Slip Op. 07–179

VALLEY FRESH SEAFOOD, INC., Plaintiff, v. **UNITED STATES**, Defendant, and **CATFISH FARMERS OF AMERICA**, ***et al.,*** Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge
Court No. 06–00132

[Denying the motions of defendant and defendant-intervenors to dismiss for failure to exhaust administrative remedies and for failure to state a claim upon which relief can be granted]

Dated: December 17, 2007

DLA Piper US LLP (*Matthew J. McConkey* and *James A. Earl*) for plaintiff.

Jeffrey S. Bucholtz, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Richard P. Schroeder* and *David S. Silverbrand*); *David Richardson*, Office of Chief Counsel for Import Administration, United States Department of Commerce, for defendant.

Akin Gump Strauss Hauer & Feld, LLP (*Valerie A. Slater, J. David Park, Jarrod M. Goldfeder*, and *Lisa W. Ross*) for defendant-intervenors.

OPINION AND ORDER

Stanceu, Judge: Plaintiff Valley Fresh Seafood, Inc. ("Valley Fresh"), a U.S. importer of fish fillets, contests a final determination ("Final Results") issued by the International Trade Administration of the United States Department of Commerce ("Commerce" or the "Department") in the first administrative review of an antidumping duty order on certain fish fillets (the "subject merchandise") from the Socialist Republic of Vietnam. *See Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Final Results of the First Administrative Review*, 71 Fed. Reg. 14,170 (Mar. 21, 2006) ("*Final Results*").

This case involves the antidumping duty assessment rate that Commerce, in the Final Results, determined for Can Tho Agricultural and Animal Products Import Export Company ("CATACO"), a

Vietnamese exporter and producer of the subject merchandise.[1] In the Final Results, Commerce invoked its authority under 19 U.S.C. § 1677e (2000) to use "facts otherwise available" and "adverse inferences" in applying to CATACO's shipments of the subject merchandise an 80.88 percent antidumping duty assessment rate. *See id.* at 14,172. Commerce calculated that rate based on the 63.88 percent assessment rate that it assigned to respondents who failed to establish independence from control of the government of Vietnam (the "Vietnam-Wide Entity rate"), to which Commerce added seventeen percent as a result of its finding, pursuant to 19 C.F.R. § 351.402(f) (2000), that CATACO had entered into an agreement to reimburse one of its importers for antidumping duties. *See id.* Valley Fresh was not the importer that entered into the particular reimbursement agreement with CATACO. At issue in this case is whether Commerce acted according to law in assigning the 80.88 percent rate to all entries of CATACO's subject merchandise, including the entries imported by Valley Fresh.

Valley Fresh argues that an adjustment pursuant to a finding of reimbursement under 19 C.F.R. § 351.402(f) is a unique adjustment specific to an individual exporter and an individual importer and that Commerce disregarded the record evidence that there was no reimbursement agreement or actual reimbursement involving Valley Fresh and CATACO. Compl. ¶¶22–23. As relief, plaintiff submits that its entries of CATACO's fish fillets should be liquidated at the Vietnam-Wide Entity rate of 63.88 percent and not the 80.88 percent rate determined by Commerce. *Id*. ¶24. Defendant United States and defendant-intervenors, the Catfish Farmers of America and eight individual U.S. catfish processors, move to dismiss this action pursuant to USCIT Rule 12(b)(5) for failure to exhaust administrative remedies and for failure to state a claim upon which relief can be granted. Def.'s Mot. to Dismiss 1; Def.-Intervenors' Mot. to Dismiss 1. Defendant and defendant-intervenors argue that Valley Fresh failed to exhaust its administrative remedies because it did not present to Commerce its arguments relating to the application of the reimbursement provisions of 19 C.F.R. § 351.402(f). Def.'s Mot. to Dismiss 4–6; Def.-Intervenors' Mot. to Dismiss 6–12. Their second argument is that Valley Fresh is not entitled to an antidumping duty rate separate from the rate assigned to CATACO and, for this reason, has failed to state a claim upon which relief can be granted. Def.'s Mot. to Dismiss 6–11; Def.-Intervenors' Mot. to Dismiss 12–15.

For the reasons discussed in this Opinion and Order, the court declines to dismiss Valley Fresh's action for failure to exhaust adminis-

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[1] The subject merchandise consists of "frozen fish fillets, including regular, shank, and strip fillets and portions thereof, whether or not breaded or marinated, of the species *Pangasius Bocourti, Pangasius Hypophthalmus* (also known as *Pangasius Pangasius*), and *Pangasius Micronemus*." *See Final Results*, 71 Fed. Reg. at 14,171.

trative remedies. Defendant-intervenors, who were the petitioners in the proceeding below, argued before Commerce that when determining cash deposit and assessment rates "Commerce should adjust the rates to account for the reimbursement finding that Commerce made at verification and draw an adverse inference that CATACO had entered into such agreements with all of its U.S. importers." *See* Def.-Intervenors' Mot. to Dismiss 5 (citing *Letter from Akin Gump Strauss Hauer & Feld LLP to Sec'y of Commerce* (Jan. 30, 2006), Attach. at 5–8 ("*Def.-Intervenors' Case Brief*") (Admin. R. Doc. No. 263)). Therefore, the issue on which Valley Fresh now seeks judicial review was presented to, and considered by, Commerce during the administrative review. Moreover, Commerce gave no indication prior to issuing the Final Results that it was considering the application to CATACO of a rate higher than the Vietnam-Wide Entity rate based on its finding concerning reimbursement. Because of the lack of such notice, the first meaningful opportunity for Valley Fresh to challenge Commerce's decision on this issue occurs upon judicial review.

The court further concludes, as discussed below, that Valley Fresh's complaint should not be dismissed for failure to state a claim upon which relief can be granted. Valley Fresh challenges Commerce's calculation of an antidumping duty rate for CATACO that is based on an adverse inference that all importers had entered into reimbursement agreements with CATACO, despite record evidence that Valley Fresh entered into no reimbursement agreement and received no reimbursement. The court concludes that because plaintiff's challenge raises the possibility of relief above the speculative level, the complaint states a claim upon which relief can be granted. *See Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007).

I. BACKGROUND

Commerce issued its antidumping duty order on certain fish fillets from the Socialist Republic of Vietnam in 2003. *See Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam*, 68 Fed. Reg. 47,909 (Aug. 12, 2003). On August 3, 2004, Commerce announced the opportunity to request an administrative review. *See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review*, 69 Fed. Reg. 46,496, 46,497 (Aug. 3, 2004). CATACO, an exporter of frozen fish fillets from Vietnam, was one of eight companies that timely requested an administrative review. *Letter from White & Case LLP to Sec'y of Commerce* (Aug. 27, 2004) (Admin. R. Doc. No. 3). In response to the requests, Commerce initiated the administrative review at issue in this case, which is the first administrative review of the antidumping duty order. *See Initiation of Antidumping and Countervailing Duty Administrative Re-*

views and Requests for Revocation in Part, 69 Fed. Reg. 56,745 (Sept. 22, 2004).

In the preliminary results of the administrative review ("Preliminary Results"), Commerce invoked facts otherwise available and adverse inferences in preliminarily assigning CATACO the Vietnam-Wide Entity rate of 63.88 percent. *Certain Frozen Fish Fillets from the Socialist Republic of Vietnam: Preliminary Results and Preliminary Partial Rescission of Antidumping Duty Administrative Review*, 70 Fed. Reg. 54,007, 54,010 (Sept. 13, 2005) ("*Preliminary Results*"). Following the issuance of the Preliminary Results, the Department began verification of CATACO's questionnaire responses. *Final Results*, 71 Fed. Reg. at 14,170; *see also Letter from Akin Gump Strauss Hauer & Feld LLP to Sec'y of Commerce* at 1 (Dec. 30, 2004) (requesting, on behalf of petitioners, that the Department conduct verification of the responses submitted by CATACO during the course of the review) (Admin. R. Doc. No. 70). During verification, the Department found that CATACO had failed to report that it had entered into an agreement to reimburse one of its importers for a certain percentage of the antidumping duties that the importer paid upon entry of shipments of CATACO's fish fillets into the United States. *See* Def.'s Mot. to Dismiss 2. At this point, CATACO terminated its participation in the verification process and filed a request that Commerce remove or destroy its submissions of business proprietary information, which the Department granted. *Final Results*, 71 Fed. Reg. at 14,170–71. Commerce concluded that CATACO did not act to the best of its ability to comply with the Department's requests for information and, according to 19 U.S.C. § 1677e(b), assigned CATACO the 63.88 percent rate as an adverse inference. *See id.*

In case briefs filed with Commerce after issuance of the Department's report on the terminated CATACO verification, petitioners argued that, when applying facts otherwise available and adverse inferences to determine cash deposit and assessment rates, "Commerce should adjust the rates to account for the reimbursement finding at verification and make an adverse inference that CATACO had entered into such agreements with all of its U.S. importers." Def.-Intervenors' Mot. to Dismiss 5 (citing *Def.-Intervenors' Case Brief* at 5–8). Also post-verification, the Department itself placed on the record information that it had obtained from U.S. Customs and Border Protection ("Customs") regarding reimbursement. *Mem. from Alex Villanueva, Program Manager, Import Admin. to Commerce File* (Jan. 17, 2006) (Admin. R. Doc. No. 246). The record information contained a copy of a certificate that Valley Fresh filed with Customs according to 19 C.F.R. § 351.402(f)(2), stating that Valley Fresh did not enter into an agreement for reimbursement of antidumping duties. *See id.*; *see also* Compl. ¶ 15; 19 C.F.R. § 351.402(f)(2).

In the Final Results, Commerce affirmed its conclusion that CATACO failed to act to the best of its ability to comply with the De-

partment's requests for information. *Final Results*, 71 Fed. Reg. at 14,172. Commerce determined that it was appropriate to apply facts otherwise available and adverse inferences to all of CATACO's exports of subject merchandise that entered the United States during the period of review. *Id.* Commerce assigned to CATACO the 63.88 percent Vietnam-Wide Entity assessment rate as an adverse inference and then, again as an adverse inference, increased that rate to 80.88 percent to account for the finding of reimbursement. *Id.* Specifically, Commerce stated:

> A finding of reimbursement is necessarily exporter-importer specific, and is treated as a unique adjustment. Morever, as we are applying [facts otherwise available and adverse inferences] in this instance, the reimbursement adjustment is exogenous to the normal calculation of the dumping margin. In order to properly account for CATACO's reimbursement activities, the Department will adjust CATACO's cash deposit and assessment rates, but not apply the adjustment to the rest of the Vietnam-Wide Entity. In this unique situation in which CATACO terminated verification and where we also found reimbursement of antidumping duties, it is appropriate to assign CATACO a rate inclusive of the Vietnam-Wide Entity rate and the reimbursement adjustment.

Id. In a footnote, Commerce added the following: "As part of the adverse inference, the Department's finding of reimbursement will be applied to all of CATACO's importers for cash deposit and assessment purposes." *Id.* at 14,172 n.3.

II. DISCUSSION

Valley Fresh's complaint alleges facts allowing the court to conclude that Valley Fresh has standing to bring its action under 19 U.S.C. § 1516a(a)(2)(A)(i)(I) (2000). Valley Fresh alleges that, as an importer of merchandise that is subject to the antidumping duty order, it qualifies as an "interested party" as defined in 19 U.S.C. § 1677(9)(A) (2000). Compl. ¶3. The complaint also alleges that Valley Fresh imported merchandise sold by CATACO, an exporter and producer whose sales were reviewed by Commerce in the administrative review proceeding conducted by Commerce. *Id.* The court reasonably may infer from this allegation that sales of CATACO's merchandise to Valley Fresh were among the sales of subject merchandise that Commerce examined in conducting the administrative review. The complaint further alleges that Valley Fresh's anti-reimbursement statement was placed on the record of the administrative review proceeding conducted by Commerce. *Id.* ¶15. Neither defendant nor defendant-intervenors challenge Valley Fresh's claim of standing to bring this action. Viewed in these circumstances and in the context of the complaint as a whole, Valley

Fresh's allegations are sufficient to support a conclusion that Valley Fresh, for purposes of standing, was a party that participated in the underlying administrative review proceeding.[2] The court exercises jurisdiction according to 19 U.S.C. § 1516a(a)(2)(A)(i)(I) and (B)(iii) and 28 U.S.C. § 1581(c) (2000).

A. The Judicial Review of Plaintiff's Claim Is Not Precluded by Plaintiff's Failure to Exhaust Its Administrative Remedies

A party who does not exhaust all avenues of administrative relief before presenting a claim to an agency usually is not permitted to raise that claim for the first time before a court reviewing the agency's action. *See Woodford v. Ngo*, 126 S. Ct. 2378, 2385 (2006) (*citing United States v. L.A. Tucker Truck Lines, Inc.* 344 U.S. 33, 37 (1952) ("[A]s a general rule, courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice.")). Valley Fresh admits that it did not challenge before Commerce the legality of Commerce's applying a finding of reimbursement on the part of one of CATACO's importers to all of its importers in determining the assessment rate. Pl.'s Opp'n to Mot. to Dismiss 4–6. However, this court has discretion under 28 U.S.C. § 2637(d) to determine the circumstances under which the court will require exhaustion of administrative remedies. 28 U.S.C. § 2637(d) (2000) (providing that the court "shall, where appropriate, require the exhaustion of administrative remedies."); *see Cemex, S.A. v. United States*, 133 F.3d 897, 905 (Fed. Cir. 1998) (reasoning that " 'where Congress has not clearly required exhaustion, sound judicial discretion governs. . . .' ") (quoting *McCarthy v. Madigan*, 503 U.S. 140, 144 (1992)). The court exercises its discretion to permit Valley Fresh's claim for two reasons. First, Valley Fresh's failure to raise in the administrative process the aspect of the reimbursement issue now before the court did not prevent Commerce from actually considering this issue at the agency level. Second, Valley Fresh's first meaningful opportunity to challenge Commerce's decision on the reimbursement issue is in this judicial review proceeding. Commerce, prior to issuing the Final Results, did not provide any party with notice of the way in which it would apply 19 C.F.R. § 351.402(f), and Commerce's decision on reimbursement in the Final Results appeared to be a departure from its ordinary practice.

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[2] Under 19 U.S.C. § 1516a(a)(2)(A), an action may be commenced by "an interested party who is a party to the proceeding in connection with which the matter arises. . . ." 19 U.S.C. § 1516a(a)(2)(A). In parallel, 28 U.S.C. § 2631(c) provides that "[a] civil action contesting a determination listed in [19 U.S.C. § 1516a] may be commenced in the Court of International Trade by any interested party who was a party to the proceeding in connection with which the matter arose." 28 U.S.C. § 2631(c) (2000).

Commerce had the full opportunity to consider the reimbursement issue during the administrative review. According to the Final Results, Commerce considered, and appears to have adopted, the position on the application of 19 C.F.R. § 351.402(f) that petitioners advocated during the proceeding, with the result that the Final Results were based on an adverse inference that CATACO had entered into reimbursement agreements with all of its U.S. importers. *See* Final Results, 71 Fed. Reg. at 14,172 n.3; Def.-Intervenors' Mot. to Dismiss 5 (citing *Def.-Intervenors' Case Brief* at 5–8); *see also* Def.-Intervenors' Reply in Supp. of Mot. to Dismiss 4 (stating that the petitioners "went on to argue specifically that Commerce should make an adverse inference that CATACO had entered into such agreements with all of its U.S. importers given the company's decision to prematurely terminate the verification, thus preventing Commerce from fully investigating the extent to which other reimbursement agreements existed.").

The court may excuse a party's failure to raise an argument before the administrative agency if, as occurred in this case, the agency in fact considered the issue. *See Holmes Prods. Corp. v. United States*, 16 CIT 1101, 1104 (1992) (citing *Wash. Assoc. for Television and Children v. FCC*, 712 F.2d 677, 682–83 n.10 (D.C. Cir. 1983)). "[C]ourts have waived exhaustion if the agency has had an opportunity to consider the identical issues presented to the court . . . but which were raised by other parties, or if the agency's decision, or a dissenting opinion, indicates that the agency had the opportunity to consider the very argument pressed by the petitioners on judicial review." *Natural Res. Def. Council, Inc. v. EPA*, 824 F.2d 1146, 1151 (D.C. Cir. 1987) (internal quotation marks, brackets, and citations omitted); *cf. N.Y. State Broadcasters Assoc. v. United States*, 414 F.2d 990, 994 (2d Cir. 1969) (concluding that the petitioners were not precluded from making their constitutional arguments before the court even though "the [agency] either would not or could not declare that [the statute] is unconstitutional," and another party had explicitly raised those issues before the agency).

Defendant-intervenors argue that the court should not allow Valley Fresh to contest the Department's decision on the reimbursement issue because Valley Fresh, during the administrative review, "chose not to respond to any of [the petitioners'] detailed submissions" and "made no effort to participate in the review process and, despite multiple opportunities, chose not to make any arguments with respect to the specific antidumping duty that would be assessed on its imports from CATACO." Def.-Intervenors' Reply in Supp. of Mot. to Dismiss 5–6. The court declines to exercise its discretion in this way. The petitioners' submission prompted Commerce to examine the reimbursement issue and, apparently, to accept the petitioners' position on that issue. Valley Fresh's participation was not necessary to Commerce's deliberation on that issue.

Valley Fresh argues that its failure to participate below should be excused because it could not predict how Commerce would adjust CATACO's rate in the Final Results. *See* Resp. in Opp'n to Mot. to Dismiss filed by Def. and Def.-Intervenors 5 (stating that "[i]t is simply not reasonable to claim that Plaintiff should have guessed that the Department was going to apply its verification reimbursement findings to all U.S. customers of CATACO when the regulation on reimbursement is exporter-importer specific, and is a unique adjustment."). The court considers it significant that Commerce did not apply 19 C.F.R. § 351.402(f) in the Preliminary Results and, at that time, gave no indication that it was considering doing so in the Final Results. Therefore, the Final Results constituted the first public statement by Commerce that it was applying an additional seventeen percent to the Vietnam-Wide Entity rate to determine assessment and cash deposit rates for CATACO.

Defendant-intervenors contend that Valley Fresh "should have been aware" that Commerce might employ a particular methodology in the Final Results because of petitioners' case brief. *See* Def.-Intervenors' Mot. to Dismiss 10. However, plaintiff alleges in its complaint that Commerce, in the Issues and Decisions Memorandum accompanying the Final Results, acknowledged that "its normal practice in the situation where a respondent prematurely terminated a verification would be to subject it to the Vietnam-Wide Entity rate of 63.88%." Compl. ¶17 (citing *Issues and Decisions Memorandum for the 1st Administrative Review of Certain Frozen Fish Fillets from the Socialist Republic of Vietnam* at 7 (Mar. 13, 2006)). The court concludes, based on the complaint and the Department's public issuances cited therein, that it would not have been reasonable for Valley Fresh to expect that Commerce would adopt a position that appeared to be inconsistent with the Department's established practice and of which Commerce gave no public indication prior to issuing its final decision.

B. Valley Fresh Has Stated a Claim upon which Relief Can Be Granted

To avoid dismissal for failure to state a claim upon which relief can be granted, the "factual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp.*, 127 S. Ct. at 1965 (internal citations omitted). In ruling on such a motion, the court assumes that all well-pleaded factual allegations in the complaint are true and draws all reasonable inferences in the plaintiff's favor. *Leider v. United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002).

In its complaint, Valley Fresh challenges the application of the 80.88 percent antidumping duty rate to its entries and alleges that this rate is improper because it was determined for CATACO based

on a finding of a single reimbursement agreement within the scope of 19 C.F.R. § 351.402(f) with an importer that was not Valley Fresh. *See* Compl. ¶¶22–24. According to the complaint, Commerce calculated this rate based on an adverse inference that CATACO entered into reimbursement agreements with all of its importers. *See id.* ¶¶17–20; *see also Final Results*, 71 Fed. Reg. at 14,172–73. Plaintiff's complaint alleges, in effect, that this rate is contrary to law in the absence of record evidence that Valley Fresh was reimbursed or had entered into a reimbursement agreement with CATACO. *See id.* ¶¶13, 20, 23 (stating that "the Department applied its finding of reimbursement to all of CATACO's importers for cash deposit and assessment purposes" and that "it is not in accordance with law to use evidence of reimbursement from one importer against all other importers from the same exporter.") (internal quotation marks omitted).

Defendant argues that Valley Fresh's complaint has failed to state a claim upon which relief can be granted because Valley Fresh, according to defendant, "is not entitled to an antidumping duty calculation separate from CATACO[.]" Def's. Mot. to Dismiss 11. Defendant submits that "[a]bsent certain exceptions which do not apply here (*e.g.*, the importer being affiliated with the exporter or producer), the law does not provide for importer rates which are separate from the producer/exporter rates." *Id.* at 8. For this argument, defendant relies in part on the Department's regulation, 19 C.F.R. § 351.213(b) (2000), concluding that an administrative review may be requested only of an exporter or producer. Similarly, defendant-intervenors contend that when Commerce applies facts otherwise available and adverse inferences to a foreign producer or exporter that has failed to cooperate to the best of its ability, "that *same* rate applies equally to all of the importers for that producer or exporter regardless of the expectations or specific actions of the importers involved." Def.-Intervenors' Mot. to Dismiss 14. According to defendant-intervenors, "as an importer, Valley Fresh is not entitled to argue that it should have received an individual antidumping duty rate more favorable than the 80.88 percent rate assigned to CATACO." *Id.* at 15.

The court does not find merit in the argument that defendant and defendant-intervenors advance in support of their motions to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted. That argument impliedly presumes that the decision by Commerce to draw an adverse inference under 19 U.S.C. § 1677e(b) that CATACO had entered into reimbursement agreements with all of its importers is insulated entirely from judicial review in the circumstance of this proceeding. In this circumstance, dismissing plaintiff's claim would be inconsistent with the court's obligation to determine whether the Final Results are "unsupported by

substantial evidence on the record, or otherwise not in accordance with law[.]" 19 U.S.C. § 1516a(b)(1)(B)(i).

At this early stage of the litigation, the court is not in a position to conclude, based on the claim as stated in the complaint and on the argument of defendant and defendant-intevenors, that plaintiff's future Rule 56.2 motion necessarily will be unable to demonstrate that the Final Results are unsustainable under the applicable standard of review. If, in ruling on Valley Fresh's Rule 56.2 motion, the court were to conclude that the Final Results are unsatisfactory under the standard of review, the court would not necessarily be powerless to order an appropriate form of relief, whether or not it is the specific relief sought by Valley Fresh, *i.e.*, liquidation of its entries at the Vietnam-Wide Entity rate of 63.88 percent. *See* Compl. ¶ 24. Defendant does not satisfactorily explain why, specifically, 19 C.F.R. § 351.213(b) precludes any form of relief. Neither defendant nor defendant-intervenors present a well-developed argument why the court could grant no relief if the court were to conclude that the Final Results are not in accordance with law, including, specifically, the requirements of 19 U.S.C. § 1675(a)(2)(A) with respect to entries of the subject merchandise. For these reasons, the court concludes that plaintiff's claim as stated in the complaint is sufficient to avoid dismissal for failure to state a claim upon which relief can be granted.

III. CONCLUSION AND ORDER

The court concludes that plaintiff's failure to exhaust administrative remedies does not require dismissal of the complaint. Commerce considered the issue of whether to calculate an assessment rate that applied its finding of reimbursement of one importer to all entries of CATACO's subject merchandise as an adverse inference because the petitioners raised this issue in their case brief. In addition, the Preliminary Results did not provide notice of the intent of Commerce to apply 19 C.F.R. § 351.402(f) in the particular way in which the issue was resolved in the Final Results. Plaintiff was not placed on notice of this resolution until the publication of the Final Results. Based on the complaint as construed according to the applicable standard of review, the court further concludes that plaintiff has stated a claim upon which relief can be granted. Plaintiff has pleaded facts which, if assumed to be true, are sufficient to raise the right to relief above the speculative level. Accordingly, upon consideration of defendant's and defendant-intervenors' motions to dismiss this action pursuant to USCIT Rule 12(b)(5), plaintiff's response thereto, and all other submissions and proceedings herein, it is

ORDERED that defendant's motion to dismiss, as filed on September 26, 2006, and defendant-intervenors' motion to dismiss, as filed on September 29, 2006, be, and hereby are, DENIED.

Slip Op. 07–180

MAXCELL BIOSCIENCE, INC., *Plaintiff*, v. UNITED STATES, *Defendant*.

Court No. 04–00254

[Plaintiff's motion for summary judgment is denied; Defendant's cross-motion is granted.]

Dated: December 18, 2007

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

Jeffrey S. Bucholtz, Acting Assistant Attorney General; *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Edward F. Kenny*); *Su-Jin Yoo*, Office of the Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection, U.S. Department of Homeland Security, Of Counsel; for Defendant.

OPINION

RIDGWAY, Judge:

At issue in this action is the tariff classification of MetaBerry and Aloe Gold, two liquid "dietary supplements" imported from Korea by plaintiff MaxCell BioSciences, Inc. in 2002 and 2003.

The Bureau of Customs and Border Protection[1] liquidated the subject entries of the two products under subheading 2106.90.99 of the Harmonized Tariff Schedule of the United States ("HTSUS").[2] That subheading covers "[f]ood preparations not elsewhere specified or included," which are dutiable at the rate of 6.4% *ad valorem*. MaxCell claims that the merchandise is instead classifiable as "other nonalcoholic beverages" under subheading 2202.90.90, subject to duties at the rate of 0.2¢ per liter.

Cross-motions for summary judgment are pending. *See generally* Plaintiff's Memorandum of Law in Support of Its Motion for Summary Judgment ("Pl.'s Brief"); Plaintiff's Memorandum of Law in Opposition to Defendant's Cross Motion for Summary Judgment ("Pl.'s Reply Brief"); Defendant's Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment ("Def.'s Brief"); Defen-

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[1] The U.S. Customs Service – formerly part of the U.S. Department of the Treasury – is now part of the U.S. Department of Homeland Security, and is known as U.S. Customs and Border Protection. The agency is referred to as "Customs" herein. *See* Homeland Security Act of 2002, Pub. L. No. 107–296, § 1502, 116 Stat. 2135, 2308; 72 Fed. Reg. 20,131 (April 23, 2007).

[2] The HTSUS consists of the General Notes, the General Rules of Interpretation ("GRIs"), the Additional U.S. Rules of Interpretation ("ARIs"), sections I through XXII (chapters 1 to 99, including all section and chapter notes, article provisions, and tariff and other treatment accorded thereto), and the Chemical Appendix. *See, e.g.*, *BASF Corp. v. United States*, 482 F.3d 1324, 1325–26 (Fed. Cir. 2007) (citations omitted). Except as otherwise noted, all citations herein are to the 2002 version of the HTSUS.

dant's Reply Memorandum in Opposition to Plaintiff's Motion for Summary Judgment and in Support of Defendant's Cross-Motion for Summary Judgment ("Def.'s Reply Brief").

Jurisdiction lies under 28 U.S.C. § 1581(a) (2000).[3] Customs' classification decisions are subject to *de novo* review pursuant to 28 U.S.C. § 2640.

For the reasons set forth below, MetaBerry and Aloe Gold are properly classified as "[f]ood preparations not elsewhere specified or included," under subheading 2106.90.99 of the HTSUS. MaxCell's motion for summary judgment is therefore denied, and the Government's cross-motion is granted.[4]

I. *The Merchandise at Issue*

The two products at issue in this matter – MetaBerry and Aloe Gold – are liquid "dietary supplements," sold in wide-mouth, 32 fluid ounce plastic containers.[5] The labels on both products indicate that there are 32 servings per container. And the instructions for suggested use indicate that MetaBerry and Aloe Gold are to be taken in measured, one- to two-ounce doses before each meal, "or as needed." To that end, the cone-shaped cap that tops each of the products is designed to serve as a measuring cup, with lines marked on the interior of the cap to indicate specific dosages (including one and two ounces).[6]

Maxcell markets MetaBerry as a substance which optimizes oxygen and glucose delivery to the brain, protects the body from free radicals, enhances the immune system, and fosters cardiovascular and urinary tract health. The label on the container prominently touts MetaBerry as an "ANTI-CATABOLIC," a "Dietary Supple-

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[3] Except as otherwise noted, all statutory citations (other than citations to the HTSUS) are to the 2000 edition of the United States Code.

[4] MaxCell's Complaint actually included six counts – one count challenging Customs' classification of MaxCell's merchandise, followed by five counts alleging that certain entries had not been timely liquidated by Customs and therefore were required to be liquidated under MaxCell's proposed classification. *See* Complaint. However, as MaxCell now acknowledges, all liquidations (and re-liquidations) of the merchandise at issue here were, in fact, timely. *See* Def.'s Brief at 23–24; Pl.'s Reply Brief at 9–10. MaxCell has therefore conceded that the last five counts of its Complaint – Counts II through VI (misnumbered Counts II through V) – should be dismissed.

[5] All facts herein are uncontested, and – except as otherwise indicated – are drawn from Plaintiff's Statement of Material Facts Which Are Not In Dispute and Defendant's Response thereto, from Defendant's Additional Statement of Undisputed Material Facts, and from the samples of the merchandise at issue (which the Government supplied with its cross-motion).

Because MaxCell did not respond to Defendant's Additional Statement of Undisputed Material Facts, the statements therein are deemed admitted. *See* USCIT Rule 56(h)(3).

[6] According to a declaration submitted by Customs' National Import Specialist responsible for the classification of dietary supplements, MetaBerry and Aloe Gold are also sold in one-ounce foil pouches.

ment," and a "Mind Body Formula & High Potency Antioxidant."[7] Similarly, Aloe Gold is marketed as a substance which slows the aging process by decreasing catabolic activity through increased antioxidant activity, and which restores the body's ideal pH, restores water balance in the colon, and supports the natural healing and renewing mechanisms of the gastrointestinal tract. Like MetaBerry, Aloe Gold is also labeled as an "ANTI-CATABOLIC" and a "Dietary Supplement."

According to the list of ingredients on the label, MetaBerry is a preparation based on a "Fruit Blend (concentrate)" of blueberry, cranberry, cherry, and grape, together with aloe vera, ginkgo biloba, alpha lipoic acid, as well as a proprietary herbal blend of jujube extract, black pepper, active aloe, and Chinese licorice, plus preservatives.[8] The product has a somewhat bitter, medicinal taste. And a warning on the label cautions against use by pregnant or nursing women without consulting a physician.

The list of ingredients on the Aloe Gold label indicates that it is a preparation consisting of active aloe, carragel,[9] pine needle extract, citric acid, and green tea extract, as well as the same proprietary herbal blend and preservatives that MetaBerry contains.[10] Aloe Gold has an oily appearance, and a texture or consistency similar to that of cod liver oil. And, like MetaBerry, Aloe Gold too is labeled to warn against its use by pregnant or nursing women without consulting a physician.

MetaBerry and Aloe Gold are sold through two main channels. Both products are offered for sale though the website of MaxCell's distributor, Oasis LifeSciences, alongside other products advertised as "part of a healthy and nutritious lifestyle which brings back the hope and vitality of youth." In addition, the two products are available for purchase through agents known as "independent Associ-

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[7] The label further states that "MetaBerry is a unique combination of berry concentrates and botanicals which contain powerful antioxidants to help protect your brain and body. Among its many benefits, MetaBerry promotes: • Improved cerebral circulation • Healthy blood sugar balance • Healthy cholesterol in individuals with already normal levels • Urinary Tract Health • Healthy Liver Function • Healthy gums."

[8] According to MaxCell, MetaBerry falls within the definition of a "dietary supplement" set forth in 21 U.S.C. § 321(ff), and is labeled as such in compliance with Food and Drug Administration ("FDA") regulations. *See* 21 C.F.R. § 101.36 (2003); Pl.'s Brief at 5; Pl.'s Statement of Material Facts ¶ 5. *But see* Def.'s Response to Pl.'s Statement of Material Facts ¶ 5 (denying "for lack of knowledge or information sufficient to form a belief as to the truthfulness of plaintiff's claim").

[9] The declaration that MaxCell submitted in support of its motion explains that carragel is "water soluble gum extracted from seaweed," which is used as a "thickening agent."

[10] MaxCell states that Aloe Gold also falls within the definition of a "dietary supplement" set forth in 21 U.S.C. § 321(ff), and is so labeled in accordance with Food and Drug Administration ("FDA") regulations. *See* Pl.'s Brief at 5; Pl.'s Statement of Material Facts ¶ 13. *But see* Def.'s Response to Pl.'s Statement of Material Facts ¶ 13 (denying "for lack of knowledge or information sufficient to form a belief as to the truthfulness of plaintiff's claim").

ates," who host "Ageless Living" events in their homes to promote Metaberry and AloeGold, along with other Oasis LifeSciences products. A 32 fluid ounce container of MetaBerry costs approximately $38.25, while a container of Aloe Gold sells for approximately $25.95 – roughly $1.20 per ounce and $0.80 per ounce, respectively.

Customs' position concerning the classification of MetaBerry and Aloe Gold is set forth in Headquarters ruling letters HQ 966849 and HQ 966850, respectively. *See* HQ 966849 (April 26, 2004); HQ 966850 (April 27, 2004).[11]

II. *Standard of Review*

Pursuant to USCIT Rule 56, summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to . . . judgment as a matter of law." USCIT R. 56(c).

Customs' classification determinations are reviewed through a two-step process. First, the relevant tariff headings must be construed, which is a question of law. And, second, a determination must be made as to the tariff term under which the merchandise at issue falls, which is a question of fact. *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1364–65 (Fed. Cir. 1998) (citation omitted). Thus, in customs classification cases, "summary judgment is appropriate when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is." *Bausch & Lomb*, 148 F.3d at 1365 (citations omitted).

Here, although the parties argue for classification under different headings of the HTSUS, there are no genuine disputes of material fact. The parties are in agreement as to "exactly what the merchandise is" – "dietary supplements" in liquid form, to be taken in measured, one- to two-ounce doses three times a day (before meals), to help maintain general health and well-being. This matter is therefore ripe for summary judgment.

III. *Analysis*

Merchandise imported into the United States is classified for tariff purposes under the provisions of the HTSUS. Classification of merchandise under the HTSUS is governed by the principles set forth in the General Rules of Interpretation ("GRIs") and the Additional U.S. Rules of Interpretation ("ARIs"). *See, e.g.*, *North Am. Processing Co. v. United States*, 236 F.3d 695, 698 (Fed. Cir. 2001). Because both the

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[11] HQ 966849 actually granted MaxCell's protest as to the entry of MetaBerry there at issue, because – as the ruling letter explains – Customs' reliquidation of the subject merchandise under heading 2106 was untimely. HQ 966849 nevertheless reflects Customs' position on the merits of the proper classification of the product. *See* Def.'s Brief at 3 n.1.

GRIs and the ARIs are part of the HTSUS, they are considered statutory law for all purposes. *See* 19 U.S.C. § 1202.

The GRIs are applied in sequential order. Most merchandise is classified pursuant to GRI 1, which provides that "classification shall be determined according to the terms of the headings and any relevant section or chapter notes and, provided such section or chapter notes do not otherwise require, according to [GRIs 2 through 6]." Here, both Maxcell and the Government contend that the merchandise is classifiable pursuant to GRI 1 – albeit with very different results. Maxcell claims that application of GRI 1 leads to classification as a "nonalcoholic beverage" under heading 2202, while the Government maintains that it leads to classification as a "food preparation" under heading 2106. *See, e.g.*, Pl.'s Brief at 4; Def.'s Brief at 20–21; Def.'s Reply Brief at 7 n.2.[12]

A. *HTSUS Heading 2202*

MaxCell contends that MetaBerry and Aloe Gold are properly classifiable as "other nonalcoholic beverages" under heading 2202 of the HTSUS. Heading 2202 covers "[w]aters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavored and *other nonalcoholic beverages*, not including fruit or vegetable juices of heading 2009." *See* Heading 2202, HTSUS (emphasis added).[13]

MaxCell argues that, "[f]or tariff purposes, a beverage is a product which is drinkable in its condition as imported." *See* Pl.'s Brief at 4. According to MaxCell, because "MetaBerry and Aloe Gold are drinkable in their condition as imported," they are classifiable under

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[12] At several points in its briefs, MaxCell asserts unequivocally that MetaBerry and Aloe Gold cannot be classified under heading 2106. *See* Pl.'s Brief at 4; Pl.'s Reply Brief at 8. However, in its Reply Brief, MaxCell also argues – apparently in the alternative, though that is far from clear – that MetaBerry and Aloe Gold are *prima facie* classifiable under *both* heading 2202 and heading 2106. *See* Pl.'s Reply Brief at 4. According to MaxCell, classification under heading 2202 is nevertheless compelled, because GRI 3(a) provides that, when merchandise is *prima facie* classifiable under two or more headings, it should be classified under the heading that provides the most specific description. *See* Pl.'s Reply Brief at 4–5; GRI 3(a), HTSUS. MaxCell further contends that, even if heading 2106 and heading 2202 were equally specific, GRI 3(c) would require classification under heading 2202, because it is the heading that occurs last in numerical order. *See* Pl.'s Reply Brief at 5–6; GRI 3(c), HTSUS.

As explained below, however, MetaBerry and Aloe Gold are not *prima facie* classifiable under heading 2202. Resort to GRI 3 is therefore improper.

GRI 2(a) and 2(b) – which have no bearing here – generally deal, respectively, with the classification of articles that are "incomplete," "unfinished," "unassembled," or "disassembled," and with the classification of "mixtures or combinations" of materials or substances.

[13] Specifically, MaxCell contends that MetaBerry and Aloe Gold should be classified under subheading 2202.90.90 of the HTSUS, which covers "[w]aters, including mineral waters and aerated waters, containing added sugar or other sweetening matter or flavored, and other nonalcoholic beverages, not including fruit or vegetable juices of heading 2009: Other: Fruit or vegetable juices, fortified with vitamins or minerals: Other: Other."

heading 2202. *Id.*; *see also* Pl.'s Reply Brief at 6 (claiming that "[s]ince Metaberry and Aloe Gold are drinkable liquids with no alcoholic content they are 'other nonalcoholic beverages' within the terms of HTSUS heading 2202"). MaxCell's argument boils down to the bald assertion that all nonalcoholic liquids which can be consumed by humans are "beverages" classifiable under heading 2202. But that claim withers swiftly under scrutiny.

In an effort to support its assertion that "a beverage is a product which is drinkable in its condition as imported," MaxCell reaches back almost 70 years to *Strohmeyer*, a case involving the classification of nonalcoholic creme de menthe and creme de cacao. *See* Pl.'s Brief at 4 (*citing Strohmeyer & Arpe v. United States*, 28 C.C.P.A. 34 (1940)); *see also* Pl.'s Reply Brief at 9. *Strohmeyer* construed a tariff provision covering nonalcoholic beverages which appeared in a 1930 version of the Tariff Schedule of the United States ("TSUS"), an early predecessor of the current HTSUS applicable in this action.[14]

As the Government correctly points out, however, the fact that the creme de menthe and creme de cacao in *Strohmeyer* were drinkable in their condition as imported was merely the initial, *threshold* showing required to justify their classification as beverages. *See generally* Def.'s Brief at 13–14. Contrary to MaxCell's implication, nothing in *Strohmeyer* suggests that *all* liquids that can be consumed by humans are "beverages" for tariff purposes. Instead, expressly relying on a definition of "beverage" from Webster's New International Dictionary – "Liquid for drinking; drink; usually, drink artificially prepared and *of an agreeable flavor*; as, an intoxicating *beverage*" – the *Strohmeyer* court based its decision largely on the testimony of a witness who had "served those preparations frequently in his own home" and who testified that "they were *very refreshing* drinks." *Strohmeyer*, 28 C.C.P.A. at 38–39 ("beverage" emphasized in the original; other emphases added). *Strohmeyer* thus does nothing to support MaxCell's position. If anything, *Strohmeyer* militates *against* classification under heading 2202.

The HTSUS defines "nonalcoholic beverages" as "beverages of an alcoholic strength by volume not exceeding 0.5 percent vol." *See* Note 3 to Chapter 22, HTSUS. However, the HTSUS does not define the term "beverage" itself. If a tariff term is not statutorily defined, a court may rely on its own understanding of the term, on standard lexicographic authorities, and on the relevant Explanatory Notes. *Mita Copystar Am. v. United States*, 21 F.3d 1079, 1082 (Fed. Cir. 1994) (citations omitted).

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[14] The language of the TSUS provision at issue in *Strohmeyer* and the language of heading 2202 of the HTSUS are quite different. But, even where the language of the provisions of the TSUS and the HTSUS are identical, decisions interpreting the TSUS may be instructive, but they are not dispositive. *See, e.g.*, *JVC Co. of America v. United States*, 234 F.3d 1348, 1354–55 (Fed. Cir. 2001) (citations omitted).

The Explanatory Notes are the official interpretation of the scope of the Harmonized Commodity Description and Coding System (on which the HTSUS is based), as set forth by the Customs Cooperation Council (the international organization now known as the World Customs Organization), which drafted the international nomenclature. Accordingly, while the Explanatory Notes "do not constitute controlling legislative history," they are "generally indicative of proper interpretation of the [HTSUS]." *Mita Copystar*, 21 F.3d at 1082; *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (quotation omitted); H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582.[15]

Although the Explanatory Notes accompanying heading 2202 do not expressly define "beverage," they define the scope of the heading, using illustrative examples which are instructive here. According to the Explanatory Notes to heading 2202, that heading covers:

> (A) Waters, including mineral waters, containing added sugar or other sweetening matter or flavored.
>
> This group includes, *inter alia*:
>
> (1) Sweetened or flavored mineral waters (natural or artificial).
>
> (2) Beverages such as lemonade, orangeade, cola, consisting of ordinary drinking water, sweetened or not, flavored with fruit juices or essences, or compound extracts, to which citric acid or tartaric acid are sometimes added. They are often aerated with carbon dioxide gas, and are generally presented in bottles or other airtight containers.
>
> (B) Other non-alcoholic beverages, not including fruit or vegetable juices or heading 20.09.
>
> This group includes, *inter alia*:
>
> (1) Tamarind nectar rendered ready for consumption as a beverage by the addition of water and sugar and straining.
>
> (2) Certain other beverages ready for consumption, such as those with a basis of milk and cocoa.

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[15] As Congress has recognized, the Explanatory Notes "provide a commentary on the scope of each heading of the Harmonized System and are thus useful in ascertaining the classification of merchandise under the system." *Id.*; *see also* 54 Fed. Reg. 35,127, 35,128 (Aug. 23, 1989) (although the Explanatory Notes are not dispositive or legally binding, they provide a commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level).

Explanatory Notes, Heading 2202, HTSUS.[16] Notably, all the "beverages" specifically identified in the Explanatory Notes to heading 2202 – including lemonade, orangeade, cola, and "beverages ready for consumption . . . with a basis of milk and cocoa" – are flavorful, refreshing drinks.[17]

Equally instructive is what the Explanatory Notes to heading 2202 expressly exclude from classification under that heading. The Explanatory Notes emphasize, for example, that "[t]his heading *does not include* . . . [f]ruit or vegetable juices, whether or not used as beverages." Explanatory Notes, Heading 2202, HTSUS. That statement alone suffices to refute MaxCell's claim that all nonalcoholic liquids that can be consumed by humans are beverages classifiable under heading 2202.

In its classification determinations, Customs has consistently interpreted "beverage" for tariff purposes in accordance with the Explanatory Notes and the common meaning of that term, as discussed above. In the ruling letters at issue in this case and in numerous other such rulings, Customs has explained:

> [B]everages, as the term is contemplated by [heading 2202], consist of drinkable liquid substances which are marketed, sold, or distributed in multi-ounce containers (*e.g.*, bottles) for consumption in significant (*e.g.*, multi-ounce) and non-measured (*e.g.*, not marketed, sold, or distributed in dosage form or in vials) quantities, and not necessarily consumed for strictly health or nutritional purposes (*e.g.*, colas). Accordingly, food preparations in liquid form, containing, among other things, honey and royal jelly (in whatever proportional amounts), marketed, sold, or distributed in vials or other like containers for consumption in small, measured, or dosage-form quantities, and taken for nutritional or health purposes, would, most certainly, not be classified as "beverages" under heading 2202 of the HTSUSA.

HQ 084981 (June 19, 1990) (classifying "nutritional food preparations" containing honey and royal jelly, as well as plant- or animal-based extracts, under heading 2106); *see also*, *e.g.*, HQ 966849 (same) (classifying MetaBerry); HQ 966850 (same) (classifying Aloe Gold); HQ 086744 (June 19, 1990) (same, except referring to "gin-

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[16] Except as otherwise noted, all citations herein are to the 2002 version of the Explanatory Notes.

[17] Heading 2202 and the Explanatory Notes that accompany it are properly construed *in pari materia* with other headings of the HTSUS, including heading 2106 and its Explanatory Notes. As detailed below, the Explanatory Notes to heading 2106 document the drafters' express intent that supplements such as MetaBerry and Aloe Gold – which are based on plant extracts, fruit concentrates, and the like, and which are marketed as products designed to foster general health and well-being – are to be classified under heading 2106. *See* section III.B, *infra*.

seng," in addition to "honey" and "royal jelly") (classifying "nutritional health supplement" containing honey, royal jelly, and ginseng, as well as plant- or animal-based extracts, under heading 2106). *Cf.* HQ 961909 (March 29, 1999) ("[l]iquid vitamin products intended to supplement one's dietary or nutritional needs are not properly classified under Heading 2202"; children's liquid vitamins classified under heading 2106).

MaxCell seeks to rely on HQ 956858 and HQ 960544, in which Customs classified as a beverage under heading 2202 a high protein drink sold in eight ounce cans and marketed as "Boost Nutritional Energy Drink." *See* Pl.'s Brief at 5; HQ 956858 (Jan. 23, 1995); HQ 960544 (April 10, 1998). MaxCell emphasizes Customs' observation that "Boost is not intended to be a regular diet or ingested in lieu of meals." *See* Pl.'s Brief at 5 (*quoting* HQ 956858). MaxCell argues that MetaBerry and Aloe Gold similarly "are not intended to be a regular diet or ingested in lieu of meals," and thus should be classified under heading 2202 as well.

MaxCell's argument fundamentally misrepresents the basis for Customs' classification of Boost, however. Contrary to MaxCell's implication, Customs' determination did not turn on whether or not the product was nutritionally complete. Instead, Customs pointed to the fact that "BOOST is advertised as a refreshing drink," and the fact that Boost is "available in 'four delicious flavors' " – "chocolate, mocha (coffee), vanilla, and strawberry." *See* HQ 960544.[18] In stark contrast, neither MetaBerry nor Aloe Gold is designed or marketed as a flavorful or refreshing drink. HQ 956858 and HQ 960544 thus support the position of the Government, not that of MaxCell.

The MaxCell merchandise at issue in this action – MetaBerry and Aloe Gold – does not fall within the common meaning of the term "beverage" as that term is used in heading 2202 of the HTSUS. Unlike beverages such as lemonade, orangeade, or cola or other soft drinks, neither MetaBerry nor Aloe Gold is intended for "consumption in significant (*e.g.*, multi-ounce) and non-measured . . . quan-

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[18] Further, Customs distinguished Boost from Sustacal, which Customs had previously classified under heading 2106. Customs observed that, "rather than emphasizing the function of the merchandise as 'a refreshing drink' " – Sustacal's label "describes the merchandise as a 'nutritionally complete liquid food,' and does not even refer to the taste or 'refreshing' nature of the merchandise." *See* HQ 960544.

Similarly, in HQ 088377, Customs classified as a beverage under heading 2202 Lipovitan, a vitamin supplement or tonic that was "marketed as a refreshing drink." *See* HQ 088377 (May 4, 1992). Customs noted that – in light of its "high vitamin content and its alleged healthful purpose" – Lipovitan had previously been classified under heading 2106, because heading 2202 has an "emphasis on soft drinks, such as cola, lemonade, nectars and purees with added water and sugar," and "concern[s] products primarily consumed for pleasure, in unlimited quantities." *Id.* However, after further consideration, Customs concluded that, "[w]hile [Lipovitan] may be designed to replenish the imbiber's vitamin supply, it is also intended to be the 'pause that refreshes,' a primary function of a beverage. All in all the main purpose of [Lipovitan] is no different than that of many other chilled, sweetened beverages: to slake one's thirst after arduous activity." *Id.*

tities." Instead, the recommend dosage for both is a mere one to two ounces, taken three times a day, before meals. Further, it is undisputed that MetaBerry has a rather bitter, medicinal taste, and that Aloe Gold has an oily appearance and the texture or consistency of cod liver oil. Thus, it cannot be said that either product is designed to be flavorful and refreshing, or to quench thirst. Indeed, both products are specifically labeled and marketed as "dietary supplements." The record is devoid of evidence that anyone would buy or consume either one other than "for strictly health or nutritional purposes." Finally, nonalcoholic beverages typically do not carry warning labels cautioning against use by pregnant or nursing women without consulting a physician. Accordingly, neither MetaBerry nor Aloe Gold is a "beverage" classifiable under heading 2202 of the HTSUS.

The result is no different if heading 2202 is treated as a "use" provision, rather than an *eo nomine* provision. *See generally* Def.'s Brief at 15–19.[19]

The Government observes that *Strohmeyer* cited Webster's New International Dictionary, which defined "beverage" as a "[l]iquid for drinking; drink; usually, drink artificially prepared and *of an agreeable flavor*; as, an intoxicating beverage." *See* Def.'s Brief at 15 (*citing Strohmeyer*, 28 C.C.P.A. at 38 (initial emphasis added)). The Government further notes that The American Heritage Dictionary of the English Language, New Collegiate Edition (1976) similarly defines "beverage" as "[a]ny of various liquid *refreshments*, usually excluding water. . . . " (Emphasis added.) *See* Def.'s Brief at 15. Based on such authorities, the Government asserts that the definition of "beverage" "*implies a use* – that a good is used as a refreshing drink," and that heading 2202 is therefore a "use" provision (although no prior case has so held). *See* Def.'s Brief at 15.[20]

Use provisions (other than actual use provisions) are governed by Additional U.S. Rule of Interpretation ("ARI") 1(a), which states that classification under such a provision is controlled by the principal use of the class or kind of merchandise described by the tariff head-

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[19] An *eo nomine* tariff provision describes the articles classifiable thereunder by name. In contrast, a use provision "classif[ies] particular merchandise according to the ordinary use of such merchandise," and "describ[es] articles in the manner in which they are used as opposed to by name." *Primal Lite, Inc. v. United States*, 182 F.3d 1362, 1364 (Fed. Cir. 1999); *Len-Ron Mfg. Co. v. United States*, 334 F.3d 1304, 1308 (Fed. Cir. 2003).

[20] For its part, MaxCell blows hot and cold on the characterization of heading 2202 as a "use" provision. At one point in its Reply Brief, MaxCell states that "[b]oth HTSUS 2106 and 2202 are use provisions." *See* Pl.'s Reply Brief at 5. But, just one page later, MaxCell asserts that "the *Carborundum* factors are not relevant to a tariff classification of MetaBerry and Aloe Gold." *See id.* at 6 (*citing United States v. Carborundum Co.*, 63 C.C.P.A. 98, 102, 536 F.2d 373, 377 (1976)). As the Government correctly points out, however, those two positions are inconsistent as a matter of fundamental logic. *See* Def.'s Repy Brief at 6–8. As explained herein, a use provision (other than an actual use provision) is governed by ARI 1(a), which, in turn, requires an analysis of the *Carborundum* factors. *See id.*

ing at issue. *See* ARI 1(a), HTSUS. When applying a use provision, a court first ascertains the class or kind of goods described by the heading, and then determines whether the merchandise at issue is a member of that class or kind. Application of the so-called "*Carborundum* factors" determines whether imported merchandise falls within a particular class or kind of merchandise. Those factors include: (1) the general physical characteristics of the merchandise; (2) the expectation of the ultimate purchasers; (3) the channels of trade in which the merchandise moves; (4) the environment of the sale (*e.g.*, the manner in which the merchandise is advertised and displayed); (5) the use of the merchandise; (6) the economic practicality of using the import in the same manner as the merchandise that defines the class; and (7) the recognition in the trade of the use. *See United States v. Carborundum Co.*, 63 C.C.P.A. 98, 102, 536 F.2d 373, 377 (1976).

As the following analysis demonstrates, even assuming *arguendo* that heading 2202 of the HTSUS is a use provision, MetaBerry and Aloe Gold cannot be classified there.

(1) *The General Physical Characteristics of the Merchandise*. As discussed above, MetaBerry has a medicinal, bitter taste, and Aloe Gold has an oily appearance and the texture or consistency of cod liver oil. As the Government properly observes, those physical characteristics are unlike those of most beverages, which are refreshing drinks with an appealing taste, often designed to quench thirst. *See* Def.'s Brief at 16–17; *see also*, *e.g.*, HQ 088377 (explaining that heading 2202 has an "emphasis on soft drinks, such as cola, lemonade, nectars and purees with added water and sugar," and "concern[s] products *primarily consumed for pleasure*, in unlimited quantities"; classifying product as "beverage" under heading 2202, where it "is marketed as a *refreshing* drink" and "the main purpose of [the] drink is . . . *to slake one's thirst* after arduous activity") (emphases added).

(2) *The Expectation of the Ultimate Purchasers*. MaxCell candidly concedes that consumers expect that MetaBerry and Aloe Gold "will aid their health." *See* Pl.'s Reply Brief at 7. Both products are labeled as "anti-catabolics" and "dietary supplements."[21] And they are spe-

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[21] As noted above, MaxCell states that the FDA requires both MetaBerry and Aloe Gold to be marketed as "dietary supplements." To be sure, the labeling of a product as a dietary supplement is not determinative of its tariff classification. *See* Pl.'s Brief at 5–6 (*quoting Inabata Specialty Chemicals v. United States*, 29 CIT ____ , ____ , 366 F. Supp. 2d 1358, 1363–64 (2005) (citations omitted)); *see also North Am. Processing Co.*, 236 F.3d at 698 (noting that "USDA regulations are not dispositive of whether a Customs classification ruling is correct); *Nestle Refrigerated Food Co. v. United States*, 18 CIT 661, 665–66 (1994) (collecting additional cases to similar effect). However, to say that FDA labeling requirements are not controlling is not to say that they are irrelevant. For example, labeling a product as a "dietary supplement" certainly has an effect on consumers' expectations of that merchandise.

Similarly, according to the declaration submitted by Customs' National Import Specialist responsible for dietary supplements, such products typically carry warnings concerning use by pregnant and nursing women. And, as the National Import Specialist responsible for

cifically marketed to appeal to consumers' interests in promoting their overall well-being. Based on its advertised properties, a consumer would expect MetaBerry to optimize oxygen and glucose delivery to the brain, protect the body from free radicals, enhance the immune system, and foster cardiovascular and urinary tract health. Similarly, based on its advertised properties, a consumer of Aloe Gold would expect it to slow the aging process by decreasing catabolic activity through increased antioxidant activity, by restoring the body's ideal pH, by restoring water balance in the colon, and by supporting the natural healing and renewing mechanisms of the gastrointestinal tract. As the Government notes, the expectations of the consumers of MaxCell's products are thus "far from the expectations of most beverage consumers who choose beverages for the products' taste, [their] ability to refresh and [their ability to] quench a thirst." *See* Def.'s Brief at 17.

MaxCell emphasizes that consumers "will not eat" MetaBerry and Aloe Gold, and that neither product will "be substituted for a meal." *See* Pl.'s Reply Brief at 7. But MaxCell's protests are of no moment. As discussed above, the liquid state of MaxCell's products is not alone sufficient to justify their classification as "beverages" under heading 2202. Nor does the fact that the products are not nutritionally complete preclude their classification under heading 2106. *See*, *e.g.*, HQ 961909 (classifying under heading 2106 liquid vitamins "designed to *supplement* the nutritional needs of infants and small children") (emphasis added).

(3) *The Channels of Trade in Which the Merchandise Moves*. MaxCell sells MetaBerry and Aloe Gold in two ways – directly to consumers, through the website of Oasis LifeSciences, and also through sales agents called "independent Associates" who host "Ageless Living" events in their homes where the two products are promoted (along with other Oasis LifeSciences products) as part of a healthy and nutritious lifestyle. MaxCell seeks to make much of the fact that an internet search "using 'beverage' as a search term returned 75 products that could be purchased online." *See* Pl.'s Reply Brief at 7. However, that fact is meaningless absent evidence that those 75 products would properly be classified as "beverages" under heading 2202 – evidence that MaxCell does not offer. Further, MaxCell fails to address the fact that its products are not available through the usual retail outlets. As the Government observes, beverages are normally sold through retail stores such as grocery stores, convenience stores, club stores, and the like. *See* Def.'s Brief at 17–18. The channels of trade in which beverages and the merchandise at issue move are thus very different.

(4) *The Environment of the Sale*. The environment of sale also weighs heavily against MaxCell. Most beverages are sold through

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beverages attested, nonalcoholic beverages generally do not.

displays on the beverage aisle at retail outlets such as grocery stores, convenience stores, and club stores. *See generally* Def.'s Brief at 18. But, as discussed above, MetaBerry and Aloe Gold are not even sold in retail stores. Instead, the products are sold exclusively on the internet and through home parties hosted by individual sales agents. MetaBerry and Aloe Gold thus are never sold side by side with typical beverages, and do not compete with them head-to-head.

MaxCell asserts that "[h]undreds of dietary supplements are offered for sale on various internet sites." *See* Pl.'s Reply Brief at 7. Maybe so – but that statement is of no relevance here absent proof that, *inter alia*, such supplements are classified as "beverages" under heading 2202. MaxCell offers no such proof; nor does it appear that it could do so.

(5) *The Use of the Merchandise*. MaxCell contends that the portion size and taste of its products are irrelevant to their classification. *See* Pl.'s Reply Brief at 7. To the contrary, as the Government points out, "[m]ost beverages are consumed in substantial quantities such as 12 ounce cans, 16 ounce bottles, or quantities which fill standard glasses or cups." *See* Def.'s Brief at 18. But the MetaBerry and Aloe Gold labels recommend a measured, one- to two-ounce dose, taken three times a day, before meals.[22] Similarly, "[m]ost beverages are . . . consumed for refreshment and to quench a thirst." *Id.* However, the bitter, medicinal taste of MetaBerry, and the oily appearance and the texture or consistency of Aloe Gold, make the two products ill-suited for such purposes. As even MaxCell concedes, consumers take MetaBerry and Aloe Gold to "aid their health." *See* Pl.'s Reply Brief at 7.

(6) *The Economic Practicality of the Use of the Merchandise*. MaxCell accuses the Government of improperly "trying to scale down the size of MetaBerry and Aloe Gold to a can of coke." *See* Pl.'s Reply Brief at 7–8. But the Government correctly observes that the economics of MetaBerry and Aloe Gold are entirely different from those of common nonalcoholic beverages. See Def.'s Brief at 19. A 32-ounce container of MetaBerry costs $38.25, and a 32-ounce container of Aloe Gold sells for $25.95. Assuming – for the sake of comparison – that MetaBerry and Aloe Gold were available in 12-ounce containers (a standard beverage container size), 12 ounces of MetaBerry would cost almost $14.35, and 12 ounces of Aloe Gold would cost nearly $ 9.75. *See* Def.'s Brief at 19. As the Government concludes, "such

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[22] According to the declaration submitted by the Customs National Import Specialist responsible for alcoholic and nonalcoholic beverages, most nonalcoholic beverages are promoted for consumption at virtually any time of the day, and certainly are not recommended for use only *prior to a meal*. Nor are beverages typically sold with a cap that serves as a measuring cup, to measure small doses for consumption. As the declaration submitted by the National Import Specialist responsible for dietary supplements explains, however, such supplements are often administered in small doses.

prices . . . are many times higher than [those] of virtually all nonalcoholic beverages." *Id.*

(7) *Recognition in the Trade*. Finally, there is no record evidence that the beverage industry, the retail grocery industry, or any other relevant trade recognizes as "beverages" dietary supplements like MetaBerry and Aloe Gold, which are neither flavorful nor refreshing, and which are taken in very small, measured doses, and are recommended for use only before meals, "or as needed." *See* Def.'s Brief at 19.

All of the *Carborundum* factors thus weigh against MaxCell. Accordingly, assuming – for purposes of this analysis – that heading 2202 is a use provision, MetaBerry and Aloe Gold are not of the "class or kind" of "beverages" covered by heading 2202, and they cannot be classified thereunder. Nor are the two products classifiable under heading 2202 if it is treated as an *eo nomine* provision, for the reasons detailed above. Contrary to MaxCell's claims, MetaBerry and Aloe Gold are not classifiable as "beverages" under heading 2202, under any theory.

B. *HTSUS Heading 2106*

The Government asserts that Customs properly classified MetaBerry and Aloe Gold under HTSUS heading 2106, which covers "[f]ood preparations not elsewhere specified or included." *See generally* Def.'s Brief at 20–23; Heading 2106, HTSUS.[23]

The tariff term "food preparation," as it is used in heading 2106, is not statutorily defined. However, the Explanatory Notes accompanying the heading provide specific guidance as to the meaning of the term, and make it clear beyond cavil that MetaBerry and Aloe Gold are properly classified there. *See* Def.'s Brief at 20–21; *see also*, *e.g.*, *Warner-Lambert Co.*, 407 F.3d at 1210 (rejecting trial court interpretation which "discounts" Explanatory Notes; emphasizing that Explanatory Notes "expressly encompass" merchandise within heading).[24]

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[23] Just as it argues that heading 2202 is a "use" provision (*see* section III.A, *supra*), so too the Government asserts in its briefs that heading 2106 is a "use" provision (though, again, as with heading 2202, there is no indication that any authority has previously so held). *See* Def.'s Brief at 20; Def.'s Reply Brief at 1–2. However, the Government's briefs do not include a separate *Carborundum* analysis seeking to demonstrate that MetaBerry and Aloe Gold are within the "class or kind" of merchandise covered by heading 2106. *See id.*

In any event, as discussed below, the Explanatory Notes to heading 2106 make it abundantly clear that MetaBerry and Aloe Gold are classifiable under that heading, basically obviating the need for a *Carborundum* analysis. Nor is there any apparent need to here decide whether or not heading 2106 is a use provision, as the Government claims.

[24] As discussed in section III.A above, the Explanatory Notes provide a commentary on the scope of each heading of the HTSUS, and are the official interpretation of the Harmonized System at the international level. Although the Explanatory Notes are not binding (and thus are not dispositive), they are "generally indicative of proper interpretation of the [HTSUS]." *See generally Mita Copystar*, 21 F.3d at 1082; *Warner-Lambert Co.*, 407 F.3d at

The Explanatory Notes to heading 2106 state that the products classifiable thereunder include:

> Preparations, often referred to as *food supplements*, based on *extracts from plants*, *fruit concentrates*, honey, fructose, etc. and containing added vitamins and sometimes minute quantities of iron compounds. These preparations are often *put up in packagings with indications that they maintain general health or well-being*. Similar preparations, however, intended for the prevention or treatment of diseases or ailments are excluded (heading 30.03 or 30.04).

See Explanatory Notes, Heading 2106, HTSUS (emphases added). The Explanatory Notes to heading 2106 thus describe MetaBerry and Aloe Gold to a "T."

According to the list of ingredients on the label, MetaBerry is a preparation based on a "Fruit Blend (concentrate)," as well plant and herbal extracts (including, *inter alia*, aloe vera and ginkgo biloba). Indeed, the label specifically promotes the product as "a unique combination of berry concentrates and botanicals." Similarly, the list of ingredients on Aloe Gold's label indicates that it is a preparation derived primarily from plant extracts (including, *inter alia*, aloe, pine needle extract, and green tea extract). Further, both MetaBerry and Aloe Gold are prominently labeled and marketed as "dietary supplements," emphasizing their benefits in maintaining general health and well-being.[25]

Moreover, as the Government observes, Customs has consistently classified dietary supplements like MetaBerry and Aloe Gold under heading 2106. *See* section III.A, *supra* (discussing, *inter alia*, HQ 084981, HQ 086744, and HQ 961909); Def.'s Brief at 22–23; Def.'s Reply Brief at 5–6.

In sum, because MetaBerry and Aloe Gold are "food supplements" based on "extracts from plants" and "fruit concentrates," among other things, and because the two products are "put up in packagings" and marketed to emphasize their asserted value in "maintain-[ing] general health or well-being," both products are properly classified as "[f]ood preparations not elsewhere specified or included," under heading 2106 of the HTSUS. *See* Explanatory Notes, Heading 2106, HTSUS.

1209 (quotation omitted); H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988), *reprinted in* 1988 U.S.C.C.A.N. 1547, 1582.

[25] Neither MetaBerry nor Aloe Gold is marketed "for the prevention or treatment of diseases or ailments." *Compare* Explanatory Notes, Heading 2106, HTSUS (excluding from the scope of heading 2106 "[s]imilar preparations . . . intended for the prevention or treatment of diseases or ailments"). Indeed, for example, the MetaBerry label is carefully worded, stating that it promotes "[h]ealthy cholesterol in *individuals with already normal levels*." (Emphasis added.)

Within heading 2106, Customs classified MetaBerry and Aloe Gold under subheading 2106.90.99, a residual (or "basket") provision covering "[f]ood preparations not elsewhere specified or included: Other: Other: Other: Other: Other: Other." *See* Subheading 2106.90.99, HTSUS. Classification in a basket provision is appropriate when there is no subheading within the heading that more specifically covers the subject merchandise. *See*, *e.g.*, *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1354 (Fed. Cir. 2002) (citation omitted); *Structural Indus., Inc. v. United States*, 356 F.3d 1366, 1368 (Fed. Cir. 2004).

Here, there is no claim by MaxCell that some other subheading of heading 2106 more specifically describes MetaBerry and Aloe Gold. A review of all subheadings under the heading indicates that, in fact, there is none. Customs thus properly classified MetaBerry and Aloe Gold under subheading 2106.90.99 of the HTSUS.

C. *Skidmore Deference*

The Government contends that *Skidmore* deference should be accorded Customs' ruling letters in this case – HQ 966849 (concerning MetaBerry), and HQ 966850 (concerning Aloe Gold). *See generally* Def.'s Brief at 7, 9–12; Def.'s Reply Brief at 4–6. *But see* Pl.'s Reply Brief at 1–2, 8–9 (arguing against *Skidmore* deference).

Customs' ruling letters are entitled to deference proportional to their power to persuade. *United States v. Mead Corp.*, 533 U.S. 218, 235 (2001) (*citing Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). In evaluating the persuasiveness of a Customs classification ruling, the factors to be considered include "the writers' thoroughness, logic, and expertness, [the ruling's] fit with prior interpretations, and any other sources of weight." *Mead*, 533 U.S. at 235.

As to the thoroughness and logic of the Headquarters ruling letters at issue here, it is worth noting that, although the rulings analyzed heading 2202 in some detail, Customs did not there characterize the heading as a "use" provision, as the Government now contends it is. *See*, *e.g.*, Def.'s Brief at 15–16 (arguing that heading 2202 is a use provision). Nor did the ruling letters state that heading 2106 is a "use" provision, as the Government here asserts. *See*, *e.g.*, Def.'s Reply Brief at 1–2 (asserting that heading 2106 is a use provision). Unlike the Government's brief, neither of the ruling letters reflects a step-by-step analysis of the *Carborundum* factors as applied to the facts of this case. *Compare* Def.'s Brief at 16–19 *with* HQ 966849 *and* HQ 966850.[26]

More importantly, in contrast to the ruling letters' analysis of heading 2202, the analysis of heading 2106 is essentially non-

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[26] As explained above, there is no need to here decide whether headings 2106 and 2202 are, in fact, use provisions. *See* sections III.A & III.B, *supra*.

existent. The analysis reads, in its entirety: "Although the [Metaberry or Aloe Gold] is not a product of heading 2202, HTSUS, it is intended for human consumption. Heading 2106, HTSUS, provides for food preparations not elsewhere specified or included. . . . [MetaBerry or Aloe Gold] is properly classified therein." *See* HQ 966849; HQ 966850. Significantly, the ruling letters make no reference whatsoever to the Explanatory Notes to heading 2106, on which the Government now hangs its hat. *Compare* Def.'s Brief at 7, 20–21 (emphasizing the relevant Explanatory Note) *with* HQ 966849 and HQ 966850.

On the other hand, the third *Skidmore* factor – the agency's expertise – clearly weighs in favor of deference. It is axiomatic that Customs has "specialized experience" in the classification of goods. *Mead*, 533 U.S. at 534 (quotations omitted); *see generally* Def.'s Brief at 11 (noting that Congress delegated to Customs the authority to interpret the Tariff Act, and that Customs' determinations are presumed to be correct). That factor weighs in favor of deference to every classification ruling, however, and therefore cannot be determinative. But, in this case, it is complemented by the fourth *Skidmore* factor – the consistency of the ruling letters here with prior Customs' interpretations.

MaxCell charges broadly that "Customs has been inconsistent in its rulings on liquids and beverages." However, MaxCell fails to identify any purported inconsistencies. *See generally* Pl.'s Reply Brief at 1–2, 8–9. The Headquarters ruling letters in this case cite three prior ruling letters, which classified various products under heading 2106 – HQ 084981 (involving "nutritional food preparations" containing honey and royal jelly, as well as plant- or animal-based extracts), HQ 086744 (involving a "nutritional health supplement" made of honey, royal jelly, and ginseng, as well as plant- or animal-based extracts), and HQ 961909 (involving children's liquid vitamins). Contrary to MaxCell's assertions, as discussed in section III.A above, the analysis set forth in those rulings is entirely consistent with that in HQ 966849 and HQ 966850, the ruling letters here. MaxCell identifies no other Customs rulings to document its claims of inconsistency.

Pointing to three judicial decisions, MaxCell intimates that, in the past, Customs has been overly expansive in its interpretation of tariff provisions covering "food preparations" and "edible preparations." *See* Pl.'s Reply Brief at 8–9 (*citing Franklin v. United States*, 289 F.3d 753 (Fed. Cir. 2002); *Cosmos Int'l v. United States*, 15 CIT 137, 760 F. Supp. 914 (1991); *Strauss v. United States*, 43 Cust. Ct. 136 (1959)). However, MaxCell's argument does nothing to undercut the fact that Customs has consistently classified dietary supplements under heading 2106, which is the basis for the Government's claim to *Skidmore* deference here. Nor do the three cases that MaxCell

cites support its assertion that MetaBerry and Aloe Gold are classifiable under heading 2202.[27]

In any event, for the reasons detailed above, even absent deference to HQ 966849 and HQ 966850, Customs' classification of MetaBerry and Aloe Gold under subheading 2106.90.99 of the HTSUS is sustained. *See* sections III.A & III.B, *supra*. There is therefore no need to definitively determine whether those rulings would otherwise merit *Skidmore* deference.

IV. *Conclusion*

As set forth above, MetaBerry and Aloe Gold were properly classified under subheading 2106.90.99 of the HTSUS. Plaintiff's Motion for Summary Judgment is therefore denied, and Defendant's Cross-Motion is granted.

Judgment will enter accordingly.

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[27] MaxCell's reliance on *Franklin*, *Strauss*, and *Cosmos* is ill-conceived for a number of reasons. In *Franklin*, the Court of Appeals held that Customs erred in classifying imported coral sand packets as a food preparation under HTSUS heading 2106. MaxCell argues that, like the coral sand packets in *Franklin*, "MetaBerry and Aloe Gold are not eaten and consumed as food and therefore, are not food preparations." *See* Pl.'s Reply Brief at 9. However, *Franklin* is distinguishable on its facts.

Among other things, unlike MetaBerry and Aloe Gold – which are consumed in their entirety – "the majority of the coral remains at the bottom of the glass while a small percentage goes into solution in order to change the chemical content of the water." *Franklin*, 289 F.3d at 760. More fundamentally, the court's decision in *Franklin* was predicated on its determination that the coral sand was used not as food but to purify water, and on the fact that the purification heading urged by the importer is more specific than the food preparation heading under which Customs had classified the coral sand. *Id.* at 761.

In *Strauss*, the court rejected Customs' classification of bubble gum under the TSUS provision covering edible preparations. As a threshold matter, cases interpreting the TSUS are of somewhat limited value as precedent in classification cases under the HTSUS. *See*, *e.g.*, *JVC*, 234 F.3d at 1354–55 (citations omitted). And, more specifically, the bubble gum in *Strauss* was found not to be classifiable as a food preparation because – although sugars and syrup in the gum were swallowed as the gum was chewed – the bubble gum itself was a masticatory, and was not designed to be swallowed in its entirety, much like the coral sand at issue in *Franklin*, and unlike the MaxCell products at issue here. *Strauss*, 43 Cust. Ct. at 140–41.

Finally, as MaxCell notes, the *Cosmos* court "rejected Customs attempts to classify . . . freezy pops as edible preparations holding they were properly classifiable as beverages." *See* Pl.'s Reply Brief at 9. Like *Strauss*, however, *Cosmos* too is a case under the TSUS, and is thus of relatively little precedential value. Moreover, the freezer pops in *Cosmos* (which were consumed as they melted) were not only liquid, but also specifically designed to be flavorful and refreshing – which MetaBerry and Aloe Gold plainly are not. *See Cosmos*, 15 CIT at 145, 760 F. Supp. at 921 (finding that products at issue were "marketed for consumption by children as a treat").

In short, contrary to MaxCell's implications, none of the three cases that it cites supports its claim that MetaBerry and Aloe Gold are properly classified as beverages rather than the food preparations under the HTSUS.

MAXCELL BIOSCIENCE, INC., *Plaintiff*, v. UNITED STATES, *Defendant*.

Court No. 04–00254

JUDGMENT

This action having been duly submitted for decision; and the Court, after due deliberation, having rendered a decision herein;

NOW, therefore, in conformity with said decision, it is

ORDERED that the last five counts of Plaintiff's Complaint – Counts II through VI (misnumbered Counts II through V) – be, and hereby are, dismissed with the consent of Plaintiff; and it is further

ORDERED that Plaintiff's Motion for Summary Judgment be, and hereby is, denied; and it is further

ORDERED that Defendant's Cross-Motion for Summary Judgment be, and hereby is, granted; and it is further

ORDERED that the classification of the subject merchandise under subheading 2106.90.99 of the Harmonized Tariff Schedule of the United States is hereby sustained; and it is further

ORDERED, ADJUDGED, and DECREED that this action be, and hereby is, dismissed.

SLIP OP. 07–181

UGINE AND ALZ BELGIUM, ARCELOR STAINLESS USA, LLC, AND ARCELOR TRADING USA, LLC, *Plaintiffs*, v. UNITED STATES, *Defendant*, and ALLEGHENY LUDLUM, AK STEEL CORP., BUTLER ARMCO INDEPENDENT UNION, UNITED STEEL WORKERS OF AMERICA, AFL-CIO/CLC, AND ZANESVILLE ARMCO INDEPENDENT ORGANIZATION, *Defendant-Intervenors.*

BEFORE: HONORABLE GREGORY W. CARMAN, JR., JUDGE

No. 05–00444

JUDGMENT

The Department of Commerce, International Trade Administration ("Commerce") having submitted its *Final Results of Redetermination Pursuant to Court Remand in Ugine and ALZ Belgium, N.V., Arcelor Stainless USA, LLC, and Arcelor Trading, USA, LLC v. United States*, Consol. Ct. No. 05–00444, Slip Op. 07–145 (Oct. 1, 2007) ("Remand Results"), and the Court having reviewed the Remand Results and all relevant submission thereto, it is hereby

ORDERED that the Remand Results are affirmed in all respects; and it is further

ORDERED that Commerce shall issue the revised instructions of the Remand Results at the time the pending injunction in this case issued on August 29, 2006 is terminated; and it is further

ORDERED that this case is dismissed.

Slip Op. 07–182

ARTHUR C. SCHICK, III and **SCHICK INTERNATIONAL FORWARDING, INC.,** Plaintiffs, v. **UNITED STATES,** Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 06–00279

[Dismissing, in response to defendant's motion, the first of plaintiffs' claims for failure to state a claim upon which relief can be granted and dismissing the remaining claims for lack of subject matter jurisdiction]

Dated: December 18, 2007

Neville Peterson LLP (*John M. Peterson, George W. Thompson, Maria E. Celis*, and *Curtis W. Knauss*) for plaintiffs.

Jeffrey S. Bucholtz, Acting Assistant Attorney General, *Barbara S. Williams*, Attorney in Charge, International Trade Field Office, *Mikki Graves Walser*, Senior Trial Counsel, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Benjamin B. Hamlow*, Office of Associate Chief Counsel, United States Customs and Border Protection, of counsel, for defendant.

OPINION

Stanceu, Judge: Plaintiffs Arthur C. Schick III ("Schick") and Schick International Forwarding, Inc. ("Schick International") brought this action to contest the revocation of Schick's customs broker's license for failure to file a timely status report ("triennial report") with Customs and Border Protection, United States Department of Homeland Security ("Customs") as required by Section 641(g) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1641(g) (2000). At the time they brought this action, plaintiffs also sought to prevent Customs from revoking Schick International's corporate customs broker's license for failure to appoint a licensed customs broker to serve as a qualifying officer as required by 19 U.S.C. § 1641(b)(5).

Invoking the subject matter jurisdiction of the Court of International Trade as set forth in 28 U.S.C. § 1581(i)(1) and (i)(4) (2000), plaintiffs make three claims on behalf of Schick and one on behalf of Schick International. On behalf of Schick, plaintiffs claim, first, that the revocation of Schick's license by Customs was conducted without the observance of specific procedures, including a hearing, that plaintiffs contend were required by 19 U.S.C. § 1641(d)(2)(B). Compl. ¶¶16–20. Second, plaintiffs claim that Customs was required

by the Fifth Amendment to the United States Constitution to afford Schick due process of law prior to depriving Schick of the property right consisting of Schick's individual license, and, further, that due process of law, as required by the Administrative Procedure Act ("APA"), included the conducting of a hearing. *Id.* ¶¶22–29, 31. Plaintiffs' third claim is that the revocation of Schick's license was an excessive fine or sanction prohibited by the Eighth Amendment to the Constitution. *Id.* ¶¶33–36. The complaint also claims, on behalf of Schick International, that the company lacked a licensed qualifying officer only as a result of an unlawful revocation of Schick's individual customs broker's license and that revocation of Schick International's corporate license on that basis would be similarly unlawful. *Id.* ¶¶38–40. Defendant United States moves to dismiss this action for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

The court concludes that 28 U.S.C. § 1581(i)(4) provides subject matter jurisdiction over plaintiffs' claim that Schick was entitled to the benefit of the procedure, including a hearing, that is provided for in 19 U.S.C. § 1641(d)(2)(B). However, the court also concludes that 19 U.S.C. § 1641 does not require resort to the procedure of § 1641(d)(2)(B) when a license is revoked under § 1641(g). For this reason, plaintiffs' first claim is not one upon which relief can be granted. The court concludes, further, that 28 U.S.C. § 1581 does not provide the court jurisdiction to adjudicate plaintiffs' claim that the revocation of Schick's license was a violation of due process of law as guaranteed by the Fifth Amendment and as provided by the APA. In addition, the court concludes that 28 U.S.C. § 1581 does not provide jurisdiction over plaintiffs' claim that the revocation was an excessive fine or sanction prohibited by the Eighth Amendment. The court lacks jurisdiction to hear plaintiffs' claim with respect to the possible revocation of the corporate license of Schick International because that claim is now moot as a result of events occurring after this action was commenced. Finally, the court concludes in the circumstances of this case that transfer to another court is not in the interest of justice. Because plaintiffs' claim pertaining to 19 U.S.C. § 1641(d)(2)(B) is not one on which relief can be granted, because the court lacks subject matter jurisdiction to hear any of plaintiffs' other claims, and because transfer is not in the interest of justice, the court will grant defendant's motion and enter judgment dismissing this action.

I. BACKGROUND

The facts pertaining to the revocation of Schick's customs broker's license and the status of Schick International's corporate customs broker's license are summarized herein based on plaintiffs' complaint, exhibits attached thereto, and plaintiffs' various other submissions.

In 2006, Schick, "[a]s the result of illness," failed to file a timely triennial report with Customs. Compl. ¶9. By letter dated on or about March 5, 2006, Customs notified Schick that Schick's customs broker's license had been suspended pursuant to 19 C.F.R. § 111.30(d) (2005) for failure to timely file the triennial report. *Id.* ¶10, Ex. A at 1. The letter informed Schick that if the required report and the $100 fee imposed under the agency's regulations were not submitted within sixty days, Schick's license would be revoked "by operation of law without prejudice." *Id.* Ex. A at 1. "Again by reason of illness," Schick did not file the required triennial report within the sixty-day period. *Id.* ¶10. By letters dated June 22 and June 26, 2006, and addressed to Schick at the address of Schick International, Customs informed Schick International that Schick's customs broker's license had been revoked under 19 C.F.R. § 111.30(d). *Id.* ¶¶12–13, Ex. B at 1, Ex. C at 1. The June 22 letter also advised Schick International that the failure to designate another individual possessing a customs broker's license to act as the qualifying officer for Schick International would result in the revocation by operation of law of Schick International's corporate customs broker's license on September 3, 2006 under 19 C.F.R. § 111.45(a) (2006). *Id.* ¶12, Ex. B at 1. The June 26 letter advised Schick International that if Schick International did not designate, by November 3, 2006, a licensed customs broker holding a permit to do business in the Los Angeles Customs District, the agency would revoke under 19 C.F.R. § 111.45(b) the corporation's permit to engage in customs business in that district. *Id.* ¶13, Ex. C at 1. Schick International subsequently avoided the revocation of its corporate broker's license and its permit. Mem. of P. & A. in Opp'n to Def.'s Mot. to Dismiss 6 n.3 (stating that "Schick International Forwarding, Inc. has, to this writing, been able to maintain its corporate license" by appointing new qualifying officers) ("Resp. to Def.'s Mot.").

On August 2, 2006, plaintiffs' counsel sent to the Port Director of Customs in Los Angeles a written request that Customs withdraw the "proposed revocations" of Schick's individual license and of Schick International's corporate license. *Id.* at 6. Plaintiffs argued that Schick was entitled to a hearing under 19 U.S.C. § 1641(d) and its implementing regulations before his license could be revoked. *Id.* Customs denied plaintiffs' request and declined to grant Schick a hearing. *Id.*

Plaintiffs filed suit on August 18, 2006, asserting the aforementioned claims under 19 U.S.C. § 1641, the APA, and the Fifth and Eighth Amendments to the Constitution. Compl. ¶¶15–40. Defendant moves to dismiss the complaint under USCIT Rule 12(b)(1) for lack of subject matter jurisdiction and under USCIT Rule 12(b)(5) for failure to state a claim upon which relief can be granted. Def.'s Mot. to Dismiss 1.

II. DISCUSSION

To avoid dismissal in whole or in part for lack of subject matter jurisdiction, Schick and Schick International must plead facts from which the court may conclude that it has subject matter jurisdiction with respect to each of their claims. *See McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936) (explaining that a plaintiff "must allege in his pleading the facts essential to show jurisdiction."). With respect to a claim within the court's subject matter jurisdiction, dismissal for failure to state a claim upon which relief can be granted is proper if plaintiffs' factual allegations are not "enough to raise the right to relief above the speculative level on the assumption that all of the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (internal citations omitted). In ruling on a motion to dismiss for failure to state a claim upon which relief can be granted, the court assumes that all well-pleaded factual allegations in the complaint are true and draws all reasonable inferences in the plaintiffs' favor. *Leider v. United States*, 301 F.3d 1290, 1295 (Fed. Cir. 2002).

A. Relief Cannot Be Granted upon Plaintiffs' Claim that Customs Was Required to Follow the Procedures in 19 U.S.C. § 1641(d)(2)(B) Before Revoking Schick's License

Plaintiffs' first claim is that the revocation of Schick's individual broker's license was unlawful because Schick was not first provided the notice and the opportunity for a hearing that are specified by 19 U.S.C. § 1641(d)(2)(B) and the Customs regulations related to that provision. *See* Compl. ¶¶16–20 ("Count I: Violation of 19 U.S.C. § 1641(d)"). According to plaintiffs, Customs is required by the statute and the regulations to follow the procedures of 19 U.S.C. § 1641(d)(2)(B) "prior to revoking the license of an individual to act as a Custom house broker." *Id.* ¶16. Plaintiffs allege that to the extent that Customs failed to provide Schick the notice and hearing required by 19 U.S.C. § 1641, the agency failed to accord Schick due process of law. *Id.* ¶19. Plaintiffs submit that the court must "set aside" the revocation according to the APA, 5 U.S.C. § 706(2)(D), because the agency's action of revoking Schick's license was "without observance of procedure required by law." *Id.* ¶20 (citing 5 U.S.C. § 706(2)(D) (2000)). p1The court first considers whether it possesses jurisdiction to adjudicate plaintiffs' first claim and concludes that such jurisdiction is provided by 28 U.S.C. § 1581(i)(4). The court then considers whether this is a claim upon which relief can be granted and concludes, based on the plain language of 19 U.S.C. § 1641, that it is not.

The jurisdiction of the Court of International Trade to adjudicate civil actions brought against the United States is provided by 28 U.S.C. § 1581. Under 28 U.S.C. § 1581(g)(2), the court is provided

exclusive jurisdiction of any civil action commenced to review "any decision of the Secretary of the Treasury[1] to revoke . . . a customs broker's license . . . under [19 U.S.C. § 1641(d)(2)(B)]." 28 U.S.C. § 1581(g)(2). Subsection (i)(4) of 28 U.S.C. § 1581 grants the court jurisdiction of civil actions that arise out of any law of the United States providing for "administration and enforcement with respect to the matters referred to" in the other provisions of § 1581, including subsection (g). *Id.* § 1581(i)(4). Plaintiffs argue that jurisdiction exists over their entire action, including this first claim, because the action "relates to matters pertaining to the administration and enforcement of 19 U.S.C. § 1641(d), which is specifically mentioned in 28 U.S.C. § 1581(g)." Compl. ¶3.

The court concludes that plaintiffs' first claim is within the court's subject matter jurisdiction. Under subsection (i)(4) of 28 U.S.C. § 1581, the court has jurisdiction to hear a claim arising out of a law providing for administration and enforcement with respect to a decision of the Secretary of the Treasury to revoke a customs broker's license under 19 U.S.C. § 1641(d)(2)(B), which is a "matter[ ] referred to" in subsection (g)(2) of 28 U.S.C. § 1581. 28 U.S.C. § 1581(g)(2), (i)(4). Plaintiffs' first claim is essentially that Schick was entitled to the benefit of the procedure specified by 19 U.S.C. § 1641(d)(2)(B) but did not receive that benefit. Compl. ¶¶16–20. As stated in the complaint, this claim "arises out of" 19 U.S.C. § 1641(d)(2)(B), which is a law providing for administration and enforcement with respect to a decision of the Secretary to revoke a license under that provision. *See* 19 U.S.C. § 1641(d)(2)(B). Therefore, plaintiffs' first claim is within the subject matter jurisdiction of the court provided by 28 U.S.C. § 1581(i)(4).

Arguing that the court lacks jurisdiction over any of plaintiffs' claims, defendant cites the decision of the Court of Appeals for the Federal Circuit ("Court of Appeals") in *Retamal v. United States*, 439 F.3d 1372, 1375 (Fed. Cir. 2006) for the proposition that "jurisdiction of revocations for failure to satisfy the triennial reporting process does not exist under 28 U.S.C. § 1581(i)(4)." Mem. in Supp. of Def.'s Mot. to Dismiss 9. Defendant's characterization of the holding in *Retamal* is overly broad. The Court of Appeals concluded in *Retamal* that "the revocation of a license under 19 U.S.C. § 1641(g)(2) is not referenced anywhere in 28 U.S.C. §§ 1581(a)-(h) or 28 U.S.C. §§ (i)(1)–(3) and, therefore, jurisdiction cannot lie under 1581(i)(4)." *Retamal*, 439 F.3d at 1376. The court does not construe the holding in Retamal to preclude the exercise of jurisdiction over plaintiffs' first claim, which arises specifically out of 19 U.S.C. § 1641(d)(2)(B).

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[1] Before January 2003, administration of 19 U.S.C. § 1641 was the responsibility of the Secretary of the Treasury. 19 U.S.C. § 1641 (2000). The functions of the Secretary of the Treasury under § 1641 are now performed by the Secretary of Homeland Security. *See* 6 U.S.C. § 203 (Supp. 2005).

Nothing in the opinion in *Retamal* states or even suggests that the Court of Appeals was presented with, or was addressing, the narrow jurisdictional issue that is posed by plaintiffs' claim that Schick was entitled to the benefit of the procedures set forth in § 1641(d)(2)(B) prior to the revocation of his license under § 1641(g)(2)(C).

The court concludes, however, that no relief can be granted on plaintiffs' first claim because the claim is based on an argument that is contrary to the plain language of 19 U.S.C. § 1641. This statute may not reasonably be construed to require adherence to the procedures of § 1641(d)(2)(B) prior to a revocation under § 1641(g)(2)(C).

The revocation procedures specified in subsections (d)(2)(B) and (g)(2) of 19 U.S.C. § 1641 are separate and independent. None of the provisions of 19 U.S.C. § 1641(d) contains any reference to subsection 19 U.S.C. § 1641(g). *See* 19 U.S.C. § 1641(d). Nor is 19 U.S.C. § 1641(d) referred to in 19 U.S.C. § 1641(g). *See id.* § 1641(g).

Additionally, revocations of brokers' licenses under § 1641(d)(2)(B) are at the discretion of the Secretary. *See id.* § 1641(d)(1) (providing that the Secretary "*may* . . . revoke . . . a license of any customs broker" (emphasis added)), (d)(2)(B). Revocation may occur for any of various reasons identified in § 1641(d)(1)(A)-(F), including, *inter alia*, a false statement or material omission in an application for a license or permit or in a required report, a conviction of certain felonies or misdemeanors, or a violation of the Customs laws or regulations. *See id.* § 1641(d)(1)(A)–(F). A license revocation proceeding conducted under § 1641(d)(2)(B) includes the opportunity for the licensee to show cause why a license should not be revoked or suspended and, if the Secretary determines revocation or suspension is still warranted, the opportunity for a hearing before an administrative law judge, who issues findings of fact and recommendations for a decision. *Id.* § 1641(d)(2)(B). The Secretary makes the final decision on the record made before the administrative law judge. *Id.* § 1641(d)(2)(B), (d)(3). The Secretary "may settle and compromise" a disciplinary proceeding instituted under 19 U.S.C. § 1641(d)(2)(B) "according to the terms and conditions agreed to by the parties, including but not limited to the reduction of any proposed suspension or revocation to a monetary penalty." *Id.* § 1641(d)(3).

In contrast, revocation of a broker's license under subsection (g)(2)(C) of 19 U.S.C. § 1641 is non-discretionary if the licensee fails to file a timely triennial report and, after receiving notice of suspension of his license, fails to remedy the noncompliance by making the required filing within the sixty-day period provided for in subsection (g)(2)(B). *See id.* § 1641(g)(2)(B)-(C). Specifically, subsection (g)(1) of 19 U.S.C. § 1641 requires that:

> On February 1, 1985, and on February 1 of each third year thereafter, each person who is licensed under subsection (b) of this section shall file with the Secretary of the Treasury a report as to–(A) whether such person is actively engaged in busi-

> ness as a customs broker; and (B) the name under, and the address at, which such business is being transacted.

Id. § 1641(g)(1); *see also* 19 C.F.R. § 111.30(d)(1)-(2) (reiterating the statutory reporting requirements and imposing certain additional reporting requirements); 19 C.F.R. § 111.96(d) (2005) (imposing a $100 "[s]tatus report fee"). If a licensee "fails to file the required report by March 1 of the reporting year, the license is suspended, and may be thereafter revoked" subject to procedures set forth in subsection (g)(2). 19 U.S.C. § 1641(g)(2). Under the statutory procedures, Customs "shall transmit written notice of suspension to the licensee no later than March 31 of the reporting year." *Id.* § 1641(g)(2)(A). If the licensee files the required report within sixty days of receiving the notice, "the license shall be reinstated." *Id.* § 1641(g)(2)(B). If the licensee does not provide the required report within sixty days of the notice, "the license shall be revoked without prejudice to the filing of an application for a new license." *Id.* § 1641(g)(2)(C); *see also* 19 C.F.R. § 111.30(d)(4). Under the plain meaning of the statutory provision, the Secretary has no discretion under § 1641(g)(2)(C) to reinstate the license once the licensee has failed to take the corrective action within the sixty-day period.

A license revocation accomplished under § 1641(d)(2)(B) differs from a revocation conducted under § 1641(g)(2)(C) in another respect as well: while the former is expressly made appealable in the Court of International Trade by § 1641(e), the latter is not. *See* 19 U.S.C. § 1641(e). Subsection (e) of § 1641 expressly provides for review in the Court of International Trade of revocations of brokers' licenses by operation of law under § 1641(b)(5) and discretionary revocations under § 1641(d)(2)(B) but makes no mention of revocations of brokers' licenses under § 1641(g)(2)(C). *Id.* Therefore, a plaintiff appealing a revocation of a license under § 1641(g)(2)(C) must rely for a waiver of sovereign immunity on the APA or pursue a nonstatutory form of review.[2] *See Motions Sys. Corp. v. Bush*, 437 F.3d 1356, 1359 (Fed. Cir. 2006) (stating that where an explicit statutory cause of action is lacking, the plaintiff must rely on the APA or some nonstatutory form of review for relief), *cert. denied*, 127 S. Ct. 69 (2006); *see also* 5 U.S.C. §§ 702 ("A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review. . . ."), 704 ("[F]inal agency action for which there is no other adequate remedy in a court [is] subject to judicial review.") (2000).

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[2] Under the doctrine of sovereign immunity, "[t]he United States, as a sovereign, is immune from suit save as it consents to be sued. . . ." *United States v. Sherwood*, 312 U.S. 584, 586 (1941) (internal citations omitted). Absent a waiver of that immunity, neither the federal government nor its agencies are subject to suit. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

Plaintiffs argue that 19 U.S.C. § 1641(g) provides only grounds for revocation, not a procedure for revocation, and that a revocation under § 1641(g) therefore is not lawfully accomplished under the statute absent the notice and hearing procedures that are provided for in § 1641(d)(2)(B). Resp. to Def.'s Mot. 9, 12–15, 30. The court disagrees. The argument that a revocation under § 1641(g) requires the conducting of a proceeding under § 1641(d)(2)(B) fails for the reasons previously discussed. Contrary to plaintiffs' argument that "19 U.S.C. § 1641(g) does not in fact provide a separate procedure for revoking Customhouse broker's licenses, but merely a ground for doing so," Resp. to Def.'s Mot. 30, § 1641(g) provides both a ground for revocation and a procedure by which such a revocation must be accomplished. *See* 19 U.S.C. § 1641(g). The statutory procedure expressly requires notice of the suspension and affords the broker the opportunity to remedy the noncompliance within sixty days and thereby avoid revocation, which, if it occurs, is without prejudice to the filing of a new application. *Id.* at § 1641(g)(2)(A)-(C).

In support of their argument that § 1641(g) provides only a ground for revocation, and that revocation on that ground must follow the procedures found in 19 U.S.C. § 1641(d)(2)(B), plaintiffs cite the report prepared by the House Committee on Ways and Means on House Bill 6064, a bill that was enacted as part of the Trade and Tariff Act of 1984, Pub. L. No. 98–573, 98 Stat. 2948 (1984) ("Trade and Tariff Act"). Resp. to Def.'s Mot. 17–18 (citing H.R. Rep. No. 98–1015, at 71–73 (1984)). The report describes section 206 of House Bill 6064, which contained amendments resulting in the current 19 U.S.C. § 1641(g), as making "comprehensive changes to [19 U.S.C. § 1641] relating to customs brokers." H.R. Rep. No. 98–1015, at 71. Plaintiffs direct the court specifically to the statement in the report that " '[b]rokers licenses *are subject to suspension and revocation* if the required triennial reports are not timely filed with the Secretary of the Treasury'" and to another sentence in the report that, in also discussing the requirement on brokers to file triennial reports, states that " '[w]ith this legislation, if these reports are not filed, *individual broker's licenses may be suspended until filed or revoked*.' " Resp. to Def.'s Mot. 17–18 (quoting H.R. Rep. No. 98–1015, at 71–73) (emphasis added by plaintiffs). Plaintiffs read in the words "are subject to suspension and revocation," and in the words "individual broker's licenses may be suspended until filed or revoked," the congressional intent that revocation under 19 U.S.C. § 1641(g) must be accomplished under the suspension and revocation procedures of 19 U.S.C. § 1641(d). *Id.*

Plaintiffs' argument based on legislative history does not convince the court that Congress intended suspensions and revocations under 19 U.S.C. § 1641(g) to be accomplished under the procedures of § 1641(d)(2)(B). Although the report language emphasized by plaintiffs suggests that suspension and revocation under § 1641(g) are

discretionary with the Secretary, Congress, in drafting § 1641(g), provided expressly that if a licensee fails to file the required triennial report by March 1 of the reporting year, "the license is suspended" and that if the licensee fails to cure the noncompliance within sixty days of receiving notice of suspension, "the license shall be revoked." 19 U.S.C. § 1641(g)(2). Thus, contrary to what might be inferred from the language of the House report, the statute itself unambiguously provides that both the suspension and the revocation occur without the exercise of any discretion on the part of the Secretary. The court declines to impart to the House report a meaning that contradicts the unambiguous language of the statute.

Moreover, the House report contains other language suggesting that suspension and revocation under subsection (g)(2) of 19 U.S.C. § 1641 were intended to be independent of the suspension and revocation procedures of subsection (d)(2)(B). Subsection (d) and subsection (g) are discussed in separate paragraphs of the report. *See* H.R. Rep. No. 98–1015, at 72–73. With respect to the former, the report comments on Congress's intent concerning the exercise of the Secretary's discretion to suspend or revoke a license. The report explains that, as amended, the statute for the first time would include authority for assessment of monetary penalties in lieu of suspension and revocation of a broker's license. *Id.* at 72. In this context, the report recounts an apparent understanding between the House Ways and Means Committee and Customs under which Customs "has agreed that proceedings for 'suspension or revocation' of a Customs broker's license will only be initiated where there is evidence supporting a reason to believe that a 'serious violation' has occurred." *Id.* This comment appears to be related solely to the Secretary's exercise of discretion to suspend or revoke a license under 19 U.S.C. § 1641(d)(2)(B). It would be illogical to construe this comment as applying to the non-discretionary suspensions and revocations under 19 U.S.C. § 1641(g). It also would be illogical to presume that Congress viewed as a "serious violation" an untimely filing of a triennial report, whether resulting in a suspension under § 1641(g)(2) or a revocation under § 1641(g)(2)(C). Suspension ends and the license is reinstated if the filing defect is cured during the sixty-day period, and revocation does not prejudice the former licensee in applying for a new customs broker's license. *See* 19 U.S.C. § 1641(g)(2)(B)-(C).

The court finds no merit in plaintiffs' argument that the Customs regulations entitled Schick to the benefit of the procedures of 19 U.S.C. § 1641(d)(2)(B) prior to the revocation of Schick's license. *See* Resp. to Def.'s Mot. 33–34. Like the statute, the regulations address suspensions and revocations under 19 U.S.C. § 1641(g) in provisions separate from those associated with 19 U.S.C. § 1641(d)(2)(B). *Compare* 19 C.F.R. § 111.30(d) (pertaining to the triennial report and consequences of the failure to file), *with* 19 C.F.R. § 111.50 (2005) (stating that the suspension and revocation procedures of Part 111,

Subpart D relate to 19 U.S.C. § 1641(d)(2)(B)). The court finds nothing in the regulations requiring adherence to the procedures of 19 U.S.C. § 1641(d)(2)(B) prior to the suspension or revocation of a license under 19 U.S.C. § 1641(g).

As shown by the statements in the complaint and the exhibits thereto, Customs revoked Schick's customs broker's license pursuant to its authority under 19 U.S.C. § 1641(g)(2)(C) and, therefore, was not required by § 1641 to commence a proceeding under § 1641(d)(2)(B). Schick violated the requirements of 19 U.S.C. § 1641(g)(1) by not filing his triennial report by the statutory deadline. *See* Compl. ¶¶8–9. His license was suspended "as a result of [his] failure to submit the Status Report required by 19 CFR 111.30(d)," a regulation which, as stated above, reiterates the reporting requirement of § 1641(g)(1). *Id.* Ex. A at 1. Customs provided Schick with notice of the suspension, which notice is expressly required by § 1641(g)(2)(A). *Id.* ¶ 10, Ex. A at 1. When Schick failed to cure his non-compliance within sixty days of that notice, Customs revoked his license, citing as authority 19 C.F.R. § 111.30(d). *Id.* ¶¶11–12, Ex. B at 1, Ex. C at 1. Revocations under 19 C.F.R. § 111.30(d) are accomplished under the authority of 19 U.S.C. § 1641(g)(2)(C). *Compare* 19 U.S.C. § 1641(g)(2)(C) (stating that "[i]n the event the required report is not filed within the 60-day period, the license shall be revoked without prejudice to the filing of an application for a new license.") *with* 19 C.F.R. § 111.30(d)(4) (stating that [i]f the broker does not file the required report within [the] 60-day period, the broker's license is revoked by operation of law without prejudice to the filing of an application for a new license.").

In summary, based on 19 U.S.C. § 1641 and on the facts as pleaded in plaintiffs' complaint and shown in the exhibits thereto, the court concludes that no relief can be granted on plaintiffs' claim that Schick was entitled by § 1641 and the Customs regulations to the benefit of the procedures specified in § 1641(d)(2)(B) prior to the revocation of Schick's license under § 1641(g)(2)(C). The court concludes, for the reasons discussed previously, that neither 19 U.S.C. § 1641 nor the regulations entitled Schick to the benefit of the notice and hearing provisions of § 1641(d)(2)(B). Contrary to Schick's claim that Customs, in revoking Schick's license, "failed to afford plaintiff Arthur Schick due process of law," Compl. ¶19, Customs provided Schick the due process that is required by § 1641(g)(2) and the regulations. The letter dated on or about March 5, 2006 not only notified Schick of the suspension but specifically instructed him that failure to submit the report and the fee within the sixty-day period would result in the revocation of Schick's license.

B. Plaintiffs' Claim that the Fifth Amendment and the APA Required a Hearing Prior to the Revocation of Schick's License Is Not Within the Court's Subject Matter Jurisdiction

Plaintiffs expressly invoke the APA in their second claim, which is that Customs was required by the Fifth Amendment to afford Schick due process of law prior to depriving Schick of the property right consisting of his individual license, and, further, that due process, as specified by the APA, 5 U.S.C. §§ 554, 556, and 557, necessarily included the conducting of a hearing. Compl. ¶¶28–29. As discussed above, Customs revoked Schick's customs broker's license under the authority and procedures of 19 U.S.C. § 1641(g). In addition to the APA itself, on which this claim relies for its procedural aspect and on which it must rely for a waiver of sovereign immunity, plaintiffs' second claim arises out of 19 U.S.C. § 1641(g).

Because the revocation of Schick's license was accomplished under 19 U.S.C. § 1641(g)(2)(C), not 19 U.S.C. § 1641(b) or (d)(2)(B), plaintiffs' second claim is not within the subject matter jurisdiction provided by 28 U.S.C. § 1581(g). Instead, plaintiffs invoke the court's jurisdiction over their second claim according to paragraphs (1) and (4) of 28 U.S.C. § 1581(i). Compl. ¶¶2–3. Under § 1581(i)(1), the court has exclusive jurisdiction of any civil action against the United States arising out of any law providing for "revenue from imports or tonnage." 28 U.S.C. § 1581(i)(1). However, neither the APA nor 19 U.S.C. § 1641(g), which requires the triennial report and provides for the suspension and revocation of a customs broker's license when the licensee does not make a timely filing, provides for revenue from imports or tonnage. The court, therefore, has no jurisdiction under 28 U.S.C. § 1581(i)(1) to hear plaintiffs' second claim.

Plaintiffs' second claim is not encompassed by 28 U.S.C. § 1581(i)(4), which, as discussed previously, provides the Court of International Trade exclusive jurisdiction of any civil action against the United States that arises out of a law providing for administration and enforcement with respect to matters referred to elsewhere in § 1581, *i.e.*, in paragraphs (1)–(3) of 28 U.S.C. § 1581(i) and in subsections (a) through (h) of 28 U.S.C. § 1581. *See id.* § 1581(i)(4). Plaintiffs argue that their entire action "relates to matters pertaining to the administration and enforcement of 19 U.S.C. § 1641(d), which is specifically mentioned in 28 U.S.C. § 1581(g)." Compl. ¶3. The "matters referred to" in 28 U.S.C. § 1581(g) include a decision of the Secretary to revoke a license under subsection (b)(5) or under subsection (d)(2)(B), but not a decision to revoke a license under subsection (g), of 19 U.S.C. § 1641. *See* 28 U.S.C. § 1581(g), (i)(4). Unlike plaintiffs' first claim, this second claim has no stated relationship to 19 U.S.C. § 1641(d)(2)(B) and, accordingly, cannot be described as arising out of that statutory provision. Therefore, for purposes of 28 U.S.C. § 1581(i)(4), plaintiffs' second claim does not arise out of a law that provides for "administration and enforcement

with respect to the matters referred to" in 28 U.S.C. § 1581(g). *See id.* § 1581(i)(4). The court concludes, accordingly, that it lacks subject matter jurisdiction to hear plaintiffs' second claim.

In support of their jurisdictional argument, plaintiffs cite the legislative history discussed previously. Plaintiffs point to a sentence in the House report which states that " '[s]ection 206 [of the 1984 Act] makes conforming changes to other provisions of law to clearly establish that *the Court of International Trade has exclusive jurisdiction over decisions of the Secretary of the Treasury pursuant to section 641* [19 U.S.C. § 1641], as amended by this legislation. . . .' " Resp. to Def.'s Mot. 18 (quoting H.R. Rep. No. 98–1015, at 71) (emphasis added by plaintiffs). This sentence from the House report, if considered in isolation, might be viewed to indicate that Congress intended revocations under 19 U.S.C. § 1641(g)(2)(C) to be appealable in the Court of International Trade. However, revocations under 19 U.S.C. § 1641(g)(2)(C) are, as discussed previously, nondiscretionary on the part of the Secretary. For this reason, the report's reference to "*decisions* of the Secretary of the Treasury pursuant to section 641" is not necessarily construed as a reference to revocations of licenses under § 1641(g)(2)(C). *See* H.R. Rep. No. 98–1015, at 71 (emphasis added).

Moreover, construing the reference in the House report to "decisions of the Secretary of the Treasury pursuant to section 641" as a reference to revocations under 19 U.S.C. § 1641(g)(2)(C) is inconsistent with the language Congress chose in drafting the amendments to 19 U.S.C. § 1641(e) and 28 U.S.C. § 1581(g). *See id.* The language of 19 U.S.C. § 1641(e), as amended by section 212(a) of the Trade and Tariff Act, expressly provides for judicial review in the Court of International Trade of "any decision of the Secretary denying or revoking a license or permit under subsection (b) or (c), or revoking or suspending a license or permit or imposing a monetary penalty in lieu thereof under subsection (d)(2)(B)." Trade and Tariff Act of 1984, Pub. L. No. 98–573, § 212(a), 98 Stat. 2948, 2978, 2981–82 (1984). Conspicuous by its absence is any reference to a revocation of a license under subsection (g)(2)(C). Similarly, section 212(b) of the Trade and Tariff Act amended 28 U.S.C. § 1581(g) to provide the court exclusive jurisdiction of any civil action commenced to review a decision of the Secretary of the Treasury to revoke a customs broker's license under subsections (b)(5) or (d)(2)(B), but not subsection (g)(2)(C), of 19 U.S.C. § 1641. *Id.* § 212(b), 98 Stat. at 2983. For these reasons, the legislative history cited by plaintiffs does not support a conclusion that the court may exercise jurisdiction over plaintiffs' claim that due process and the APA required a hearing prior to the revocation of Schick's license.

C. Plaintiffs' Eighth Amendment Claim Is Not Within the Court's Subject Matter Jurisdiction

Plaintiffs' complaint also includes a claim that the revocation of Schick's license was an excessive fine or sanction prohibited by the Eighth Amendment. According to the complaint, "[t]o the extent that Customs revoked and forfeited the Customhouse broker license of plaintiff Arthur C. Schick III as a fine or sanction for his failure to timely file the informational report prescribed in 19 U.S.C. § 1641(g)(1), the sanction constitutes an excessive fine in violation of the Eighth Amendment to the United States Constitution, and must be set aside as unlawful." Compl. ¶36.

Construed most broadly, plaintiffs' Eighth Amendment claim is essentially that 19 U.S.C. § 1641(g)(2)(C) is unconstitutional on its face or as applied to Schick. Because this claim arises out of 19 U.S.C. § 1641(g)(2)(C), not § 1641(b) or (d)(2)(B), it cannot rely on § 1641(e) for a waiver of sovereign immunity. *See* 19 U.S.C. § 1641(e). In bringing this claim, plaintiffs are seeking "some form of nonstatutory review." *See Motions Sys. Corp.*, 437 F.3d at 1359.

Plaintiffs' Eighth Amendment claim seeking nonstatutory review suffers from the same basic jurisdictional defect as does plaintiffs' claim arising out of the APA and the Fifth Amendment. Unlike plaintiffs' first claim, these two claims have no relationship to 19 U.S.C. § 1641(d)(2)(B). Because the revocation of Schick's license was accomplished under 19 U.S.C. § 1641(g)(2)(C), not 19 U.S.C. § 1641(b) or (d)(2)(B), plaintiffs' third claim, like its second claim, is not within the subject matter jurisdiction provided by 28 U.S.C. § 1581(g). The court concludes, further, that this third claim does not lie within the subject matter jurisdiction conferred by 28 U.S.C. § 1581(i)(1) because it does not arise out of a law providing for revenue from imports or tonnage. Jurisdiction according to 28 U.S.C. § 1581(i)(4) is also lacking because plaintiffs' Eighth Amendment claim does not arise out of a law providing for administration and enforcement of a matter referred to in 28 U.S.C. § 1581(a) through (h) or in paragraphs (1) through (3) of 28 U.S.C. § 1581(i). As required by the express limitations in 28 U.S.C. § 1581(g) and (i), the court must dismiss plaintiffs' third claim for lack of subject matter jurisdiction.

D. Plaintiffs' Claim Relating to Schick International Is Moot

Plaintiffs claim that any revocation of Schick International's corporate customs broker's license resulting from an unlawful revocation of Schick's individual license would be contrary to law and "must be set aside as unlawful pursuant to 5 U.S.C. § 706(2)(D)." Compl. ¶40. Defendant has moved to dismiss the claim as to Schick International on the ground that it is moot or unripe. Mem. in Supp. of Def.'s Mot. to Dismiss 7, 20–21. To avoid dismissal for mootness, a case must present "a real and substantial controversy admitting of

specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 241 (1937). As stated by plaintiffs in their response to the motion to dismiss and reiterated at the oral argument on defendant's motion to dismiss, held on February 27, 2007, Schick International now has a qualifying officer with a valid customs broker's license and a permit to transact business in the Los Angeles Customs District. Resp. to Def.'s Mot. 6 n.3; *see also* Oral Argument 4:15–25, Feb. 27, 2007. Schick International therefore has attained, as a result of its own actions, the result it originally was seeking. "Federal courts lack jurisdiction to decide moot cases because their constitutional authority extends only to actual cases or controversies." *Iron Arrow Honor Society v. Heckler*, 464 U.S. 67, 70 (1983) (per curiam). For this reason, the court must dismiss for lack of jurisdiction plaintiffs' claim relating to the corporate license of Schick International.

E. The Interests of Justice Do Not Require Transfer in the Circumstances of this Case

Under 28 U.S.C. § 1631 (2000), if the court concludes that there is a want of jurisdiction over a civil action, the court is required to transfer the action to another federal court in which the action could have been brought if doing so is in the interest of justice.[3] Because the court has concluded that it lacks subject matter jurisdiction to adjudicate two of the claims pertaining to the revocation of Schick's customs broker's license, the court has considered whether, in the interest of justice, this action should be transferred to another federal court. At the oral argument on defendant's motion to dismiss, the court raised the question of transfer under 28 U.S.C. § 1631, at which time plaintiffs informed the court that, in the event the court disagreed with their assertion of subject matter jurisdiction, they did not intend to pursue this matter according to the transfer procedure. Oral Argument 8:21–31, Feb. 27, 2007 (at which plaintiffs' counsel stated that "it would be the current intention of this plaintiff that if this case were dismissed for lack of subject matter jurisdiction, we would appeal that [decision] to the [Court of Appeals]"). Because plaintiffs' statements at oral argument informed the court that plaintiffs would not prosecute their claims following a transfer, the court concludes that transfer would not be in the interest of justice.

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[3] Under 28 U.S.C. § 1631, if the court concludes there is a want of jurisdiction over a civil action, it "shall, if it is interest of justice, transfer such action . . . to any other such court in which the action . . . could have been brought at the time it was filed or noticed, and the action . . . shall proceed as if it had been filed in . . . the court to which it is transferred on the date upon which it was actually filed in . . . the court from which it is transferred." 28 U.S.C. § 1631 (2000).

III. CONCLUSION

Plaintiffs' claim pertaining to the revocation procedure of 19 U.S.C. § 1641(d)(2)(B) is within the court's subject matter jurisdiction but must be dismissed for failure to state a claim upon which relief can be granted. Plaintiffs' claim relating to the Fifth Amendment and the APA and their claim relating to the Eighth Amendment are not within the subject matter jurisdiction of 28 U.S.C. § 1581(g), (i)(1) or (i)(4). Plaintiffs' claim relating to the possible revocation of the corporate broker's license of Schick International is moot. Transfer is not in the interest of justice. Judgment dismissing plaintiffs' first claim for failure to state a claim upon which relief can be granted and dismissing plaintiffs' remaining claims for lack of jurisdiction will be entered accordingly.

ARTHUR C. SCHICK, III and **SCHICK INTERNATIONAL FORWARDING, INC.,** Plaintiffs, v. **UNITED STATES,** Defendant.

Before: Timothy C. Stanceu, Judge
Court No. 06–00279

JUDGMENT

Upon review of plaintiffs' complaint, defendant's motion to dismiss the complaint, and all other filings and proceedings herein, after due deliberation, and in conformity with the Opinion issued in this case, it is hereby

ORDERED that defendant's motion to dismiss the complaint is hereby granted because no relief can be granted on plaintiffs' first claim and because the court lacks subject matter jurisdiction of the remaining claims; it is further

ORDERED that this action is dismissed.

SLIP OP. 07–183

MICRON TECHNOLOGY, INC., Plaintiff, v. UNITED STATES, Defendant, and QIMONDA NORTH AMERICA CORP.; HYNIX SEMICONDUCTOR INC.; and HYNIX SEMICONDUCTOR AMERICA INC., Defendant-Intervenors.

Before: Jane A. Restani, Chief Judge
Consol. Court No. 06–00133

[Plaintiff's motion for judgment on the agency record denied. Defendant-Intervenors' Hynix Semiconductor Inc. and Hynix Semiconductor America Inc. motion for judgment on the agency record denied. Plaintiff's motion for remand to supplement the administrative record denied.]

Dated: December 19, 2007

King & Spalding, LLP (*Gilbert B. Kaplan*, *Cris R. Revaz*, *Daniel L. Schneiderman*, and *Jeffrey M. Telep*) for the plaintiff.

Jeffrey S. Bucholtz, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*David F. D'Alessandris*) for the defendant.

Kelley Drye Collier Shannon (*Eric R. McClafferty* and *Kathleen W. Cannon*) for defendant-intervenor Qimonda North America Corp.

McKenna Long & Aldridge, LLP (*Jeffrey M. Winton*) for defendant-intervenors Hynix Semiconductor Inc. and Hynix Semiconductor America Inc.

OPINION

Restani, Chief Judge: This matter represents the consolidation of two complaints against defendant United States and is before the court on motions for judgment on the agency record by defendant-intervenors Hynix Semiconductor Inc. and Hynix Semiconductor America Inc. (together "Hynix") and plaintiff Micron Technology, Inc. ("Micron"), challenging the Department of Commerce's ("Commerce") findings in the first administrative review of a countervailing duty order on Dynamic Random Access Memory Semiconductors ("DRAMS") from South Korea. Hynix, a South Korean manufacturer of DRAMS, challenges Commerce's findings that elements of a financial restructuring constituted countervailable subsidies under 19 U.S.C. § 1677(5) (2000). Micron, a domestic DRAMS manufacturer, challenges Commerce's finding that Hynix began receiving the benefit of a debt to equity swap in 2002, rather than in 2003.

BACKGROUND

In 2003, Commerce issued a countervailing duty order on DRAMS from South Korea, *see Notice of Countervailing Duty Order: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 Fed. Reg. 47,546 (Aug. 11, 2003), based on its finding that the Government of Korea ("GOK") entrusted or directed private entities

to make financial contributions to Hynix through elements of a financial restructuring, which constituted countervailable subsidies under 19 U.S.C. § 1677. *See Final Affirmative Countervailing Duty Determination: Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 Fed. Reg. 37,122 (June 23, 2003); *Issues and Decision Memorandum for the Final Determination in the Countervailing Duty Investigation of Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 68 Fed. Reg. 37,122 (June 23, 2003). Hynix challenged the determination in this Court in 2005. *Hynix Semiconductor Inc. v. United States*, 391 F. Supp. 2d 1337 (CIT 2005) ("*Hynix I*"). *Hynix I* recognized Commerce's authority to establish entrustment or direction under 19 U.S.C. § 1677(5)(B)(iii) by showing a government-directed program of financial restructuring transactions involving multiple financial institutions, and affirmed Commerce's methodology for proving such a program by aggregating direct and circumstantial evidence from across the parties and transactions involved. *Id.* at 1343. Following remand for further consideration of evidence that the transactions in question may have been motivated by an independent commercial actor, the Court upheld Commerce's determination that the GOK entrusted or directed the 2001 financial contributions to Hynix. *Hynix Semiconductor Inc. v. United States*, 425 F. Supp. 2d 1287, 1290, 1315 (CIT 2006) ("*Hynix II*").

On December 30, 2002, Hynix's Creditors' Council adopted a new financial restructuring plan in response to continued financial difficulties and a failed attempt to negotiate a merger or sale of one of Hynix's divisions to Micron. *See Dynamic Random Access Memory Semiconductors from the Republic of Korea: Preliminary Results of Countervailing Duty Administrative Review*, 70 Fed. Reg. 54,523, 54,526 (Sept. 15, 2005) ("*Preliminary Results*"); *Issues and Decision Memorandum for the Final Results in the First Administrative Review of the Countervailing Duty Order on Dynamic Random Access Memory Semiconductors from the Republic of Korea*, 71 Fed. Reg. 14,174, C–580–851, ARP 04/07/2003–12/31/2003, *available at* http://ia.ita.doc.gov/frn/summary/korea-south/E6-4071-1.pdf, at *9–10 (Mar. 21, 2006) ("*2006 Issues & Decision Memorandum*").[1] The plan, which was similar to the 2001 restructuring plan and included a debt to equity swap, extension of loan maturities, and conversion of interest due into new loans, was approved by Hynix's board of directors on January 7, 2003, and entered onto Hynix's financial statements for 2002.[2] *Id*. at *6, 74. When Commerce initiated the first ad-

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[1] The Creditors' Council was led by the Korean Exchange Bank ("KEB"), whose largest shareholder is the GOK. *See 2006 Issues & Decision Memorandum* at *34–35.

[2] On January 22, 2003, Hynix issued its audited 2002 financial statements, which included the elements of the restructuring plan and treated the debt to equity swap as convertible bonds to be converted into common stock or new convertible bonds after share-

ministrative review of the countervailing duty order, *see Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part*, 69 Fed. Reg. 56,745 (Sept. 22, 2004), Micron petitioned for review of the December 2002 restructuring plan as alleged new subsidies.

On March 21, 2006, Commerce issued the *Dynamic Random Access Memory Semiconductors from the Republic of Korea: Final Results of Countervailing Duty Administrative Review*, 71 Fed. Reg. 14,174 (Mar. 21, 2006) ("*Final Results*"). Commerce concluded that Hynix received additional countervailable subsidies in the December 2002 restructuring program, the GOK entrusted or directed Hynix's creditors to provide the financial contributions, the contributions conferred a benefit on Hynix, and Hynix began receiving the benefit in 2002. *2006 Issues & Decision Memorandum* at *9, 76–77. Commerce found that the subsidies continued to confer a benefit during the April 7, 2003 to December 31, 2003 review period and imposed a countervailing duty rate of 58.22 percent. *Final Results* at 14,175. Hynix and Micron both challenge these findings.

JURISDICTION & STANDARD OF REVIEW

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2000). When reviewing the final results of an administrative review, the court must sustain Commerce's findings, determinations, or conclusions unless they are " 'unsupported by substantial evidence on the record, or otherwise not in accordance with the law.' " *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996) (quoting 19 U.S.C. § 1516a(b)(1)(B)).

DISCUSSION

I. Hynix's Motion for Judgment on the Agency Record is Denied.

Hynix challenges Commerce's findings that: 1) Hynix received financial contributions as defined by 19 U.S.C. § 1677(5)(D); 2) the GOK entrusted or directed Hynix's creditors to provide the financial contributions through the restructuring plan; and 3) Hynix received a benefit from the contributions. Under 19 U.S.C. § 1677(5)(B), a countervailable subsidy is defined, in relevant part, as a transaction "in which an authority . . . provides a financial contribution . . . or entrusts or directs a private entity to make a financial contribution . . . . and a benefit is thereby conferred." 19 U.S.C. § 1677(5)(B).

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holder approval. The stock was officially issued on April 15, 2003. *2006 Issues & Decision Memorandum* at *74.

Hynix first challenges Commerce's finding that Hynix received a financial contribution through the restructuring plan on the grounds that the relief provided did not constitute an "infusion of equity" or "direct transfer of funds" under the statute. 19 U.S.C. § 1677(5)(D) defines "financial contribution" as:

> (i) the direct transfer of funds, such as grants, loans, and equity infusions, or the potential direct transfer of funds or liabilities, such as loan guarantees,
>
> (ii) foregoing or not collecting revenue that is otherwise due, such as granting tax credits or deductions from taxable income,
>
> (iii) providing goods or services, other than general infrastructure, or
>
> (iv) purchasing goods.

Id.

It is not clear that Hynix raised this issue during the administrative process, thereby preserving the challenge for review before this Court. (*See* Hynix's Case Br. (Oct. 24, 2005), *available at* P.R. 142, C.R. 26); *2006 Issues & Decision Memorandum* at *71–72; *see also Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 342 F. Supp. 2d 1191, 1205 (CIT 2004) (quoting *Pohang Iron & Steel Co. v. United States*, 23 CIT 778, 792 (1999)). Even so, in *Hynix I* and *Hynix II*, the Court accepted that debt relief associated with complex restructuring programs of this type may qualify as a countervailable infusion of equity under 19 U.S.C. § 1677(5)(B)(iii). *See Hynix I*, 391 F. Supp. 2d at 1343; *Hynix II*, 425 F. Supp. 2d at 1306. In addition, Commerce has consistently treated debt relief as a countervailable subsidy. *See*, *e.g.*, 19 C.F.R. § 351.508; *Notice of Preliminary Results of Countervailing Duty Administrative Review: Certain Hot-Rolled Carbon Steel Flat Products from India*, 71 Fed. Reg. 1,512, 1,518 n.5 (Jan. 10, 2006) ("[I]t is the Department's practice to treat any material change to an outstanding loan as a new loan. . . ."). As found in *Hynix II*, such a practice reflects a reasonable interpretation of the governing statute. *See Hynix II*, 425 F. Supp. 2d at 1306. Therefore, Commerce's finding that the debt relief granted through the restructuring plan constituted a financial contribution to Hynix is sustained.

Hynix also challenges Commerce's findings that the GOK "entrusted or directed" Hynix's creditors to provide financial contributions through the restructuring plan, asserting that Commerce lacked direct evidence to support its conclusion.[3] This Court stated

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[3] Hynix also argues that Commerce improperly refused to consider the commercial reasonableness of the creditors' actions with respect to the finding of entrustment or direction. As stated in 19 U.S.C. § 1677(5)(B) and (E)(i), commercial reasonableness applies only to

in *Hynix I* that "[i]n appropriate circumstances, Commerce may permissibly use circumstantial evidence to prove, in whole or in part, the existence of entrusted or directed financial contributions under 19 U.S.C. § 1677(5)(B)(iii)."[4] *Hynix I*, 391 F. Supp. 2d at 1348 (citing *AK Steel v. Untied States*, 192 F.3d 1367, 1373–76 (Fed. Cir. 1999)). In reaching a finding of entrustment or direction, "proof of motive, propensity, proclivity, opportunity, and capacity [may be] derived by inference from circumstantial evidence. Individually, each of these inferences would be insufficient to establish the existence of a program of entrustment or direction; but, together, this collection of inferences could permit such a conclusion." *Id.* at 1349 (footnote omitted). The collection of inferences must be reasonable based on the available circumstantial evidence. *Id.* at 1343.

The circumstantial evidence presented by Commerce strongly supports Commerce's findings that the GOK entrusted or directed Hynix's creditors to provide financial contributions through the restructuring plan. Commerce provided evidence that Hynix was again facing a dire financial situation and "desperately needed new financial assistance from its creditors in order to survive as a viable entity." *Preliminary Results* at 54,528. Based on negative financial indicators and Hynix's likely inability to obtain comparable commercial loans, Commerce determined that Hynix was unequityworthy and "kept alive only through debt restructuring programs." *2006 Issues & Decision Memorandum* at *5, 9–10, 63 (quotes omitted). Pointing to evidence of an ongoing plan to assist Hynix, including statements by senior GOK officials expressing concern for the potential political and economic effects of Hynix's failure, Commerce found that the GOK had a policy and motive to entrust or direct assistance to Hynix.[5] *See Preliminary Results* at 54,529; *2006 Issues & Decision Memorandum* at *9–11, 21–26. In addition, Commerce presented evidence that the GOK had the ability to influence or direct the creditors' actions. Commerce noted that "the GOK-owned or controlled banks dominated [Hynix's] Creditors' Council," and found that "[a]lthough government ownership by itself is not sufficient to result in a finding that a financial institution is a government entity, the high level of ownership by the government in

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the finding of benefit conferred by a subsidy, and not to the analysis of entrustment or direction.

[4] *Hynix I* explained that, because "benefit-conferring contributions made by private parties pursuant to government entrustment or direction . . . [are] by their furtive nature, [ ] likely to be difficult to discern and even harder to prove by the requisite substantial evidence," it is permissible for Commerce to "rely heavily on circumstantial evidence," so long as it fairly weighs the evidence invoked in support of such a finding. *Id.* at 1347–48.

[5] Although Commerce is not permitted to use past findings of government-directed subsidies to establish entrustment or direction, it may use past subsidies as a starting point to show an ongoing program of assistance so long as it provides evidence to support reasonable inferences that such policies "continued into the period of investigation." *See AK Steel*, 192 F.3d at 1376.

Hynix's creditors gave it the ability to exercise substantial influence over the activities of these entities, including their lending decisions with regard to Hynix." *Preliminary Results* at 54,530. Commerce also pointed to other instances in which the GOK influenced or directed the decisions of creditors in support of its finding that the GOK regularly exercised such control.[6] *See id.* at 54,528, 54,531; *2006 Issues & Decision Memorandum* at *32–35. Together, this evidence reasonably supports Commerce's conclusion that the GOK entrusted or directed Hynix's creditors to provide assistance through the 2002 restructuring plan.

Hynix also challenges Commerce's finding that Hynix received a benefit from the infusion of equity, claiming that the restructuring was consistent with normal market practices. Hynix argues that Commerce improperly evaluated the rationality of the investments by refusing to consider as part of its analysis the future interests of existing or "inside" creditors, and the resulting "commercial reasonableness" of their actions.

Under 19 U.S.C. § 1677(5)(E)(i), a benefit is deemed to have been received as a result of an equity infusion "if the investment decision is inconsistent with the usual investment practice of private investors." *Id.* The model for economic analysis used by Commerce to evaluate whether a benefit was received under the terms of this provision is based on the future interests of an outside investor with no existing ties to the company.[7] *See*, *e.g.*, *Preliminary Results* at 54,525. Commerce will normally use a prospective outside investor in a particular company to perform such an analysis, but when none exists, it will determine the company's equityworthiness by projecting the rational future interests of a theoretical private investor. *See 2006 Issues & Decision Memorandum* at *3–4. In the instant case, Hynix argues that Commerce improperly applied this analysis by failing to consider the rational future interests of an investor with an existing stake in the company's survival. (*See* Hynix's R. 56.2 Mot. for J. on the Agency R. ("Hynix Br.") 31.) Commerce rejected this approach in the *2006 Issues & Decision Memorandum*, arguing that the commercial reasonableness of the actions of inside investors is not a required determination and that Hynix's proposed approach would require examination of the subjective motivations and incen-

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[6] Commerce also noted that "[t]he contributions in this case are loans and equity infusions . . . . [which] would normally be vested in the government," *Preliminary Results* at 54,528, which brings the contributions firmly within the scope of 19 U.S.C. § 1677(5)(B)(3) (" . . . if providing the contribution would normally be vested in the government and the practice does not differ in substance from practices normally followed by governments.").

[7] In *Hynix II*, this Court accepted as reasonable Commerce's approach for determining whether investment would be rational based on the future interests of an outside or theoretical private investor. *Hynix II*, 425 F. Supp. 2d at 1314 (citing *British Steel Corp. v. United States*, 10 CIT 224, 231, 632 F. Supp. 59, 65 (1986)).

tives of the existing investors. *2006 Issues & Decision Memorandum* at *62–63.

Although Commerce's approach may seem simplistic, the court finds insufficient reason on the facts of this case to reject its approach. Where, as here, there is strong evidence of government entrustment or direction, it is extremely difficult for Commerce to discern the government-imposed motives from the commercial motives of inside investors. Even if in a particular case Commerce would be required to assess independent evidence of the value of an investment to an inside investor, in this case the independent economic valuations that would be required for such an inquiry were not presented to Commerce at the time of its review.[8] The court therefore finds that Commerce's approach in the instant case was reasonable and in accordance with law.

Commerce concluded that Hynix was not equityworthy at the time of the restructuring on the basis of objective analyses and financial data. Commerce cited reliable industry reports in support of its findings that Hynix was " 'technically bankrupt, kept alive only through debt restructuring programs,' " and that it presented " 'a negative investment case.' " *2006 Issues & Decision Memorandum* at *63 (quoting Morgan Stanley Hynix Semiconductor Equity Research (Sept. 25, 2002) and Merrill Lynch: Hynix Semiconductor, Inc.: Comment (Nov. 27, 2002)). Commerce noted that the DB Report, which provided the sole positive outlook on Hynix's situation, recommended only that existing creditors minimize their losses, and was produced at the request of the KEB and GOK. *Id.* at *61–63; *see also Preliminary Results* at 54,526. Commerce also determined that Hynix's "net profit margin, return on equity, and return on assets were all negative during this period. The debt-to-equity, current and quick ratios all demonstrate that Hynix was in danger of not being able to make all of its payments." *Id.* at 54,526–27. This evidence provides substantial support for Commerce's finding that Hynix was unequityworthy at the time of the restructuring and therefore received a benefit from the contributions.

Accordingly, Commerce's determination that Hynix received countervailable subsidies through the December 2002 restructuring plan is sustained, and Hynix's motion for judgment on the agency record is denied.[9]

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[8] Hynix points to estimations of value included in the Deutsche Bank ("DB") Report in support of its assertions. Commerce provided sufficient explanation in the *Preliminary Results* and *2006 Issues & Decision Memorandum* to support its conclusion that the DB Report was not a reliable and independent source of economic analysis. *See Preliminary Results* at 54,526; *2006 Issues & Decision Memorandum* at *47, 62–63 ("[G]iven DB's relationship with KEB and the GOK, the Department finds that the DB Report does not constitutea . . . objective analysis.").

[9] Micron and Hynix both seek to add to the record various materials including financial information, elements of Korean bankruptcy law, proposed economic theories, and evidence

II. Micron's Motion for Judgment on the Agency Record is Denied.

Micron challenges Commerce's determination that Hynix received the benefit of the restructuring program in 2002, arguing that the benefit did not accrue until the transactions were completed in 2003 through board and shareholder approvals and issuance of the stock certificates.[10] Under 19 C.F.R. § 351.507(b), Commerce "consider[s] the benefit to have been received on the date on which the firm received the equity infusion." *Id.* Deciding when the equity infusion occurs where it is in the form of debt relief is not a simple task.

The essence of the court's decision in Part I affirming Commerce's determination that Hynix received a financial contribution is that the restructuring program itself, which is intended to improve the future potential of the company, constitutes the countervailable event. Micron's argument that the issuance of the actual stock certificates is the controlling event is therefore without merit. Commerce's finding that the benefit was received in 2002 instead depends primarily on the reflection of the transactions on Hynix's financial statements. Commerce noted that Hynix recorded the effect of the restructuring on its 2002 financial statements, including the release from existing debt obligations and parallel increase in equity capital resulting from the debt to equity swap. *2006 Issues & Decision Memorandum* at *76–77. Commerce acknowledged that the statements indicated that the convertible bonds derived from the debt to equity swap would be converted into stock or new convertible bonds following shareholder approval in 2003, but also noted that because the Creditors' Council controlled Hynix and was entrusted or directed by the GOK to carry out the restructuring, the same entities that approved the restructuring as creditors in December 2002

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of general Korean accounting principles in support of their respective motions. (*See* Micron's Mot. for Remand to Supplement the Admin. R. and Reconsider the Timing of the April 2003 Debt-Equity Swap (Apr. 3, 2007); Hynix Br. at Attach. 1–3.) The court orally rejected Micron's motion. As to Hynix's new material, the court will take judicial notice only of Korean law, although the availability of reorganization proceedings in bankruptcy does not change the analysis. The court is not required to determine from this record whether or not the restructuring was more beneficial or equally beneficial to a hypothetical reorganization. Because the documents sought to be added were available at the time of Commerce's review and do not demonstrate new or changed circumstances, the parties should have provided these materials at the appropriate time during Commerce's review. *See Beker Indus. Corp. v. United States*, 7 CIT 313, 316 (1984). Hynix's additional materials will therefore not be considered by the court, and Micron's Motion for Remand to Supplement the Administrative Record is denied.

[10] Micron raises this issue because, in accordance with 19 C.F.R. § 351.524(b)(1), the benefit of the equity infusion is allocated over five years, which means that according to Commerce's determination the increased duty rate will run from 2002 to 2006. Micron argues that because the liquidation of entries was not suspended until April 2003, Hynix's entries for 2002 were not countervailed at the new rate, effectively shielding Hynix from one-fifth of the increased duty that would otherwise apply. (*See* Pl. Micron Tech., Inc.'s Reply Br. 13.)

had control over approval of the plan as shareholders in February 2003. *Id.* at *77. The finding of entrustment or direction, which the court has sustained, underlies Commerce's determination about the nature of the 2003 events. Commerce concluded that although board and shareholder approval "might be significant in other instances, . . . the facts of this case deem these events pro forma."[11] *Id.* Commerce therefore determined that the benefit was received when the plan was approved in December 2002. *Id.* Given the inherent difficulty in deciding the timing question, the court must defer to Commerce. There is nothing in this record which compels Commerce to choose the pro forma actions of 2003 over the crucial decisionmaking that occurred in 2002.

Although Micron now asserts that Commerce should have considered additional information,[12] including the financial statements of Hynix's creditors, which may have reflected the transactions differently from Hynix's statements, the court finds no reason to reject Commerce's conclusion as to the timing of the benefit to Hynix. Commerce's decision was properly based on the documents presented to it at the time of the review, and the finding that the benefit accrued in December 2002 is supported by substantial evidence on the record. Accordingly, Micron's motion is denied.

CONCLUSION

For the foregoing reasons, Hynix's Motion for Judgment on the Agency Record is denied. Micron's Motion for Judgment on the Agency Record is denied. Micron's Motion for Remand to Supplement the Administrative Record is denied. Commerce's determinations in the first administrative review are sustained.

MICRON TECHNOLOGY, INC., Plaintiff, v. UNITED STATES, Defendant, and QIMONDA NORTH AMERICA CORP. HYNIX SEMICONDUCTOR INC.; and HYNIX SEMICONDUCTOR AMERICA INC., Defendant-Intervenors.

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[11] Micron relies on a previous decision in which Commerce did not consider a debt to equity swap to constitute debt relief because it was pending final approval by an entity that might have rejected it. *See Final Affirmative Countervailing Duty Determination: Grain-Oriented Electrical Steel From Italy*, 59 Fed. Reg. 18,357 (Apr. 18, 1994) ("*GOES*"). *GOES* is clearly distinguishable from the instant case because the pending approval in *GOES* was that of the European Community, which operated as a truly independent decisionmaking body. *Id.* In this case, the substantial overlap between creditors and shareholders and the fact that the decisions were entrusted or directed by the GOK indicates that the approval process was pro forma, and not dependent upon the substantive decision of an independent body.

[12] *See supra* note 9.

JUDGMENT

This case having been submitted for decision and the Court, after deliberation, having rendered a decision therein; now, in conformity with that decision,

IT IS HEREBY ORDERED that Plaintiff Micron Technology, Inc.'s Motion for Judgment on the Agency Record is denied. Defendant-Intervenors Hynix Semiconductor Inc. and Hynix Semiconductor America Inc.'s Motion for Judgment on the Agency Record is denied. Plaintiff Micron Technology, Inc.'s Motion for Remand to Supplement the Administrative Record is denied. Commerce's determinations in the first administrative review are sustained.