood Wholesale Co., USA, Boston Seafood Processors, Inc., GMRI, Inc., ("GMRI/Red Lobster") and Ocean Duke Corporation[1] (collectively "Plaintiffs") for judgment upon the agency record pursuant to USCIT R. 56.2. Plaintiffs challenge certain aspects of the first administrative review of the antidumping duty order covering imports of freshwater crawfish tail meat from the People's Republic of China ("PRC") for the period of March 26, 1997, through August 31, 1998. *See Freshwater Crawfish Tail Meat From the P.R.C.: Final Results of Administrative Antidumping Duty and New Shipper Reviews, and Final Rescission of New Shipper Review,* 65 Fed. Reg. 20,948 (Apr. 19, 2000) *("Final Results").* The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) and 19 U.S.C. § 1516a(a)(2)(i)(I). Where a party challenges the findings of an antidumping review, the court will 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). For the reasons set forth below, the court denies Plaintiffs' motion and the final determination of the United States Department of Commerce is sustained.

BACKGROUND

On September 20, 1996, the Crawfish Processors Alliance ("Petitioner"), on behalf of the domestic industry, filed a petition with the United States Department of Commerce ("Commerce") alleging that imports of

[1] As the domestic importers of the subject merchandise, Plaintiffs Worldwide Link, Inc., Captain Charlie Seafood Wholesale Co., USA, Boston Seafood Processors, Inc., GMRI/Red Lobster and Ocean Duke Corporation are "interested parties" within the meaning of 19 U.S.C. § 1677(9).

freshwater crawfish tail meat from the PRC were being sold, or were likely to be sold, in the United States at less than fair value. *See Freshwater Crawfish Tail Meat From the P.R.C.; Initiation of Antidumping Investigation,* 61 Fed. Reg. 54,154 (Oct. 17, 1996).[2] Following receipt of the petition, Commerce initiated an investigation and sent antidumping questionnaires to various PRC freshwater crawfish tail meat exporters and producers. *See Notice of Prelim. Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat From the P.R.C.,* 62 Fed. Reg. 14,392, 14,393 (Mar. 26, 1997) *("Investigation Prelim. Determination").* Questionnaire responses were received from numerous companies,[3] including Huaiyin Foreign Trade Corporation ("HFTC").[4] Plaintiff Huaiyin 30, an entity unrelated to HFTC, took no part in the proceedings.[5] As it had done previously, Commerce treated the PRC as a nonmarket economy country[6] and, thus, companies wishing to receive a company-specific antidumping duty margin were required to demonstrate an absence of state control. *Id.* at 14,394. In its questionnaire response, HFTC indicated that it was applying for a separate company-specific margin. *Id.*

In August of 1997, Commerce completed its investigation and established antidumping duty margins for individual producers and for the PRC as a whole. HFTC demonstrated the requisite absence of state control and, thus, its company-specific antidumping duty margin was set at 91.5 percent. *See Notice of Final Determination of Sales at Less Than Fair Value: Freshwater Crawfish Tail Meat From the P.R.C.,* 62 Fed. Reg. 41,347, 41,349 (Aug. 1, 1997), *amended by, Notice of Amendment to Final Determination of Sales at Less Than Fair Value and Antidumping Duty Order: Freshwater Crawfish Tail Meat From the P.R.C.,* 62 Fed. Reg. 48,219 (Sept. 15, 1997) ("The ad valorem weighted-average dumping margins are as follows * * * Huaiyin Foreign Trading Corporation

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[2] The period of investigation covered 1996–97 and

> [t]he product covered by this investigation is freshwater crawfish tail meat, in all its forms (whether washed or with fat on, whether purged or unpurged), grades, and sizes; whether frozen, fresh, or chilled; and regardless of how it is packed, preserved, or prepared. Excluded from the scope of the investigation are live crawfish and other whole crawfish, whether boiled, frozen, fresh, or chilled. Also excluded are saltwater crawfish of any type and parts thereof.

See Freshwater Crawfish Tail Meat From the P.R.C.; Initiation of Antidumping Investigation, 61 Fed. Reg. at 54,155.

[3] The following companies submitted questionnaire responses: China Everbright Trading Company, Binzhou Prefecture Foodstuffs Imp. & Exp. Corp., Yancheng Fengbao Aquatic Food Co., Ltd., Yancheng Foreign Trade Corp., Huaiyin Foreign Trade Corp., Jiangsu Cereals, Oils & Foodstuffs Imp. & Exp. Corp., Jiangsu Light Industrial Prods. Imp. & Exp. (Group) Yangzhou Co., Lianyungang Yupeng, Jiangsu Overseas Group Corp., Anhui Cereals, Oils & Foodstuffs Imp. & Exp. Corp., Qidong Baolu Aquatic Prods. Co., Ltd., Shandong Foodstuffs Imp. & Exp. parte. Corp., Nantong Delu Aquatic Food Co., Ltd., Huaiyin Ningtai Fisheries Co., Ltd., and Yancheng Baolong Aquatic Foods Co., Ltd. *See Investigation Prelim. Determination,* 62 Fed. Reg. at 14,393.

[4] Among the complicating factors in this action is the confusion resulting from the similarity in names of the various PRC entities—i.e., Huaiyin Foreign Trade Corp., Huaiyin Foreign Trade Corporation 5 ("Huaiyin 5") and Huaiyin Cereals, Oils & Foodstuffs Import and Export Corporation are a single concern—while Plaintiff Huaiyin 30 is an unrelated entity.

[5] In their papers Plaintiffs assert that, "[a]s stated to [Commerce] in its questionnaire response, [Plaintiff] Huaiyin 30 paid its legal fees to the lawyer in the initial investigation * * *. Unfortunately, [Plaintiff] Huaiyin 30 was misled. The lawyer did not file any documents for [Plaintiff] Huaiyin 30 on the record of the initial investigation." (Pls.' Mem. Supp. Mot. J. Agency R. at 2.)

[6] A nonmarket economy is defined by the antidumping statute as "any foreign country that the administering authority 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) (1994). "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). Commerce's designation of China as a nonmarket economy country is not disputed.

* * * 91.50" percent.) *("LTFV Final Determination").* As Plaintiff Huaiyin 30 took no part in the proceedings, it was assigned the PRC-wide antidumping duty margin of 201.63 percent, as were all other exporters of crawfish tail meat that did not establish their independence from government control. *See id.* at 41,349 ("We are applying a single antidumping [PRC] rate * * * to all exporters in the PRC other than those firms that were fully responsive to our requests for information."). Commerce based this "determination * * * on [the] presumption that the export activities of the companies that failed to" demonstrate the absence of state control "are controlled by the PRC government." *Id.* (citation omitted). Therefore, because it did not qualify for a separate rate in the investigation, Plaintiff Huaiyin 30 was assigned the PRC-wide antidumping duty margin of 201.63 percent. *(See Issue and Decision Mem.,* 04/07/2000, Pub. R. Doc. 214 at 124 ("[Plaintiff Huaiyin 30] has never qualified for a separate rate, either in this review or the LTFV investigation * * *.").)

According to Plaintiffs, following the issuance of the *LTFV Final Determination,* events transpired outside of the context of any Commerce proceeding that affected the subsequent course of events. First, upon learning that HFTC had received a lower rate than Plaintiff Huaiyin 30, the local PRC government concluded that Plaintiff Huaiyin 30 should take advantage of HFTC's lower rate:

> After the 1996 crawfish investigation, HFTC[] got a relatively low antidumping duty rate while [Plaintiff] Huaiyin 30 got a much higher rate. [Plaintiff] Huaiyin 30 and other local crawfish exporters wanted to use HFTC['s] low rate. HFTC[] was unhappy about this and asked the Committee for assistance. * * * *[T]he Committee and other local companies felt that HFTC[] should share its rate with other local exporters.*

(Pls.' Mem. Supp. Mot. J. Agency R. at 8 (citing Committee Verification Report, Pub R. Doc. 185 at 3) (emphasis in Pls.' Mem.).) Thus, despite having been assigned the PRC-wide antidumping duty margin of 201.63 percent, Plaintiff Huaiyin 30 took advantage of HFTC's separate company-specific antidumping duty margin of 91.5 percent when exporting its product to the United States. This decision on the part of the local PRC government appears to have raised questions in the minds of Plaintiff Huaiyin 30's customers who consequently made inquiries. On this point, Plaintiffs state that GMRI/Red Lobster:

> [M]et with the Vice Director of the China Commodities Inspection Bureau * * * and the Vice General Manager of [Plaintiff Huaiyin] 30 * * *. These gentleman assured [GMRI/Red Lobster that Plaintiff Huaiyin] 30 was entitled to the 91.5% tariff. When asked * * * for documentation they produced a circular from their industry association which clearly stated Huaiyin Foreign Trade Corporation was entitled to the 91.5% tariff. They also produced a letter from the US Embassy in Beijing which stated Huaiyin Foreign Trade Corp., without specifying numbers, had the benefit of the 91.5% tariff. The officials with whom [GMRI/Red Lobster] were meeting proffered those documents as substantiation for their representation [that]

> any crawfish purchased from [Plaintiff Huaiyin] 30 could be imported into the US under the 91.5% rate.

(Response of Worldwide Link, Inc., *et al.,* Supplemental Questionnaire of 02/17/00, Pub. R. Doc. 172 at 7; *see also* Pls.' Mem. Supp. Mot. J. Agency R. at 6). In addition, Plaintiffs assert that,

> GMRI/Red Lobster, made numerous attempts to contact the U.S. government, including [Commerce] to determine whether the 91.5% cash deposit rate for Huaiyin Foreign Trade Corp. applied to [Plaintiff] Huaiyin 30 before importing crawfish from [Plaintiff] Huaiyin 30. Red Lobster contacted [Plaintiff] Huaiyin 30 and [HFTC], the U.S. Embassy and [Commerce] itself seeking clarification in the summer of 1998. After seeking such clarification and receiving only a copy of the antidumping order with the 91.5% cash deposit rate for Huaiyin Foreign Trade Corp., in the summer of 1998, Red Lobster imported the crawfish from [Plaintiff] Huaiyin 30 relying on the language in the antidumping order.

(Pls.' Mem. to Commerce of 11/14/99, Pub. R. Doc. 125 at 15–16; *see also* Pls.' Mem. Supp. Mot. J. Agency R. at 37–38.)

The antidumping order remained unchallenged until September 1998. At that time, Commerce "received a request from [Petitioner] to conduct an administrative review of the antidumping order on freshwater crawfish tail meat from the PRC." *See Notice of Preliminary Results of Antidumping Duty Administrative Review and New Shipper Reviews, Partial Rescission of the Antidumping Duty Administrative Review, and Rescission of the New Shipper Review for Yancheng Baolong Biochemical Products, Co. Ltd.: Freshwater Crawfish Tail Meat From the P.R.C.,* 64 Fed. Reg. 55,236, 55,237 (Oct. 12, 1999) *("Prelim. Results").* In its request, Petitioner identified certain exporters of crawfish tail meat, including "Huaiyin Foreign Trade Corp." for review. *(See* letter from Ablondi & Foster to Commerce of 9/30/98, Pub. R. Doc. 3 at 2); *see also Initiation of Antidumping and Countervailing Duty Administrative Review, Requests for Revocation in Part and Deferral of Administrative Reviews,* 63 Fed. Reg. 58,009, 58,010 (Oct. 29, 1998) *("Notice of Initiation").* Petitioner did not, however, name Plaintiff Huaiyin 30 in its petition and Commerce did not specifically name it in the *Notice of Initiation. (See* letter from Ablondi & Foster to Commerce of 9/30/98, Pub. R. Doc. 3 at 2); *Notice of Initiation,* 63 Fed. Reg. at 58,010. Commerce then sent questionnaires to the PRC crawfish tail meat exporters identified in the *Notice of Initiation.*

Thereafter, in September 1999, "[a]fter an * * * inquiry from" the United States Customs Service ("Customs"), (Def.'s Mem. Opp'n to Mot. J. Agency R. at 22.), Commerce issued a "Clarification of Message" to Customs regarding which company was actually entitled to a cash deposit based on the separate lower "HFTC" antidumping duty margin. (Def.'s Mem. Opp'n to Mot. J. Agency R., Ex. 7 at 4; Def.'s Mem. Opp'n to Mot. J. Agency R. at 22.) The Clarification of Message stated that HFTC "was also known as" Huaiyin 5 and, therefore, per the *LTFV Final Determination* "only freshwater crawfish tail meat [entries] imported

from" HFTC or Huaiyin 5[7] were entitled to a cash deposit based on the separate company-specific antidumping duty margin of 91.5 percent. (Def.'s Mem. Opp'n to Mot. J. Agency R., Ex. 7 at 4; Pls.' Mem. Supp. Mot. J. Agency R. at 10 (citation omitted).) As a result, imported crawfish tail meat entries from Plaintiff Huaiyin 30 were to be entered with a cash deposit based on the PRC-wide antidumping duty margin of 201.63 percent. In addition, in accordance with Commerce's instructions, Customs imposed a cash deposit based on the PRC-wide antidumping duty margin of 201.63 percent on all Plaintiff Huaiyin 30's 1997–98 crawfish tail meat entries imported into the United States. *(Id.)* Consequently, certain domestic importers[8] of Plaintiff Huaiyin 30's crawfish tail meat were required "to post additional cash deposits of approximately 110" percent to cover the difference. (Pls. Mem. Supp. Mot. J. Agency R., App. Tab 5 at 12.)

On October 12, 1999, Commerce issued its preliminary findings for the administrative review of the antidumping order. *See Prelim. Results,* 64 Fed. Reg. at 55,236. Commerce preliminarily determined that sales of crawfish tail meat imported into the United States from the PRC were made below normal value during the period of investigation. In making its determination, Commerce continued to treat the PRC as a nonmarket economy country. *Id.* at 55,241 ("In every case conducted by [Commerce] involving the PRC, the PRC has been treated as an [nonmarket economy] country."). As such, Commerce followed its policy[9] that "exporters in [nonmarket economy countries] are entitled to separate, company-specific margins [if] they can demonstrate an absence of government control, both in law and in fact, with respect to [their] export activities." *Id.* at 55,240. Companies that did not request a separate rate, and companies unable to demonstrate an absence of state control would be assigned the PRC-wide rate. *Id.* In determining "the PRC-wide rate, [Commerce] used the highest rate from the petition, * * * which was [also] the PRC-wide rate in the" *LTFV Final Determination. See Prelim. Results,* 64 Fed. Reg. at 55,239. Consequently, Commerce continued to assess the PRC-wide antidumping duty margin, found in the initial investigation, of 201.63 percent. *Id.*

Following the review of comments on the *Prelim. Results* received from interested parties, including Plaintiff Huaiyin 30, Commerce issued the *Final Results* on April 19, 2000. In the *Final Results,* Com-

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[7] Commerce, in making its clarification, stated that the entity known to it as Huaiyin 5 "is the same entity that submitted the sales and factors information on which [Commerce] based the separate rate * * * in the LTFV investigation" and, therefore, Huaiyin 5 was entitled to a cash deposit based on HFTC's separate company specific antidumping duty margin of 91.5 percent. *(See Issue and Decision Mem.,* Pub. R. Doc. 214 at 138.) As previously noted in footnote 4 *supra,* HFTC and Huaiyin 5 constitute the same entity.

[8] The importers affected by Commerce's Clarification of Message include the domestic importer Plaintiffs. (Pls.' Mem. Supp. Mot. J. Agency R., App. Tab 5 at 1.)

[9] Commerce also followed its policy "that [a] separate-rates questionnaire must be [submitted and] evaluated each time a respondent makes a separate rate claim, regardless of any separate rate the respondent received in the past." *See Prelim. Results,* 64 Fed. Reg. at 55,239 (citation omitted). Thus, HFTC had the burden of demonstrating, again, its independence from PRC governmental control. Commerce, however, was unable to perform verification of HFTC, because "the company refused to permit verification * * * of its questionnaire response." *Id.* at 55,238 (citation omitted). As such, Commerce did "not use the information" submitted in HFTC's questionnaire. Instead, Commerce decided that "the use of [facts available was] required for" HFTC. *Id.* (citation omitted).

merce made no changes to the margin calculations with respect to HFTC and Plaintiff Huaiyin 30 from the margins set out in the *Prelim. Results. See Final Results,* 65 Fed. Reg. at 20,949. Instead, Commerce concluded that HFTC and Huaiyin 5 constituted a single company, and that such company failed to demonstrate an absence of state control. Thus, crawfish tail meat entries labeled with either name were assigned the PRC-wide antidumping duty margin of 201.63 percent. *Id.* In addition, Commerce determined that, since Plaintiff Huaiyin 30 had "not requested a separate rate" in the administrative review, it was not "entitled to a separate rate * * *. [Therefore,] all Chinese exporters not specifically named" in the *Notice of Initiation* that did not demonstrate an absence of state control "including [Plaintiff Huaiyin 30] were subject to the" PRC-wide rate. *Id.* ("Huaiyin Foreign Trade Corporation (30) * * * [is] subject to the PRC-wide rate of 201.63%.").

DISCUSSION

Plaintiffs claim that Commerce: (1) violated statutory and regulatory procedures by failing to provide Plaintiffs with adequate notice of and an adequate opportunity to participate in the review investigation; and (2) by issuing its Clarification of Message, caused Customs improperly to increase Plaintiff Huaiyin 30's cash deposit rate and wrongly apply it retroactively on Plaintiff Huaiyin 30's entries of merchandise imported into the United States. In addition, Plaintiffs complain that payment by the United States Government of antidumping duties to the domestic industry, pursuant to 19 U.S.C. § 1675c(a), changes the antidumping statute from one remedial in nature into a statute that imposes a penalty and, therefore, Plaintiffs were entitled to full due process rights including a review proceeding as provided in the Administrative Procedure Act.[10]

The United States ("Government"), on behalf of Commerce argues that Commerce: (1) provided Plaintiffs with adequate notice of and an adequate opportunity to participate in the review investigation; and (2) properly clarified to Customs that Plaintiff Huaiyin 30 was not entitled to a cash deposit based on the antidumping duty margin of 91.5 percent. Finally, the Government claims that payment of antidumping duties to the domestic industry does not transform the antidumping regime into one that imposes a penalty and, therefore, Plaintiffs were not entitled to full due process rights including a review proceeding as provided in the Administrative Procedure Act.

I. Adequate Notice Of and An Adequate Opportunity To Be Heard

In their brief, Plaintiffs argue that they were given neither adequate notice of nor an adequate opportunity to participate in the administrative review because Commerce "did not name [Plaintiff] Huaiyin 30 in its *Notice of Initiation* * * *." (Pls.' Mem. Supp. Mot. J. Agency R. at 29.)

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[10] *See* 5 U.S.C. § 551 et seq. (1994); *see also GSA, S.R.L., v. United States,* 23 CIT 920, 931, 77 F. Supp. 2d 1349, 1359 (1999) (stating that "the APA does not apply to antidumping administrative proceedings."); 19 U.S.C. 1677c(b)(providing that an administrative hearing "shall not be subject to the provisions * * * of title 5 * * * of" the APA).

In addition, Plaintiffs contend that "despite [Commerce's] clear instructions to specify each individual producer or exporter for review, the Petitioner[] did not request that [Plaintiff] Huaiyin 30 be reviewed." *(Id.* at 24.) In support of their argument, Plaintiffs rely on two related regulations. The first, 19 C.F.R § 351.213, provides in relevant part: "Each year during the anniversary month of the publication of an antidumping * * * order, a domestic interested party * * * may request * * * that the Secretary conduct an administrative review * * * of specified individual exporters or producers covered by an order * * *." 19 C.F.R § 351.213(b)(1). The second, 19 C.F.R. § 351.221, states that pursuant to subsection 351.213(b)(1): "In an administrative review * * * the Secretary * * * [w]ill publish the notice of initiation of the review no later than the last day of the month following the anniversary month * * *." 19 C.F.R. § 351.221(c)(1)(i). Thus, Plaintiffs claim that because Commerce "did not include [Plaintiff] Huaiyin 30 in its *Notice of Initiation"* by specifically naming it, "neither [Plaintiff] Huaiyin 30 nor the Plaintiff importers * * * received any real notice of the 1997–98 administrative review." (Pls.' Mem. Supp. Mot. J. Agency R. at 26.)

The Government, on the other hand, argues that "Commerce need not give personal notice to any party that could be affected by an administrative review" and, therefore, it was "free to choose a variety of means to give reasonable notice that certain exporter's goods [were] subject to an administrative review." (Def.'s Mem. Opp'n to Mot. J. Agency R. at 13.) As such, the Government claims that the constructive notice provided by the *Notice of Initiation* "adequately advised [Plaintiff Huaiyin] (30) and its importers that they would be subject to the administrative review" of the antidumping order covering imports of crawfish tail meat from the PRC. *(Id.)* In other words, "the statement contained in the *Notice of Initiation* clearly advised [Plaintiffs] that if any of the listed exporters did not qualify for a separate rate, all of the exporters of crawfish tail meat from the PRC would be subject to [the administrative] review." *(Id.* at 14–15.)

The court is not convinced of Plaintiffs' arguments that they were provided with inadequate notice by the *Notice of Initiation.* On this matter, *Transcom, Inc. v. United States,* 182 F.3d 876 (Fed. Cir. 1999) *("Transcom I")* and two later Transcom decisions of this court[11] are instructive. As here, *Transcom I* involved an administrative review of an antidumping order affecting an exporter from a nonmarket economy

[11] *See Transcom, Inc. v. United States,* 24 CIT ____, 121 F. Supp. 2d 690 (Nov. 7, 2000) *("Transcom II")* (finding notice of initiation at issue provided adequate notice); *Transcom, Inc. United States,* 24 CIT ____, 123 F. Supp. 2d 1372 (Nov. 22, 2000) (finding notice of initiation at issue failed to provide adequate notice).

country that was not named in a notice of initiation. The CAFC found the notice of initiation at issue[12] to be inadequate because the importer:

> [H]ad no reason to expect that the antidumping duties on its exporters' products could be affected by proceedings in which the exporters were not named as parties. Neither the statute nor Commerce's regulations gave any hint that such a procedure would be used. Moreover, at the time of the administrative reviews at issue in this case, Commerce had not announced that it would be following a different practice with respect to unnamed exporters in administrative reviews of products from nonmarket economy countries * * *.

Transcom I, 182 F.3d at 881. Thus, the CAFC held, *inter alia,* that Commerce was required to "provide some form of notice that the administrative review may * * * increase * * * the antidumping duty rates applicable to its [unnamed] foreign exporters." *Id.* at 884. This being the case, Plaintiffs would be entitled to the relief they seek, if it were shown that the *Notice of Initiation* failed adequately to alert them that their interests might have been affected by the pending administrative review. Here, the *Notice of Initiation* reads in relevant part:

> If one of the above named companies does not qualify for a separate rate, all other exporters of freshwater crawfish tail meat from the People's Republic of China who have not qualified for a separate rate are deemed to be covered by this review as part of the PRC entity of which the named exporter is part.

Notice of Initiation, 63 Fed. Reg. at 58,010. Plaintiffs argue that this notice was inadequate and, therefore, they "did not request a review investigation" or "participate in the review simply because they did not know" about the pendency of the administrative review. (Pls.' Mem. Supp. Mot. J. Agency R. at 34.)[13] Again, *Transcom I* is instructive. There, the CAFC found it persuasive that the language of the notice of initiation, at issue in that case, had not previously been used and that, therefore, unnamed exporters had inadequate notice of a change in Commerce's policy that put them at risk with respect to their merchan-

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[12] In *Transcom I,* the government argued that Commerce's notice of initiation, which specifically named certain companies for review, was also sufficient to alert unnamed exporters of tapered roller bearings to the scope of the administrative review because:

> [A]ll exporters in a nonmarket economy country are presumed to be part of the state-controlled entity * * *. [T]hat if any company named in the administrative review is found to be part of the state-controlled entity, the effect of that finding is to bring within the scope of the review any other exporters from that country that fail to demonstrate their independence from the state-controlled entity. According[ly] * * * if the unnamed exporters wish[] to avoid having the PRC rate applied to their exports, they should * * * voluntarily participate[] in the review[] and demonstrate[] their independence from the nonmarket economy entity.

Transcom I, 182 F.3d at 881. The CAFC found, however, that the use of this language represented a new policy for Commerce to which it did not alert potentially affected parties. Thus, the new policy, together with the language itself led the CAFC to conclude "that Transcom had no reason to expect that the antidumping duties on its exporters' products could be affected by proceedings in which the exporters were not named as parties. *Id.*

[13] The Government, on the other hand, contends that the language in the *Notice of Initiation* "is no less clear than" the language in the notice of initiation at issue in *Transcom II* and, therefore, the court should conclude, as the court did in *Transcom II,* that Plaintiffs had sufficient "notice that the entries in which [they] had an interest could * * * be affected by the administrative review * * *." (Def.'s Mem. Opp'n to Mot. J. Agency R. at 14.) The notice of initiation at issue in *Transcom II* was described by the court as follows, "In addition to listing the one hundred and one companies subject to the review, the 'Notice of Initiation' provided that '[a]ll other exporters of tapered roller bearings are conditionally covered by this review.'" *Transcom II,* 24 CIT at ____, 121 F. Supp. 2d at 700. The court found that this language "gave Transcom * * * more than sufficient * * * notice that the particular entries in which Transcom had an interest could possibly be affected by the administrative review." *Id.,* 24 CIT at ____, 121 F. Supp. 2d at 701 (footnote omitted).

dise. The CAFC did acknowledge that following publication of such notice of initiation Commerce:

> [B]egan stating in notices of initiation * * * that all unnamed exporters * * * from the People's Republic of China are conditionally covered by the review or, more explicitly, that if one of the named companies does not qualify for a separate rate, all other exporters that have not qualified for a separate rate are deemed to be covered by the review as part of the single Chinese entity of which the named exporters are a part.[14]

Transcom I, 182 F.3d at 882. Though the CAFC declined to find that this new language "satisf[ied] statutory and regulatory notification requirements[,]" it did observe that such language went "far beyond any notice, constructive or otherwise, given to the unnamed exporters" in that case. *Id.*

In addition, the CAFC stated that since Commerce was not "required to give personal notice to any party that could be affected by an administrative review that its interests may be at stake[,]" *id.* (citation omitted), constructive notice by publication was adequate.[15] Moreover, the CAFC did not find that a party must be specifically named for a notice of initiation to be adequate. Rather, the CAFC concluded that 19 U.S.C. § 1675(a)[16] and 19 C.F.R. §§ 351.213(b)(1) and 351.221(c)(1), when taken together, provide "that any reasonably informed party should be able to determine, from the published notice of initiation read in light of announced Commerce policy, whether particular entries in which it has an interest may be affected by the administrative review." *See Transom I,* 182 F.3d at 882–83. Thus, the CAFC did not find that only those specific parties named by domestic producers could be affected by the proceedings announced in a notice of initiation, or that such notice could only be adequate as to named parties rather than to a class. *Id.* at 882–83.

Here, the notice given to Plaintiffs satisfies the CAFC's criteria. First, Plaintiff Huaiyin 30 was a "reasonably informed" party by virtue of its being a PRC producer of crawfish tail meat that had previously: (1) tried to participate in the original crawfish tail meat antidumping investigation and seek a company-specific antidumping duty margin therein; and (2) taken advantage of HFTC's cash deposit, which was based on

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[14] Commerce has been using this notice of initiation language in administrative reviews of antidumping orders covering PRC exporters since August 1, 1997. *See, e.g., Action: Notice of Initiation of Antidumping and Countervailing duty Administrative Reviews and Request For Revocation In Part,* 62 Fed. Reg. 41,339, 41,345 (Aug. 1, 1997). This language is of the same import as the language used in the *Notice of Initiation* at issue here, and had been in use for more than a year prior to the *Notice of Initiation* being published. Thus, there is no serious argument that the language used in the *Notice of Initiation* represented a change in policy.

[15] *See also Transcom, II,* 24 CIT at ____, n.10, 121 F. Supp. 2d at 701, n.10 ("Constructive notice is information or knowledge of a fact imputed by law to a person * * * because he could have discovered the fact by proper diligence, and his situation was such as to cast upon him the duty of inquiring into it. * * *" (citation omitted)).

[16] Subsection 1675(a) of title 19 provides, *inter alia:*

> At least once during each 12-month period beginning on the anniversary of the date of publication of * * * an antidumping duty order * * * the administrating authority, if a request for such a review has been received and after publication of notice of such review in the Federal Register, shall * * *
>
> (B) review, and determine * * * the amount of any antidumping duty * * *
>
> and shall publish in the Federal Register the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed.

19 U.S.C. § 1675(a)(1)(B).

HFTC's separate company-specific antidumping duty margin. As such, Plaintiff Huaiyin 30, though not specifically named, was well situated to determine from the *Notice of Initiation* that its 1997–98 crawfish tail meat entries could be affected by the administrative review. Second, the domestic importer Plaintiffs can also be found to be "reasonably informed" parties to whom the *Notice of Initiation* provided adequate notice. These Plaintiffs were fully aware that an entity with "Huaiyin" in its name was supplying them with crawfish tail meat. They received a copy of the antidumping order which, together with Plaintiff Huaiyin 30's representations, apparently convinced them that they were being supplied by the "Huaiyin" entity that was named in the antidumping order as the one entitled to take advantage of the cash deposit based on the company-specific antidumping duty margin of 91.5 percent. As this was the same entity that was specifically named in the *Notice of Initiation,*[17] Plaintiffs cannot now be heard to claim that, at the time the *Notice of Initiation* was published (October 29, 1998 nearly a year prior to the issuance of the Clarification of Message), they did not believe that the "Huaiyin" entity named in the *Notice of Initiation* was their supplier. Thus, the domestic importer Plaintiffs had reason to believe that the crawfish tail meat entries in which they had an interest could be affected by the administrative review.

Because they received adequate notice, the court is necessarily unpersuaded by Plaintiffs' claim that they could not have participated in the administrative review until after the *Prelim. Results* were published. As noted above, Plaintiff Huaiyin 30 is a crawfish tail meat exporter that had reason to expect that, at the time the *Notice of Initiation* was published, its 1997–98 crawfish tail meat entries could be affected by the administrative review. Moreover, as Commerce specifically named the "Huaiyin" entity in the *Notice of Initiation* that the domestic importer Plaintiffs believed to be their crawfish tail meat supplier, they cannot claim that the *Notice of Initiation* failed adequately to alert them of the pendency of the administrative review. As to the time frame during which Plaintiffs were given an opportunity to participate in the review investigation, the *Notice of Initiation* quite clearly stated that, "[i]f one of the [specifically] named companies does not qualify for a separate rate, all other exporters * * * who have not qualified for a separate rate are deemed to be covered by this review * * *." *See Notice of Initiation,* 63 Fed. Reg. at 58,010. Thus, Plaintiffs were given a choice, at the time the *Notice of Initiation* was published, to either participate in the review by seeking a separate company-specific antidumping duty margin, or risk being assigned the PRC-wide rate should any named company fail to qualify for a separate rate. By choosing not to participate in the review investigation, Plaintiffs and any other similarly situated entities,

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[17] *See LTFV Final Determination,* 62 Fed. Reg. at 48,219 ("The ad valorem weighted-average dumping margins are as follows * * * Huaiyin Foreign Trade Corp. * * * 91.50" percent.); *see also Notice of Initiation,* 63 Fed. Reg. at 58,009–10 ("The Department of Commerce has received requests to conduct administrative reviews of various antidumping * * * orders and findings with September anniversary dates. In accordance with the Department's regulations, we are initiating review[]" of the following company: "Huaiyin Foreign Trade Corp.").

risked the consequences of their inaction. The court, therefore, finds that the *Notice of Initiation* gave adequate notice to Plaintiffs of the pendency of the administrative review, and that Plaintiffs had an adequate opportunity to participate in such review.

II. Commerce's Clarification of Message To Customs

The next question presented is whether Commerce properly clarified to Customs which PRC exporter was entitled to take advantage of cash deposits based on the antidumping duty margin of 91.5 percent. Plaintiffs do not dispute Commerce's authority to apply a presumption of state control and assess a PRC-wide antidumping duty margin where a PRC exporter fails to demonstrate an absence of state control. Rather, Plaintiffs argue that Commerce's Clarification of Message to Customs—that only the entity known as HFTC or Huaiyin 5 was entitled to the lower cash deposit based on the antidumping duty margin of 91.5 percent—was improper, because Plaintiffs relied "in good faith upon [Commerce]'s mistake" of allowing Customs to assign a cash deposit to Plaintiff Huaiyin 30's entries of merchandise based on the lower antidumping duty margin of 91.5 percent. Plaintiffs, further, argue that Commerce "should not be * * * allowed to gain a windfall as a direct result of its mistake by applying retroactive duties" to Plaintiff Huaiyin 30's 1997–98 crawfish tail meat entries. (Pls.' Mem. Supp. Mot. J. Agency R. at 44.)

The Government, on the other hand, argues that "Commerce did not make a mistake." The Government contends that "[d]uring the * * * investigation [leading to the *LTFV Final Determination],* Commerce determined that the HFTC entity that participated * * * and responded to Commerce's requests for information was entitled to a separate rate of 91.5 percent *ad valorem,"* and, therefore, "[t]he clarification merely stated HFTC's address and the two other names under which it was known."[18] (Def.'s Mem. Opp'n to Mot. J. Agency R. at 24.) In addition, the Government argues that, since HFTC "advised Commerce for the first time on August 31, 1999 that its official name was" HFTC, Commerce, therefore, "did not make a mistake in assigning the 91.5 percent rate in the" *LTFV Final Determination* to HFTC "because that was how the HFTC entity that was investigated represented itself during the investigation." *(Id.* at 25–26 (citations omitted.) Finally, the Government contends that "Commerce[] had no reason to refer to" Plaintiff Huaiyin 30 in the *LTFV Final Determination* "because Commerce was not even aware of the existence of [Plaintiff Huaiyin 30] during the investigation." *(Id.* at 26.)

Plaintiffs' argument that Commerce's September 1999 Clarification of Message had improper results is unconvincing. Commerce's Clarification of Message merely alerted Customs as to which PRC crawfish tail meat exporter was entitled to avail itself of cash deposits based on the separate company-specific antidumping duty margin. That this export-

[18] *See* footnote 4, *supra.*

er was HFTC and not Plaintiff Huaiyin 30 in no way means that the United States Treasury gained a "windfall." First, the local PRC government's decision to allow Plaintiff Huaiyin 30 to use HFTC's separate company-specific antidumping duty margin of 91.5 percent was in no way authorized by Commerce. Second, Plaintiff Huaiyin 30 was fully aware that it had been assigned the PRC-wide antidumping duty margin but, nonetheless, participated in taking advantage of cash deposits based on HFTC's lower rate when exporting its product to the United States. As Plaintiff Huaiyin 30 did not take part in either the original investigation or the administrative review, it cannot now claim any entitlement to cash deposits based on a company-specific antidumping duty margin. With respect to the domestic importer Plaintiffs, their reliance on their inadequate investigation and on Plaintiff Huaiyin 30's representations cannot be attributed to Commerce. Commerce can hardly be held accountable for the similarity among exporters' names and a supplier's deceptive business practices. Commerce had no reason to know that Plaintiff Huaiyin 30 existed prior to Custom's inquiry in September of 1999 and, thus, no reason to make a distinction among the "Huaiyin" named entities until such time. Thus, the claims of both Plaintiff Huaiyin 30, and the domestic importer Plaintiffs of "good faith" reliance or the history of Customs applying HFTC's cash deposit rate to Plaintiff Huaiyin 30's merchandise are not credible.

III. Continued Dumping and Subsidy Offset Act of 2000

Plaintiffs' final argument is that the Continued Dumping and Subsidy Offset Act of 2000, 19 U.S.C. § 1675c (2000) ("Byrd Amendment"), transforms the antidumping statute[19] from being remedial in nature into a law that imposes penalties. (Pls.' Mem. Supp. Mot. J. Agency R. at 49.) Prior to enactment of the Byrd Amendment, duties collected pursuant to antidumping orders were deposited with the Treasury for general purposes. By enactment of the Byrd Amendment, however, Congress modified the antidumping statute so that "[d]uties assessed pursuant to * * * an antidumping order * * * shall be distributed on an annual basis * * * to the affected domestic producers * * *." 19 U.S.C. § 1675c(a). In other words, as a result of the Byrd Amendment, these duties are to be distributed to the firms that petitioned for relief, and to those firms that supported the petition. *See* 19 U.S.C. § 1675c(b)(1)(A), (B).

It is well settled that the antidumping statute, as it existed prior to enactment of the Byrd Amendment, did not impose a penalty. An early decision of the United States Court of Customs and Patent Appeals reviewed the nature of the antidumping statute and found that:

> [W]e cannot escape the conviction that the expressed purpose of Congress, in the Antidumping Act of 1921, was to impose not a penalty, but an amount of duty sufficient to equalize competitive conditions between the exporter and American industries affected * * *.

[19] Section 516A of the Tariff Act of 1930, *as amended,* 19 U.S.C. § 1516a (1994).

> It follows that the Antidumping Act of 1921 is not repugnant to the provisions of said Amendment V [to the U.S. Constitution], as denying to the importer due process of law * * *.

C.J. Tower & Sons v. United States, 21 C.C.P.A. 417, 427–28, 71 F.2d 438, 445–46 (1934). Since *C.J. Tower* courts have continued to find that, "[d]umping duties are not penal in nature, but are 'additional duties' to equalize competitive conditions between the exporter and [affected U.S. industries]." *See Union Camp Corp. v. United States,* 22 CIT 267, 278, 8 F. Supp. 2d 842, 852 (1998) (citing *Imbert Imp., Inc. v. United States,* 67 Cust. Ct. 569, 576 n.10, 331 F. Supp. 1400, 1406 n.10 (1971), *aff'd,* 60 C.C.P.A. 123, 475 F.2d 1189 (1973)). Moreover, because the imposition of these duties was "not penal, retaliatory or compensatory," *Chr. Bjelland Seafoods A/C v. United States,* 16 CIT 945, 953 (1992) (citation omitted), the statute was solely remedial. *Chaparral Steel Co. v. United States,* 901 F.2d 1097, 1103–04 (Fed. Cir. 1990).

Plaintiffs argue that the changes in the antidumping statute effected by the Byrd Amendment nullify the remedial nature of the statute and impose a penalty entitling Plaintiffs to "full due process rights, including a hearing before a neutral judge" because the Fifth Amendment demands due process where there is a deprivation of "life, liberty or property." (Pls.' Mem. Supp. Mot. J. Agency R. at 50 (citation omitted)); *see* 5 U.S.C. § 551 et seq. (1994). The Government, on the other hand, contends that the "provision for the distribution * * * of antidumping duties that have been collected to the affected domestic producers does not change the purpose and remedial aspect of the antidumping law into a punitive one" because: (1) "importers continue to be liable for antidumping duties equal to the amount by which the normal value exceeds the export or constructed export price for the merchandise"; and (2) the "amendment does not make any changes to existing procedures" regarding how Commerce determines an importer's antidumping duty liability. (Def.'s Mem. Opp'n to Mot. J. Agency R. at 20–21 (citations omitted).) Finally, Plaintiffs counter that the Government's position that there has been no change in the magnitude of the duties collected is irrelevant because "a change in the remedy is a change to * * * the purpose of the law." (Pls.' Reply Mem. Supp. Mot. J. Agency R. at 14.) The court agrees with the Government.

First, the changes made by the Byrd Amendment to the antidumping statute do not impose upon foreign exporters the types of burdens traditionally found to constitute civil or criminal penalties and, thus, the consequent necessity of a hearing pursuant to the Fifth Amendment. In general, "'A penalty is a sum of money of which the law exacts payment by way of punishment for the doing of some act that is prohibited, or omitting to do some act that is required to be done.'" *Brown v. Cummins Distilleries Corp.,* 56 F. Supp. 941, 942 (W.D. Ken. 1944) (citation omitted). As such, the amount of a penalty generally bears no relation to the cost of remediation of any harm caused by the performance or failure of performance of the act. *United States v. DelBellas,* 23 CIT 600,

601 (1999)[20] (noting that in the context of a civil penalty proceeding under 19 U.S.C. § 1592 "there is nothing in the language of [the statute] indicating that the amount of the penalty is in any way related to costs incurred by the government."); *see also Cummins Distilleries Corp.,* 56 F. Supp. at 942 ("In a proceeding of this nature the [Government] has suffered no damages, and the action is not for the purpose of compensation."). Another indicator of whether a statute provides for a penalty is the magnitude of the burden imposed. Indeed, courts have found that a duty may constitute a penalty where it is "enormously in excess of the greatest amount of regular duty ever imposed upon an article of the same nature * * *." *See Helwig v. United States,* 188 U.S. 605, 611–13 (1902) (finding that where reappraisement of imported merchandise resulted in an increased duty of $354.00, and the further "sum" imposed by statute was $9,067.68, such further sum was a penalty because "the amount imposed was so large in proportion to the value of the merchandise imported, as to show beyond doubt that it was a sum imposed not, in fact, as a duty upon an imported article, but as a penalty and nothing else."). Here, the facts do not support a finding of a penalty. First, the amount of the antidumping duty assessed is directly related to the remedial goal of equalizing "competitive conditions[,]" *C.J. Tower & Sons,* 21 C.C.P.A. at 427, 71 F.2d at 445, and this amount is determined in all respects as it was prior to the adoption of the Byrd Amendment. Second, the magnitude of the duty cannot be said to be so large as to necessarily constitute a penalty, since the amount assessed following the enactment of the Byrd Amendment is identical to the amount assessed prior to the amendment's enactment.

Next, Congress itself may determine that a provision not be regarded as a penalty. *See Helwig,* 188 U.S. at 613 ("If it clearly appears that it is the will of Congress that the provision shall not be regarded as a penalty, the Court must be governed by that will."); *see also United States v. Reorganized CFSI Fabricators of Utah, Inc.,* 518 U.S. 213, 221 n.5 (1996) (citing *Helwig).* This holds true in situations where Congress determines how funds are to be dispensed. *See Helwig,* 188 U.S. at 613 ("Congress may enact that such a provision should not be considered as a penalty or in the nature of one * * * with reference to the distribution of moneys thus paid * * *."). In enacting the changes contained in the Byrd Amendment, Congress determined that the funds collected were to be distributed to domestic producers. In support of its determination, Con-

[20] *DelBellas* is one of a line of cases of this court discussing the magnitude of an assessed amount and its relation to actual damage sustained. These cases examined civil penalties to determine whether such penalties constituted "double jeopardy." *See, e.g., United States v. Danzler Lumber & Exp. Corp.,* 16 CIT 1050, 1056, 810 F. Supp. 1277, 1283 (1992) (discussing amount of recovery for violations may be "so excessive as to inflict punishment * * *."), and *United States v. Gordon,* 10 CIT 292, 297, 634 F. Supp. 409, 415 (1986) (discussing magnitude of amount assessed as factor in determining remedial effect of statute; and considering relation of damage sustained by society to magnitude of amount assessed, as factor in determining whether statute was remedial or constituted punishment).

gress made certain findings[21] including: "continued dumping * * * of imported products after the issuance of antidumping orders * * * can frustrate the remedial purpose of the laws by preventing market prices from returning to fair levels" and that "United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved." Agriculture, Rural Development, Food and Drug Administration and Related Agencies Appropriations Act of 2000, 106 Pub. L. 387, Title X [Continued Dumping and Subsidy Offset] § 1002 (3), (5), 114 Stat. 1549 (2000), as enacted. In order to effect this purpose, Congress chose to distribute the collected duties to affected domestic producers in hopes that they "will [not] be reluctant to reinvest or rehire and may be [able] to maintain pension and health care benefits that conditions of fair trade would permit. Similarly, small businesses and American farmers and ranchers may be [able] to pay down accumulated debt, to obtain working capital, or to otherwise remain viable."[22] *Id.* at (4). These findings demonstrate that Congress sought to change the antidumping law in order to strengthen its remedial purpose. Thus, rather than imposing a penalty on foreign exporters, Congress' enacted purpose was to "strengthen[] * * * the remedial purpose of" the antidumping statute. *Id.* at (5). Congress having clearly expressed its remedial purpose, this court is bound by its will.

Finally, while courts have found that the antidumping statute, as it existed prior to the enactment of the Byrd Amendment, was remedial in nature and, thus, did not constitute a penalty, these courts did not find that the duties imposed by that statute were the exclusive way in which this remediation could be accomplished. *See generally C.J. Tower & Sons,* 21 C.C.P.A. at 417, 71 F.2d at 438; *Union Camp Corp.,* 22 CIT at

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[21] These findings were as follows:

(1) Consistent with the rights of the United States under the World Trade Organization, injurious dumping is to be condemned and actionable subsidies which cause injury to domestic industries must be effectively neutralized.
(2) United States unfair trade laws have as their purpose the restoration of conditions of fair trade so that jobs and investment that should be in the United States are not lost through the false market signals.
(3) The continued dumping or subsidization of imported products after the issuance of antidumping orders or findings or countervailing duty orders can frustrate the remedial purpose of the laws by preventing market prices from returning to fair levels.
(4) Where dumping or subsidization continues, domestic producers will be reluctant to reinvest or rehire and may be unable to maintain pension and health care benefits that conditions of fair trade would permit. Similarly, small businesses and American farmers and ranchers may be unable to pay down accumulated debt, to obtain working capital, or to otherwise remain viable.
(5) United States trade laws should be strengthened to see that the remedial purpose of those laws is achieved.

H.R. 4461, 106th Cong. (2000), *reprinted in* 2000 U.S.C.C.A.N . 1549, 1549A–72, 73.

[22] With or without the Byrd Amendment, the duties imposed by the antidumping statute are not compensatory in nature because, rather than providing payment for past injury, they are prospective in nature, 19 U.S.C. § 1675c(b)(4), and used to "equalize competitive conditions * * *." *C.J. Tower & Sons,* 21 C.C.P.A. at 427, 71 F.2d at 445. The Byrd Amendment does not change the prospective nature of these duties, nor does it provide that such funds should be used to compensate affected domestic firms for past injuries. Rather, the funds obtained by these duties are distributed to affected domestic firms for qualifying expenditures:

> The term "qualifying expenditure" means an expenditure incurred after the issuance of the antidumping duty finding or order or countervailing duty order in any of the following categories:
>
> (A) Manufacturing facilities.
> (B) Equipment.
> (C) Research and development.
> (D) Personnel training.
> (E) Acquisition of technology.
> (F) Health care benefits to employees paid for by the employer.
> (G) Pension benefits to employees paid for by the employer.
> (H) Environmental equipment, training, or technology.
> (I) Acquisition of raw materials and other inputs.
> (J) Working capital or other funds needed to maintain production.

19 U.S.C. § 1675c(b)(4).

267, 8 F. Supp. 2d at 842; *Chr. Bjelland Seafoods,* 16 CIT at 945; *Chaparral Steel Co.,* 901 F.2d at 1097. Prior to the enactment of the Byrd Amendment, any duties collected were deposited with the Treasury. Now, these same duties are to be collected and distributed to parties affected by dumping. At its base, Plaintiffs argument is that this amended statutory scheme is not remedial because it will not "'equalize competitive conditions between the exporter and American Industries affected * * *.'" (Pls.' Mem. Supp. Mot. J. Agency R. at 49 (citing *C.J. Tower).)* Congress, however, has concluded otherwise. The wisdom of the manner in which Congress chooses to achieve its "remedial purpose" to "equalize competitive conditions," is not a matter of inquiry for this court. *See Hampton, Jr. Co. v. United States,* 14 C.C.P.A. 350, 366 (1926) ("Whether the particular statute before us is wise or unwise is not for our consideration. This is a political question, with which courts will not deal. The cure for an unwise and injudicious exercise of its constitutional powers by Congress lies with the people, from whom its members derive their commissions." (citing *Springer v. United States,* 102 U.S. 586 (1880); *Kuttroff, Pickhardt & Co. v. United States,* 12 Ct. Cust. App. 299 (1924); *McCray v. United States,* 195 U.S. 27 (1904))).

CONCLUSION

For the reasons set forth above, the court concludes that Commerce provided Plaintiffs with adequate notice of the pendency of the administrative review and an adequate opportunity to participate in such review; that Commerce properly clarified to Customs that Plaintiff Huaiyin 30 was not entitled to cash deposits based on antidumping duty margin of 91.5 percent; and that payment of antidumping duties to the domestic industry in accordance with the Byrd Amendment does not transform the antidumping regime into one that imposes a penalty. Thus, the court denies Plaintiffs' motion for judgment upon the agency record and Commere's final determination is sustained. Judgment is entered accordingly.

(Slip Op. 02–43)

AMMEX, INC., PLAINTIFF *v.* UNITED STATES OF AMERICA, DEFENDANT

Court No. 99–01–00013

[Motion for Reconsideration: Denied.]

(Decided May 1, 2002)

Steptoe & Johnson LLP (Herbert C. Shelley, Alice A. Kipel), for Plaintiff.
Robert D. McCallum, Jr., Assistant Attorney General; *John J. Mahon,* Acting Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, United States Department of Justice *(Amy M. Rubin),* for Defendant.

MEMORANDUM OPINION AND ORDER

I

INTRODUCTION

WALLACH, *Judge:* Purusant to USCIT Rule 59, Plaintiff Ammex, Inc. ("Ammex") moves the court to reconsider its decision in *Slip Opinion 02–20* and accompanying order, dated February 22, 2002 ("Slip Op."),[1] in which the court denied Ammex's Motion for Order to Show Cause Why Defendant Should Not be Held in Contempt ("Ammex's Contempt Motion"). Ammex claims the February 22, 2002 opinion should be reconsidered because, it says: (1) the court reviewed Ammex's *res judicata* argument under issue preclusion instead of claim preclusion principles, and (2) the opinion misconstrues Ammex's October 23, 2000 letter to Customs as a forfeiture of Ammex's ability to challenge the revocation decision on *res judicata* grounds. Ammex's Motion for Reconsideration is denied.

II

DISCUSSION

The grant of a motion for reconsideration is within the sound discretion of the court. *Union Camp Corp. v. United States,* 21 CIT 371, 963 F. Supp. 1212, 1213 (1997). "The purpose of a rehearing is not to relitigate the case but, rather, to rectify a fundamental or significant flaw in the original proceeding." *Asociacion Colombiana de Exportadores de Flores v. United States,* 22 CIT 724, 19 F. Supp.2d 1116, 1118 (1998). It is well established that the court will not disturb its decision unless it is "manifestly erroneous." *Precision Speciality Metals v. United States,* 182 F. Supp.2d 1314, 1321 (CIT 2001). The circumstances in which a "significant flaw" or "manifestly erroneous" decision is present are as follows:

> (1) an error or irregularity in the trial; (2) a serious evidentiary flaw; (3) a discovery of important new evidence which was not available even to the diligent party at the time of trial; or (4) an occurrence at trial in a nature of an accident or unpredictable surprise or

[1] Familiarity with the court's earlier opinion is assumed.

> unavoidable mistake which impaired a party's ability to adequately present its case.

USEC, Inc. v. United States, 138 F. Supp.2d 1335, 1337 (CIT 2001). Ammex has not established that reconsideration of the court's earlier decision is warranted.

Contrary to Ammex's argument, the court's February 22, 2002 opinion rested on the court's lack of jurisdiction to hear Ammex's contempt motion. *See* Slip Op. at 6–10. In addressing the numerous arguments raised by Ammex, the court found Ammex's *res judicata* argument unpersuasive and stated that "[i]ssue preclusion should thus not operate to bar either party from raising [the] issue in the correct procedural posture." *Id.* at 11. Ammex now argues that the focus of its *res judicata* argument was on claim preclusion grounds and that the court erred by focusing instead on issue preclusion.

"Under the doctrine of res judicata [claim preclusion], a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based upon the same claim or cause of action." *Golden Pac. Bancorp v. United States,* 15 F.3d 1066, 1071 (Fed. Cir. 1994) (citing 1B James W. Moore et al., Moore's Federal Practice ¶ 0.401[1] (2d ed. 1993)). The court is not persuaded that the claim or cause of action in *Ammex, Inc. v. United States,* 116 F. Supp.2d 1269 (CIT 2000) *("Ammex I"),* is the same claim at the basis of Customs' revocation of the September 5, 2000 letter. In denying Ammex's Contempt Motion, the court recognized the distinction between Ammex's initial claim raised in *Ammex I* (that the specific decisions and rationale contained in the challenged Customs Headquarter rulings were arbitrary, capricious, or contrary to law) and the separate and distinct claim with which Ammex challenged Customs' revocation of the September 5, 2000 letter (that the fuel sold at Ammex's duty-free store satisfies the statutory definition of "duty-free merchandise" and that such fuel is not subject to federal tax). *See* Slip Op. at 7. Because claim preclusion operates to "bar a second suit raising claims based on the same set of transactional facts," *Jet, Inc. v. Sewage Aeration Sys.,* 223 F.3d 1360, 1362 (Fed. Cir. 2000), and Ammex has failed to establish that the "transactional facts"underlying the claim in *Ammex I* are the same as those underlying Customs' revocation decision, Ammex's claim preclusion argument failed then, and still fails.

Ammex also argues in its Motion for Reconsideration that a mistake of fact underlies the court's conclusions regarding Ammex's October 23, 2000 letter of Ammex to Customs. "Contrary to the Court's understanding," Ammex argues, "Ammex did not write the October 23, 2000 letter because Ammex believed the excise tax question was left unresolved after *Ammex I*." Memorandum of Law in Support of Ammex, Inc.'s Motion for Reconsideration ("Ammex's Memo") at 7 (footnotes omitted). As previously noted, the court's opinion was grounded on the basis that the court lacked jurisdiction to hear Ammex's contempt motion because such motion raised an issue separate and distinct from the issues raised

in the original proceeding. The opinion simply did not rest on any conclusions the court drew from the October 23, 2002 letter.

The decision to grant or deny a civil contempt motion is discretionary. *MAC Corp. of Am. v. Williams Patent Crusher & Pulverizer Co.,* 767 F.2d 882, 885 (Fed. Cir. 1985). Ammex has not established the existence of a fundamental, significant, or relevant flaw in the original proceeding, nor brought to light any evidence that the court's decision is manifestly erroneous. Instead, Ammex has merely reiterated its original position and again mischaracterized the court's holding in *Ammex I.* Given Ammex's failure to establish the requisites for reconsideration and the discretionary nature of a decision on a contempt motion, Ammex's motion is unpersuasive.

III

CONCLUSION

For the foregoing reasons, Ammex's Motion for Reconsideration is denied.