U.S. Court of International Trade

Slip Op. 15–130

REBAR TRADE ACTION COALITION, et al., Plaintiffs, v. UNITED STATES, Defendant, and ICDAS CELIK ENERJI TERSANE VE ULASIM SANAYI, A.S., AND HABAS SINAI VE TIBBI GAZLAR ISTIHSAL ENDUSTRISI A.S., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 14–00268

[Remanding negative less-than-fair-value determination on rebar from Turkey.]

Dated: Dated: November 23, 2015

Alan H. Price, *John R. Shane*, *Maureen E. Thorson*, and *Jeffrey O. Frank*, Wiley Rein LLP, of Washington, DC, for plaintiffs.

Richard P. Schroeder, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for the defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Reginald T. Blades, Jr.*, Assistant Director. Of Counsel on the brief was *David W. Richardson*, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

Matthew M. Nolan, *Nancy A. Noonan*, and *Diana Dimitriuc Quaia*, Arent Fox LLP, of Washington, DC, for defendant-intervenor Icdas Celik Enerji Tersane ve Ulasim, A.S.

David J. Simon, Law Office of David L. Simon, of Washington, DC, for defendant-intervenor Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S.

OPINION AND ORDER

Musgrave, Senior Judge:

Domestic industry representatives Rebar Trade Action Coalition and its individual members (plaintiffs or "RTAC") challenge a number of aspects on the record of *Steel Concrete Reinforcing Bar From Turkey: Final Negative Determination of Sales at Less Than Fair Value and Final Determination of Critical Circumstances*, 79 Fed. Reg. 21986 (Sep. 15, 2014) ("*Final Results*"), and accompanying issues and decision memorandum ("*IDM*"), as compiled by the U.S. Department of Commerce, International Trade Administration ("Commerce"). The period of investigation is July 2012, through June 2013.

ICDAS Celik Enerji Tersane ve Ulasim, A.S. ("Icdas") and Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. ("Habas"), respondents

at the administrative proceeding, have intervened in defense of Commerce's determination. The plaintiffs' USCIT Rule 56.2 motion for judgment coalesce their nine-count complaint into four broad issues: (1) calculation of duty drawback adjustments for each respondent, specifically the fact that the cost side of the adjustments is on a different basis than the sales side, as well as grant of the adjustments in the first instance; (2) use of invoice date as the U.S. date of sale in the antidumping duty margin calculation for Icdas; (3) acceptance of potentially misreported yield strength information for rebar produced and sold by Icdas; and (4) failure to collect alloy usage cost information from Icdas and declining to adjust Icdas's costs to reflect alloy useage differentials.

Commerce has requested voluntary remand of the issue concerning duty drawback calculation, which has also prompted the plaintiffs to file a motion to expedite reconsideration of that single issue. The defendant and Icdas oppose that motion, arguing that bifurcation resulting in multiple remands is disfavored and that the plaintiffs have not shown good cause therefor, while Habas did not file a position thereon. In view of the quality of the briefing, this opinion moots the motion for oral argument as well as the motion for bifurcation and expedition of only one of the issues, and the matter as a whole will be remanded in accordance with the following.

II. *Jurisdiction and Standard of Review*

Jurisdiction is here pursuant to 28 U.S.C. §1581(c). In this type of proceeding, the court holds unlawful any determination, finding, or conclusion found "unsupported by substantial evidence on the record, or otherwise not in accordance with law". 19 U.S.C. §1516a(b)(l)(B)(i).

III. *Discussion*

A. Procedural History

The plaintiffs filed their antidumping duty petition regarding rebar from Turkey on September 4, 2013. *See IDM* at 2. On October 2, 2013, Commerce initiated its investigation thereof and issued an affirmative preliminary determination in April 2014. *See Steel Concrete Reinforcing Bar From Turkey*, 79 Fed. Reg. 22804 (Apr. 24. 2014) ("*Preliminary Determination*") and accompanying issues and decision memorandum ("*Pre-IDM*"), PDoc 212. Commerce calculated preliminary margins of 0.00 percent for Habas, 2.64 percent for Icdas, and 2.64 percent as the "all others" rate. *Preliminary Determination*, 79 Fed. Reg. at 22805. After verification of the respondents and review of case and rebuttal briefs, on September 15, 2014, Commerce published

its final determination as negative, *i.e.,* that it did not find sales of rebar from Turkey to the United States to have been sold at less than fair value, and terminated the investigation. 79 Fed. Reg. 54965. *See IDM* at 1. This appeal followed.

B. Duty Drawback Adjustment Issues

The plaintiffs' first challenges are to Commerce's decision to grant respondents a duty drawback adjustment with respect to a particular tax imposed by Turkey and the calculation thereof.

1. Statutory and Regulatory Framework

Pursuant to the Tariff Act of 1930, as amended, Commerce will upwardly adjust export prices by "the amount of any import duties imposed by the country of exportation which have been rebated, or which have not been collected, by reason of the exportation of the subject merchandise to the United States." 19 U.S.C. 1677a(c)(1)(B). The United States Court of Appeals for the Federal Circuit has explained that "if a foreign country would normally impose an import duty on an input used to manufacture the subject merchandise, but offers a rebate or exemption from the duty if the input is exported to the United States, then Commerce will increase [the export price] to account for the rebated or unpaid import duty (the 'duty drawback')." *Saha Thai Steel Pipe (Public) Company Ltd. v. United States*, 635 F.3d 1335, 1338 (Fed. Cir. 2011) ("*Saha Thai*").

"The purpose of the duty drawback adjustment is to account for the fact that the producers remain subject to the import duty when they sell the subject merchandise domestically, which increases home market sales prices and thereby increases [normal value]." *Id*. "A duty drawback adjustment is meant to prevent dumping margins that arise because the exporting country rebates import duties and taxes that it had imposed on raw material used to produce merchandise that is subsequently exported." *Allied Tube & Conduit Corp. v. United States*, 29 CIT 502, 506, 374 F. Supp. 2d 1257, 1261 (2005) (citations omitted).

In order to determine whether a respondent is eligible for a duty drawback adjustment, Commerce employs a two-prong test, pursuant to which the respondent must establish (1) that the rebate and import duties are dependent upon one another, or in the context of an exemption from import duties that the exemption is linked to the exportation of the subject merchandise, and (2) that there are sufficient imports of the raw material to account for the duty drawback on the exports of the subject merchandise. *Saha Thai*, 635 F.3d at 1340 (citation omitted).

2. Further Background

Commerce requested Icdas and Habas to "[r]eport the unit amount of any duty drawback received upon exportation of the subject merchandise to the United States . . . [and] [e]xplain how the amount of the duty drawback received is calculated". Commerce Sections B-D Questionnaire at C-24, PDoc 61. Both Icdas and Habas reported that they had participated in the Turkish "Inward Processing Regime" ("IPR"), which permitted them to import into Turkey "raw materials free of import duties, the resource utilization fund (KKDF) and value added tax if such inputs are intended for producing final goods for export." *See* Icdas Section C Questionnaire Resp. at C-33--C-34, PDoc 118; Habas Section C Questionnaire Resp. at C-34, PDoc 110.

The IPR defines its "tax" as "[a]ll financial obligation such as taxes, duties, fees, fund payments etc. which are stipulated for collection during import and export goods." *See* Habas Section C Questionnaire Resp., Ex. C-16 at 3. Icdas further explained that the "resource utilization fund", or "KKDF tax", is "a tax imposed on foreign currency loans", and that the IPR made such foreign currency loans exempt from the KKDF tax if the loans were "used to finance imported inputs that are used to manufacture goods for export." Icdas Supplemental Questionnaire Resp. at SC-13-SC-14, PDoc 167. Both Icdas and Habas explained that the IPR is similar to the United States' system of "substitution" duty drawback, meaning that the company does not have to "track whether particular imports are physically incorporated into particular exports; it is enough that the imports were actually imported, that the exports were actually exported, and that the products that were exported were made from inputs of the type of imports." Icdas Supplemental Questionnaire Resp. at SC-12--SC-13, PDoc 167; Habas Supplemental Questionnaire Resp. at 28, PDoc 161 (highlighting omitted). That is, the respondents claimed that due to the fungible nature of the imported steel input, tracing the specific molecules of the steel input from the import to the export was unnecessary as long as the export of the finished product (*i.e.*, rebar) contained sufficient amounts of the steel to account for the quantity of the imports. *Id*.

To benefit from duty drawback, a firm must "obtain a Domestic Processing Certificate/Authorization" ("IPC"). *See* Habas Section C Questionnaire Resp., Ex. C-16 at 7, Art. 9, PDoc 110. Once the export obligation under an IPC has been met, the party must disclose the specific export commitment by submitting evidence that the processed products were exported. *See id*. at 11, Art. 19. Icdas and Habas provided an explanation thereof and exhibits, including IPCs, letters,

and other documentation pertinent thereto. *See* Icdas 2nd Supplemental Questionnaire Resp. at S2C-1--S2C-3, PDoc 198; Habas 2nd Supplemental Questionnaire Resp. at 1–2, PDoc 187. According to Commerce, these submissions provided for the record evidence that (1) the products were sold for export, (2) that they were produced from imported scrap under an IPC, (3) that they actually were exported, (4) that the necessary approval therefor was obtained from the Turkish government, and (5) that Icdas and Habas received the completion report from the Turkish government. Def's Resp. at 9 (citations omitted).

In the *Preliminary Determination*, Commerce granted duty drawback adjustments to both Icdas and Habas. *Pre-IDM* at 17–18. Commerce explains that before reaching that determination it had compared a list of imports during the period of investigation with the IPCs submitted by the respondents, and it also reviewed the documentation that they claimed to have provided to the Turkish government "when they closed out an IPC." Def's Resp. at 10, quoting *id*. at 18. Commerce observed that the documentation the respondents submitted provided a tally of imports and exports. *Pre-IDM* at 17–18. Applying its two-pronged test for granting a duty drawback adjustment, Commerce preliminarily determined that (1) "respondents established sufficient linkage between their respective inputs and the exports of subject merchandise during the [period of investigation]" and (2) respondents had sufficient imports to account for the duty drawback received." *Id*.

At verification, Commerce officials requested and reviewed the relevant Turkish customs regulations and law. *See* Icdas Verification Report at 21–22, PDoc 272. Commerce officials were provided access to Icdas's Turkish Customs online account and found it to be consistent with the data submitted to Commerce. *Id*. at 22. Commerce confirmed that the IPCs used during the period of investigation were closed and that quantities for the period of investigation matched the online database. *Id*. Commerce also reviewed the relevant customs duties and the KKDF tax rates for inputs from several countries, and it tracked the applicable duty rates to the rates that Icdas used for its drawback calculations. *Id*. For two sales, Commerce officials tied the reported quantity by vessel and the relevant IPC to the United States sales listing. *Id*. Commerce officials also traced a single import and a single export through Icdas's financial records. *Id*. Finally, Commerce officials confirmed that the percentage of scrap reported was based on imported scrap. *Id*.

Commerce found that all the information presented on this issue was consistent with Icdas's questionnaire response. *Id*. It also made similar inquiries at the Habas verification and, other than minor corrections reported by Habas at the beginning of the verification, Commerce found no discrepancies in Habas's questionnaire responses. *See* Habas Verification Report, at 23–24, PDoc 271.

In the *Final Results*, Commerce continued to grant both Icdas and Habas the duty drawback adjustment. *IDM* at 13–14. Commerce again applied its two-prong test, *id*., and with respect to the first prong of that test, Commerce expressly noted that it looks for a "reasonable link between the duties traced and rebated or exempted" and that it does not require "the imported input be traced directly from importation through exportation." *Id*.

In finding that the respondents had met the first prong of the duty drawback test, Commerce relied on the Turkish laws and regulations, as well as the paperwork that is required to be filed to qualify for the KKDF tax exemption submitted with questionnaire responses and examined at verification. *IDM* at 14–15. Commerce determined, based on this record information, that "[e]ach respondent had demonstrated that[,] although the KKDF [tax] is related to the type of financing used, the tax is import dependant and export contingent." *Id*. at 14.

In finding that the respondents had satisfied the second prong of the duty drawback test -- that is, that both respondents had sufficient imports to account for the exported merchandise--Commerce relied, among other things, on respondents' lists of imports during the period of investigation, documentation matching the imports to the exports, and Commerce's verification findings, including an examination of the Turkish government's on-line customs database. *Id*. at 15.

Commerce also found that a comparison of the Turkish and United States duty drawback systems did not undermine the legitimacy of the Turkish system. *Id*. at 16. It further addressed a number of cases on which the plaintiffs had relied to support their arguments, finding that they did not require Commerce to reach a different result. *Id*.

In sum, after considering the evidence on the record, as well as the parties' arguments, *IDM* at 9–13, Commerce concluded that both Icdas and Habas were entitled to a duty drawback adjustment.

3. Calculation of Duty Drawback Adjustment

The plaintiffs argue that the "sales side" duty drawback adjustments for each respondent involved dividing total drawback duties by total exports, in contrast to the "cost side" adjustments that relied on total production cost for both domestic and export sales; this, the

plaintiffs contend, results in distorted adjustments. *See* Compl. ¶¶ 41–42; Pls' Br. at 14–21.

The defendant acknowledges the inconsistency ("because, although the adjustment to the costs averaged the total duties over total domestic and foreign sourced input costs, the sales-side adjustment spread the entire duty drawback amount on the just exported sales") and requests voluntary remand in order to reconsider pursuant to *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001) (court has discretion to issue a remand if the government so requests even without admission of error).[1]

Icdas defends this aspect of the *Final Results*, contending that the petitioners seek to overturn established precedent on arguments that are inconsistent with the statute and based on a faulty premise. Icdas Resp. at 12–17. Icdas cites a number of cases, including *Saha Thai Steel Pipe (Public) Co. v. United States*, 635 F.3d 1335 (Fed. Cir. 2011) ("*Saha Thai*"), indicating that Commerce normally calculates (and must calculate) a cost side duty drawback adjustment wherever it calculates a sales side adjustment. Icdas Resp. at 12–14. The plaintiffs reply that none of the cited cases deal with the allocation basis for that adjustment, and that even *Saha Thai* appears to have been concerned solely with the question of whether a cost side duty drawback adjustment should be made, and not with "how" the "corresponding increase" to the cost of production is to be calculated. Pls' Reply at 2, referencing *Saha Thai*, 635 F.3d at 1342–43.

Icdas also argues that the Tariff Act of 1930 defines "cost of production" such that there can only be one, single cost of production determined, covering both home-market and export sales. Icdas Resp. at 14–15. The plaintiffs reply that while the statute specifies the costs that make up the cost of production, it does not mandate the methodology by which those costs must be calculated. *See* 19 U.S.C. § 1677b(b)(3); *see also SeAH Steel Corp. v. United States*, 34 CIT 605, 614, 704 F. Supp. 2d 1353, 1363 (2010) (the statute "does not dictate the method by which Commerce may calculate costs of production"). Nor, they argue, is it true that Commerce never calculates multiple costs of production; rather, it routinely calculates separate costs of production for each model of merchandise at issue. Pls' Reply at 3, referencing *id*. at 1358. Moreover, they point out, Commerce regularly adjusts for differences in costs that are incidental to selling to specific markets, such as freight. *Id*.

[1] Def's Resp. at 16–17, referencing *IDM* at 17–18 & Pls' Br. at 14–21. The defendant's request prompted the plaintiffs' motion to expedite remand of this single issue. *See* ECF Nos. 67–69 (Sep. 18–21, 2015). As indicated above, in light of this opinion that motion, as well as the plaintiffs' motion for oral argument, ECF No. 66 (Sep. 18, 2015), must be, and hereby are, denied as moot.

Finally, in arguing that the plaintiffs' claims are based on a faulty premise, Icdas states that "export sales simply did not incur the raw material duty costs as prescribed by the duty drawback." Icdas Resp. at 16. The plaintiffs reply that the sales-side adjustment requires that exempted duties be added to export price, although export sales did not incur the related costs, thus putting the export prices on the same basis as home-market prices and avoiding phantom dumping margins. Likewise, they contend, on the cost side of the equation imputed duties should be allocated so as to avoid phantom "cushions" against dumping.

For its part, Habas also defends the *Final Results* as they stand, arguing that it reported its costs in accordance with Commerce's instructions, and that the plaintiffs' arguments are inconsistent with the "matching principle." Habas Resp. at 8–12. The plaintiffs reply they are not arguing any failure to respond to the agency's questionnaires, they are arguing Commerce has not adequately explained its rejection of their cost side allocation claim and that the allocation distorts the margin. Regarding the matching principle of accounting, the plaintiffs contend that the sales side drawback adjustment requires adding imputed duty values to U.S. prices while home-market prices require no adjustment because they already reflect the value of any import duties; thus, they contend, in order to match the sales side adjustment on the cost side, *per Saha Thai*, the costs for exported material must be adjusted to account for duties not actually paid, while no adjustment is required to domestically-sold product costs.[2] Likewise, the plaintiffs further contend, under the matching principle it would be illogical to impute the costs of the import duties that have been added to the export price sales to home market production --which should already reflect any import duty costs--but, as the *Final Results* currently stand, Commerce "did exactly that". *Id*. (confidential portion of argument omitted).

Summarizing, the plaintiffs argue the cost side of the duty drawback allocation was not well-explained in this instance, resulted in distorted margins, and delivered results that appear contrary to the agency's intent. Whether Commerce would agree with that characterization, the court finds that Commerce's request for remand expresses a substantial and legitimate concern for reconsidering its duty drawback adjustment calculation, and the matter will be remanded therefor.

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[2] "As *Saha Thai* explained, 'it would be illogical to increase EP to account for import duties that are purportedly reflected in NV, while simultaneously calculating NV based on a COP and CV that do not reflect those import duties.'" Pls' Reply at 4, quoting *Saha Thai*, 635 F.3d at 1342.

4. Sufficiency of the Agency's Explanation for Including the KKDF Tax as Part of the Duty Drawback Adjustment Calculation

The plaintiffs also contend that Commerce failed to explain sufficiently the determination to grant a duty drawback adjustment with respect to the KKDF tax in the first place.

The *IDM*'s discussion of the KKDF tax begins by stating that "[i]n order for Turkish companies to qualify for exemptions from paying customs duties and KKDF [tax] on imported inputs for rebar exports under the IPR, each respondent demonstrated that it applied for[,] or 'opened,' and the GOT maintained[,] an IPC[,] which is the official mechanism under the IPR by which companies justify, and the GOT affirms, entitlement to such exemptions." *IDM* at 14. The plaintiffs contend that the sum of the *IDM*'s explanation and analysis of the KKDF tax, including citation to the verification reports, is that the respondents had demonstrated that "although the KKDF is related to the type of financing used, the tax is import-dependent and export contingent." *Id*., citing Habas Sales Verification Report at 23–25 and SVE-21; and Icdas Sales Verification Report at 21–22 and SVE-29.

The plaintiffs argue that this is inadequate explanation for determining that the KKDF tax qualified as a statutory "import duty" under 19 U.S.C. §1677a(c)(l)(B) or, for that matter, that the tax was "import-dependant and export contingent." The KKDF tax is not imposed on imports as such, the plaintiffs argue, but on commercial loans that are financed in certain ways, and regardless of whether those loans are used to support imports or not. Their argument is that the tax amount is not based on the value of goods secured, nor is it paid through the mechanism of the loan itself, but is rather based on the amount of money borrowed. *See*, *e.g.*, Pls' Reply at 5, referencing Icdas Sections A and C Supplemental Response at Ex. SC-14, PDoc 166. As such, they contend they pointed out to Commerce that the KKDF tax did not qualify as an "import duty" within the meaning of 19 U.S.C. § 1677a(c)(l)(B) because the KKDF tax can be avoided altogether, even with respect to loans to support imports, simply by avoiding certain types of financing options such as acceptance loans or loans denominated in foreign currencies. *See* PDoc 283, CDoc 504, at 46–49. They also argued that the record did not show that the loans by which respondents financed their import purchases were of a type that would incur the KKDF tax, such that the tax could be rebated or exempted by reason of their exports of rebar to the United States. Pls' Br. at 9, referencing PDocs 166, 168. Elaborating here, the plaintiffs acknowledge that financing, if documented to support the importation of goods under the IPR, is "exempt" from KKDF taxes, but they

argue that this fact does not, by itself, explain the basis for finding that the KKDF tax is itself an "import duty" contemplated by the statute. For example, they contend, the fact that the IPR can exempt income taxes does not transform income taxes into "import duties", and they further complain that Commerce never explained how export contingency could signify that a tax is an import duty. *Id.* at 10.

Commerce responds that it specifically reviewed the Turkish import system, including the customs regulations specific to the IPR and the relevant IPCs, and explained that the applicable Turkish government bylaws concerning the KKDF tax provides, in relevant part, that a six percent rate shall be applied on "imports made with acceptance loan, deferred letter of credit and in the form of cash on delivery." Def's Resp. referencing PDoc 166 at Ex. SC-14 ("Communique On Resource Utilization Fund Regarding Bylaw"), Art. 2, Sec. (7)D, PDoc 168. After also quoting Article 2, Section 8 of those resource utilization fund bylaws, which describes an applicable KKDF tax rate of a zero percent rate on loans for financing exports, Commerce emphasizes that the bylaws specifically reference the "inward processing license" (IPC) with which its determination was concerned. Def's Resp. at 12–13. Commerce states that because the explicit exemption in the bylaws for the KKDF tax on imports under the Turkish duty drawback system is contingent on import and export commitments, it reasonably found the KKDF tax to be eligible for adjustment in accordance with the Turkish duty drawback scheme.

Although the relevant translation of the Turkish decree might speak for itself, and although Commerce's response borders on impermissible *post hoc* explanation,[3] Commerce's response does not, in any event, completely address the plaintiffs' points insofar as it as-

[3] The plaintiffs also contend the verification reports do not appear to furnish the required explanations. *See id.* They point out that the sales verification report for Habas, for example, notes that the agency collected a copy of the KKDF decree (which had previously been provided in the questionnaire responses), *see* Mem. to The File from George McMahon & Jolanta Lawska, Senior International Trade Analysts, Office III, Antidumping and Countervailing Duty Operations, *re* : Verification of the Sales Response of Habas in the 2012–13 Antidumping Duty Investigation of Concrete Reinforcing Bar from Turkey (June 23, 2014) at 23 ("Habas SV Report"), *see also* Icdas Section A and C Supplemental Response at Ex. SC-14, but, they argue, the verification report offers no analysis of the decree, and accordingly, it does not explain the agency's reasons for finding the KKDF tax to be "import-dependent and export contingent." Further, the plaintiffs contend the only other apparent reference to the KKDF tax in Habas' sales verification report indicates that the agency verifiers looked up KKDF rates on a website and matched these rates with the rates that Habas used in the drawback calculations it had presented to the agency. Pls' Br. at 11, referencing Habas SV Report at 24. As the plaintiffs point out, however, the fact that standard KKDF rates obtained from websites tied to Habas's own calculation of its duty drawback adjustment does not establish that the KKDF tax itself is "import dependent." Here, the plaintiffs would again call attention to the fact that the decree itself indicates that

sumes that KKDF tax was in fact owing on the respondents' methods of import financing. The plaintiffs further plead for address of their argument that even if the KKDF did constitute an "import duty" it was not one that was rebated or which went uncollected by reason of exports as required by 19 U.S.C. §1677a(c)(1)(B). *Cf.* RTAC Case Br. at 46–49, *with IDM* at 14. The plaintiffs contend that in their case brief they argued that it was the respondents' responsibility to clearly establish that their import financing transactions would normally have been subject to the KKDF tax,[4] and they again note that the tax does not apply to imports *per se* but only to certain types of financing that may or may not be used in conjunction with imports. In other words, they argue that the mere fact that imports occurred does not suffice for finding that the KKDF tax was applicable, and thus it would be improper to simply assume that KKDF taxes were rebated or uncollected on respondents' import financing, as the respondents were first required to show that the financing was of a type to incur the tax in the first place.

Most importantly, the plaintiffs aver, nothing in the record shows that respondents' import financing was such as to incur the tax. *See* Pls' Reply at 6–8 (discussing lack of confirmation in the record that respondents' imports were financed in taxable ways). "If no tax was ever owed, then it could not have either been rebated or foregone by reason of exports to the United States", Pls' Br. at 13, referencing RTAC Case Br. at 48–49, and they maintain that in the *IDM*, Commerce neither addressed their arguments nor pointed to any factual information on the record indicating that respondents in fact owed the KKDF tax on any financing associated with imports claimed under the IPR as relating to U.S. sales of rebar, *id*. referencing *IDM* at 14.

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the KKDF is not a tax on imports as such but rather is a tax on certain types of loans, apparently regardless of the reasons such loans are taken out, and the plaintiffs complain that neither the *IDM* nor the verification reports engage with this fact, or explain the agency's rationale in discounting RTAC's arguments based on it. They further argue that the discussion of the KKDF tax in the Icdas verification report is even more cursory, consisting only of a statement that the agency verifiers looked up KKDF rates on a website and matched these rates with the rates that Icdas used in the drawback calculations it had presented to the agency. *See* Mem. to File from Jolanta Lawska and George McMahon, Senior International Trade Analysts, Office III, Antidumping and Countervailing Duty Operations, *re* : Verification of the Sales Response of Icdas Celik Enerji Tersane ve Ulasim Sanayi A.S. (Icdas) in the 2012–13 Investigation of Steel Concrete Reinforcing Bar from Turkey (June 27, 2014) at 21 ("Icdas SV Report") & reference to Ex. SVE-29, pp. 21–40. As such, the plaintiffs contend, there is still no explanation of the agency's decision to treat the KKDF as "import-dependent and export contingent," or otherwise as an "import duty."

[4] *See*, *e.g.*, *Allied Tube v. United States*, 25 CIT 23, 29 (2001) ("[a]s with all favorable adjustments to normal value or export price, respondent bears the burden of establishing both prongs of the test, and therefore, its entitlement to a duty drawback adjustment").

The foregoing persuades that the *IDM* is lacking clear reasons for rejecting the points the plaintiffs raise, and without such an explanation the basis for the agency's determination to include the KKDF tax as part of the respondents' duty drawback adjustments cannot be sustained. *See*, *e.g.*, *Altx, Inc. v. United States*, 25 CIT 1100, 1103 (2001), citing *United States v. Nova Scotia Food Prods*., 568 F.2d 240, 252 (2d Cir. 1977) ("[i]t is not in keeping with the rational [agency] process to leave vital questions, raised by comments which are of cogent materiality, completely unanswered"). On remand, Commerce is requested to either provide reasons therefor, or reconsider inclusion of "foregone" KKDF taxes in any adjustment for duty drawback.

C. Selection of Invoice Date as Icdas's U.S. Date of Sale

In calculating antidumping duty margins, Commerce matches U.S. and home market sales to one another on the basis, *inter alia*, of the respondent's "date of sale" in each market. Under Commerce's regulations, the date of invoicing is the presumptive date of sale unless the record demonstrates otherwise. 19 C.F.R. §351.401(i).

Considering the record, Commerce initially concluded that the material terms of Icdas's U.S. sales were set before invoicing, *i.e.*, as of the date of the contract or purchase order ("PO") or the last-amended contract or PO. *See*, *e.g.*, PDoc 212 at 16–17. For the *Final Results*, Commerce verified that Icdas invoiced and shipped material in accordance with the terms of the last amended contract or PO, but it nonetheless determined that the material terms were not set until invoicing. PDoc 297 at 30–32.

The plaintiffs argue that Commerce did not adequately explain its reasons for rejecting its preliminary conclusion or adequately support its final conclusion, and that Commerce's and Icdas's *post hoc* explanations are insufficient to remedy the problem and are further inconsistent with the record. They contend, as an initial matter, that Commerce identified no invoices that reflected material terms distinct from those in the last amended contract or PO. Pls' Br. at 25–26; *see also* PDoc 297 at 30–31. Certain POs examined at verification were unsigned, PDoc 297 at 30, and thus the plaintiffs argue that the actual practice of the respondents and their counterparties does not indicate that they viewed signatures as a necessary indicator of a "meeting of the minds." *See*Pls' Br. at 26; *see also* Icdas SV Report at Exs. SVE-9, SVE-34--SVE-38. Likewise, the plaintiffs contend, it is unclear why Commerce concluded that the issuance of POs or contracts "within days of the invoice date" meant that those documents did not reflect final terms. *See* Pls' Br. at 26–27. Finally, the plaintiffs argue that the sole precedent cited by the agency involved meaning-

fully different facts, in the form of a documented instance of an invoice that reflected different material terms than the related contract, while the agency's reasons for discounting the precedents offered by the plaintiffs are unclear. *Id*. at 27- 28; PDoc 297 at 30–31.

Commerce defends its determination not by pointing to any instances in which invoices reflected different terms than the last-amended contracts or POs, but by arguing that the plaintiffs "are second-guessing Commerce's exercise of its judgment and expertise on this issue." Def's Resp. at 20. In particular, Commerce argues that it reasonably treated unsigned POs or contracts as not reflecting final terms, even though no changes occurred between the last-amended PO/contract and invoicing. Commerce concedes that there were no such changes, *id*. at 21, but it characterizes this fact as immaterial given that certain POs/contracts lacked signatures, certain POs/contracts were issued "within days of the invoice date," and Icdas had no uniform method of amending POs or contracts across customers. *Id*. at 21–22. Commerce also argues that its case citation was apposite, while those cited by the plaintiffs were not. *Id*. at 22–23.

The court concludes that further explanation from Commerce would aid the record. Although Commerce apparently concedes that no invoices reflected material terms of sale different from those in Icdas's last-amended POs/contracts, *id*. a 21, the *Final Results* do not address this fact. *See* PDoc 297 at 30–31. Similarly, Commerce's elucidation of its case citation and rejection of the plaintiffs' cited cases go beyond the explanation provided for the *Final Results*. *See* Def's Resp. at 22–23. Commerce offers a new reason, also not provided in the *Final Results*, for finding that Icdas's material terms were not set until invoicing, to wit, that Icdas did not have a uniform practice or method of amending contracts or POs. *Id*. at 20–21.

The plaintiffs' contention is that Commerce's explanation runs counter not only to the record but also precedent. They point out that Commerce appears to take the position that material terms of sale are not established unless they are unchangeable; in other words, even where no change occurs between a particular date on which material terms of sale are memorialized and the invoice date, if the terms were "subject" to change in the abstract, then the terms should be considered set only as of the invoice date. *See* Def's Resp. at20–23. That position was rejected in both *Nucor Corp. v. United States*, 33 CIT 207, 256–57, 612 F. Supp. 2d 1264, 1306–07 (2009) and *Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi A.S. v. United States*, 33 CIT 695, 735, 625 F. Supp. 2d 1337, 1373 (2009), wherein certain RTAC members were plaintiffs or intervened and argued what appears to

have been the same position that Commerce now appears to take -- that terms were established only once they were no longer subject to even theoretical change. Not only did the *Nucor* and *Habas* courts reject that approach, but it also appears that Commerce has repeatedly rejected it in the past, selecting a date as the date of sale despite the fact that material terms actually changed afterwards (and thus must have been "subject to change".[5]

In previous matters, the salient question has been held to be that of when the parties to the transaction intended the terms to be final. *E.g.*, *Habas*, 33 CIT at 735, 625 F. Supp. 2d at 1373 ("the focus of an agency date of sale analysis is to determine when the contracting parties reached a 'meeting of the minds' on the material terms of sale"). The plaintiffs argue that from the record of Icdas's sales it does not appear that Icdas and its customers intended to --or ever did -- continue to negotiate as to material terms through invoice date. Pls' Reply at 13, referencing Pls' Br., Att. 2 (summarizing record sales traces). They further contend that the rationale offered by Commerce -that the precedents they cited involved sales contract transactions rather than POs and therefore were inapposite to the determination here -- "makes no sense" and is *post hoc* in any event. Pls' Reply at 13–14, referencing Def's Resp. at 22–23. The gist of Commerce's argument, they contend, appears to be that documents termed "contracts" are uniformly treated as such by contracting parties and represent an unchangeable "meeting of the minds" notwithstanding the agency's prior experience with changes to contracts. *See id*. The plaintiffs argue that the actual practice of the parties, as indicated in the record, shows otherwise. *Id*. at 14 (citation omitted).

Icdas's defense of Commerce's date of sale determination focuses on a line from Icdas's sales verification report, stating that Commerce officials "verified Icdas'[s] claim that for these sales there were quantity, price, and/or product specification change [*sic*] between the purchase order/sales contract date and the date Icdas issued an invoice." Icdas Resp. at 18, quoting Sales Verification Report at 30,

[5] *See*, *e.g.*, Issues and decision memorandum accompanying *Circular Welded Carbon Steel Pipes and Tubes From Thailand*, 78 Fed. Reg. 65272 (Oct. 31, 2013) (final rev. results) at cmt 6 (finding contract date or amended contract date, as applicable, to be the date of sale); Issues and decision memorandum accompanying *Sulfanilic Acid from Portugal*, 67 Fed. Reg. 60219 (Sep. 25, 2002) (final inves. results) at cmt 1 (finding contract date to be date of sale despite contract renegotiation after certain production quantities could not be met); *Circular Welded Non-Alloy Steel Pipe from the Republic of Korea*, 63 Fed. Reg. 32833, 32836 (June 16, 1998) (final rev. results) (choosing contract date as date of sale despite subsequent changes including changes to material terms of sale); Issues and decision memorandum accompanying *Certain Welded Steel Carbon Pipes and Tubes from Thailand*, 65 Fed. Reg. 60910 (Oct. 13, 2000) at cmt 1 (final rev. results) (selecting contract date as date of sale despite quantity changes).

PDoc 272, CDoc 500. The plaintiffs contend that Commerce did not rely on this statement, either in its determination or as further explanation in its briefs, and they maintain that the verification report is not inconsistent with their arguments, because they agree that changes occurred between the initial PO/contract and invoicing, but Commerce preliminarily found no evidence of changes between the *last amended* PO/contract and invoicing. In other words, whatever the validity of Icdas's summarization of the record evidence and the conclusions it draws therefrom, it veers into *post hoc* territory that forms no basis for sustaining this determination as it stands.

In view of the foregoing and Commerce's seeming departure from its own (and judicially-confirmed) precedent, the matter also needs to be remanded at least for further explanation, as argued by the plaintiffs in their briefs to the court, or for reconsideration, at Commerce's discretion, of the determination on the date of sale for Icdas's U.S. sales.

D. Icdas's Yield Strength Coding

Yield strength is a physical characteristic of rebar attributable to carbon equivalency and was among the factors that Commerce included in its model match criteria. Commerce's questionnaire asked the respondents to assign one of six numbered codes to each of their models of rebar and also categorize according to yield strength based on psi; in the case of two of those codes, by "maximum specified carbon equivalency [less than or equal to] 0.55%". *See* Def's Resp. at 24. Rebar with a carbon equivalency over 0.55% cannot be welded, and the plaintiffs emphasize repeatedly that Turkish standards require weldability, a point that Commerce apparently downplayed or overlooked.[6]

Both Icdas and Habas initially reported home market sales of certain grades of rebar as having a carbon equivalency over 0.55%.[7] For the *Preliminary Determination*, Commerce adjusted this reporting on the basis that rebar with such a carbon equivalency would not meet weldability requirements. Commerce later collected mill test certificates ("MTCs") from Habas[8] but not from Icdas. In the *Final Results*, Commerce reasoned that it lacked sufficient record evidence to reject Icdas's reporting and it accepted Icdas's yield-strength coding as originally submitted. *IDM* at 20.

The plaintiffs argue that Commerce's determination was not ad-

[6] *See* PDoc 217, CDoc 314, at 2–3; PDocs 136–37, CDocs 158–59, at 7–8 and Ex. 2; PDoc 33 at 5–8.

[7] *See* PDoc 223, CDoc 331, at 4; PDoc 217, CDoc 314, at 2–3.

[8] *See* PDoc 297 at 20; *see also* PDoc 300, CDoc 512, at 2–3.

equately explained. *See* Pls' Br. at 29–34. They claim that Commerce's response goes "well beyond" what was provided at the administrative proceeding to essentially conclude that the lack of Icdas MTCs on the record is determinative.[9] The plaintiffs contend it is important to note here that the agency has not stated that anything on the record suggests that Icdas's rebar actually had carbon equivalencies greater than 0.55%, *cf.* Def's Resp. at 23–39, and they note that while Commerce now claims that the relevant standards could potentially include such products, *id*. at 26, 28, Commerce has not stated whether it is now finding that there is no requirement that rebar sold in Turkey be weldable, which would seem to be the inference towards which Commerce's determination would otherwise point. Further, the plaintiffs argue it appears Commerce is only just now revealing that it accepted Habas's originally-reported yield-strength coding with respect to a particular grade of rebar, and they claim this has taken them by surprise as an unexplained or unannounced change in the *Final Results* as compared with the *Preliminary Determination*, and is an issue they claim they might have chosen to appeal had they been apprised of it. *See* Pls' Reply at 17 n.10.

Commerce admits that it addressed Habas's data by collecting MTCs and did not collect any MTCs from Icdas.[10] Def's Resp. at 26–27. The plaintiffs argue that the absence of Icdas MTCs appears to have led Commerce to accept Icdas's original reporting despite the agency's subsequent conclusion that the Turkish grade standards for certain products are ambiguous. *See id*. at 27–28. Given that preliminary misgiving, the plaintiffs argue it is not clear that the agency acted reasonably in declining to collect MTCs from Icdas.

For its part, Icdas argues that its reporting was consistent with Field 3.2 of the agency's Section C questionnaire and that the record does not show that weldability is a requirement for rebar sold in the Turkish market. Icdas Resp. at 23–27. Whether those points are true, they go beyond what the *IDM* articulates. *Cf*. *id*., with PDoc 297 at 20, CDoc 512, PDoc 300 at 2–3. Regardless, the plaintiffs contend that Icdas's points do not excuse or establish the reasonableness of the

[9] *Cf.* Def's Resp. at 23–39, *with* PDoc 297 at 20, CDoc 512, PDoc 300 at 2–3, CDoc 520, PDoc 303 at 2–3.

[10] While Commerce depends on respondents' cooperation to develop the record, the agency has its own obligation to attempt to ensure that the record allows for accurate calculations. For example, this court recently remanded Commerce's use of a simple average in calculating an all-others rate, finding that the lack of public data necessary for weight-averaging was due to the agency's failure to request it or enforce its regulatory requirements that respondents provide it. *MacLean-Fogg Co. v. United States*, 39 CIT ___, Slip Op. 15–85 (2015).

agency's decision not to collect MTCs from Icdas in the first place, either by following up on its initial request or by requesting them at verification.

The agency's determination on this issue, and the restatement(s) thereof (and arguments thereon) among the papers here, are fairly muddled.[11] Given Commerce's realization, at some point, of no theoretical maximum yield strength/carbon equivalency levels among the Turkish standards for the particular products about which the plaintiffs complain, as reported by the respondents, but which reporting by Habas Commerce determined to have been inaccurate in fact (at least in part), based upon MTCs for the product verified with respect to Habas, the fact that the record does not at present contain specific production data for Icdas by which to test Icdas's reported coding of the yield strength/carbon equivalency for the grades of rebar in question does not reasonably lead to the inference that those grades were accurately coded (although they may well have been), particularly given the seemingly unsettled question of Turkish weldability requirements, either in general or (preferably) with respect to the grades of rebar in question. In view of the foregoing, therefore, Commerce is requested on remand either to reopen the record and obtain relevant MTCs from Icdas as it did from Habas, or to reconsider and/or explain the reasonableness of resorting to what appears to be an uncorroborated "facts available" determination under 19 U.S.C. § 1677e(a)(1) in this instance.

E. Air-Cooled Rebar and Nonadjustment of Icdas's Reported Costs

The characteristics of rebar are affected by the cooling process. *E.g.*, PDoc 203, CDoc 306, at 8–15; PDoc 188, CDoc 229, at 2 & Ex. S3D-1. Water cooling imparts a strength to rebar that air-cooled rebar lacks, and thus additional alloying elements must be added to air-cooled

[11] Just as an example, the defendant's response brief states at page 25 that Habas originally reported one grade of rebar as a type with a maximum specified carbon equivalence of 0.55%, and then at page 26 states that Habas had originally reported the same grade of rebar as an "other" type, *i.e.*, with no maximum specified carbon equivalency level; on page 25 again, the brief states that the record establishes that this same grade of rebar does not have a maximum specified carbon equivalency level based on the official Turkish specification standard, whereas in its preliminary analysis memorandum for Habas it stated that Habas had provided information in a supplemental response that "shows that [the particular grade] of specification TSE708 have a maximum carbon equivalency level of 0.50%." *See generally* Def's Resp. at 23–29; Mem. to The File from George McMahon, Case Analyst, AD/CVD Operations, Office III, *re* : Less-Than-Fair-Value Investigation of Steel Concrete Reinforcing Bar from Turkey: Preliminary Determination Analysis Memorandum for Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi (Apr. 18, 2014), PDoc 217, CDoc 314, at 3.

rebar to equilibrate strength. *See id*. While water-cooled rebar is accepted in Turkey, it is not generallyaccepted in imports to the U.S. market; as such, additional alloys must be incorporated into U.S. bound product. *See*, *e.g.*, Icdas Br. at 27–28.

Commerce's model-match criteria did not incorporate cooling method. *See* PDoc 212 at 9. Commerce did, however, seek information from respondents on the alloy cost differences attributable to water- and air-cooled product. *See* Pls' Br. at 35–36 (citations omitted). Habas provided such information, PDoc 110, CDocs 54–55, at D-37, but Icdas stated that it did not track such costs, and that while it might be able to construct them it was not worth doing so. PDocs 19197, CDocs 237–48, at 38–40 & Ex. SD-54; PDocs 252–57, CDocs 369–86, at 2SD-9--2SD-15. RTAC then argued to Commerce that it should adjust Icdas's cost reporting to reflect the greater alloy usage in air-cooled rebar. PDoc 283, CDoc 504, at 17–21. Commerce declined, stating that Icdas's cost reporting was based on actual, product-specific costs, and thus already reflected all cost differences for water- and air-cooled rebar. PDoc 297 at 35; CDocs 474–492, 502, PDoc 269, 276 ("Icdas CV Report") at 4, 6–7, 15–17 & Exs. CVE-6- CVD-9.

The plaintiffs here contend that Commerce's explanation is inadequate, given that Icdas itself had stated that it did not track or record alloy usage or costs, and that the verification materials Commerce cited did not support the conclusion that Icdas tracked actual, product-specific, alloy costs. Pls' Br. at 37–39. They contend Commerce's response indicates that at verification it found Icdas's repeated statements that it did not track product-specific alloy usage or cost essentially not correct, *see* Def's Resp. at 31–32, and therefore the plaintiffs argue that if this is true, it would indicate that Icdas "repeatedly stymied" valid agency requests for information to which the company had easy access. *See* Pls' Br. at 37–39. The court is unclear as to whether the record merits such construction, but in their reply the plaintiffs also argue it is not clear whether that is in fact true, pointing out that while Commerce states that it verified that "the amount of alloy . . . is not averaged over all products," Def's Resp. at 31, this finding is not reflected in the *IDM*, PDoc 297 at 35, nor is it apparent from the verification report or relevant exhibits thereto. Pls' Reply at 19, referencing Icdas CV Report at 13–17 and Exs. CVE-6--CVE9, CVE-11.

The bottom line, the plaintiffs argue, is that Commerce is now glossing over the report, with references to specific pages of lengthy exhibits that, in the report itself, are referenced only *in toto*, *see* Def's Resp. at 32, and that these specific pages are untranslated and

largely illegible. Pls' Reply at 20, referencing Tab I to Conf. Appx to Def's Resp. As such, they contend, the defendant's arguments are again *post hoc* and do not show that these pages "demonstrate the specific quantity of each alloy used in the production of each specific billet used to produce the rebar included in each of the selected CONNUMS", Def's Resp. at 32, in any event.

With regard to Commerce's statement that Icdas requires only a certain discernible modicum of additional alloys per ton of air-cooled rebar, Def's Resp. at 34, the plaintiffs reply that this is more *post hoc* explanation, as Commerce did not address their arguments regarding the value of such costs during the administrative proceeding, and they further contend that the figure is only an estimate that Icdas prepared with respect to just one of the main alloying elements. *Cf. id. with* CDoc 237–248, PDoc 191–197 at 39 (stating that the figure is an estimate of what additional manganese cost "could" be) & Ex. SD-54; *see also* Icdas Br. at 28 (stating that this figure is "not actual"). They also note that to the extent Commerce defends its decision on the basis that it correctly accepted Icdas's yield strength coding, that issue is unsettled. *See supra.*

Icdas, for its part, argues that the plaintiffs conceded to the International Trade Commission ("ITC"), in a sunset review involving rebar from countries other than Turkey, that cost differences between air- and water-cooled rebar are not significant. Icdas Br. at 30–31 and Ex. 1. To which the plaintiffs reply that the statements of a certain company's official regarding the possibility of both water- and air-cooled product conforming to ASTM standards does not support Icdas's point, that such statements are the views of one person, that such statements are not of record here, and that such statements are not compelling in any event as against actual record data from a U.S. producer demonstrating a more significant cost difference than the estimated modicum quoted by Commerce. Pls' Reply at 20, referencing PDoc 203, CDoc 306, at Ex. 3. It is for Commerce, however, to sort out such matters on remand.

Icdas lastly argues that Commerce correctly found that it tracked costs with the required level of specificity. The plaintiffs point out, however, that Icdas confirmed "allocated" costs based on a testing of "each type of billet," rather than individually measuring alloys in "each specific billet used to produce the rebar" at issue here, as the defendant now concludes. Pls' Reply at 20, referencing Icdas Br. at 30, 31. The plaintiffs thus contend that "Icdas and Commerce still cannot agree as to what Icdas's accounting records contain, or how the company records costs." *Id*.

In light of such confusion, with a view towards addressing all the concerns expressed above, it is appropriate that this issue also be remanded, along with the others, for further explanation or reconsideration of the support for Commerce's determination in the first instance.

IV. *Conclusion*

In view of the foregoing, the case shall be, and hereby is, remanded for further proceedings not inconsistent with this decision.

The results of remand shall be due February 22, 2016. After the results of remand are filed with the court, the parties shall confer and file a joint status report within five days of that filing to propose dates for filing comments and/or concerning any other matters needing the assistance of the court.

So ordered.

Dated: November 23, 2015 New York,
New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 15–131

GOLD EAST PAPER (JIANGSU) CO., LTD., NINGBO ZHONGHUA PAPER CO., LTD., AND GLOBAL PAPER SOLUTIONS, Plaintiffs, and BUREAU OF FAIR TRADE FOR IMPORTS & EXPORTS, MINISTRY OF COMMERCE, PEOPLE'S REPUBLIC OF CHINA, Plaintiff-Intervenor, v. UNITED STATES, DEFENDANT, AND APPLETON COATED LLC, NEWPAGE CORP., S.D. WARREN COMPANY D/B/A SAPPI FINE PAPER NORTH AMERICA, AND UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC, Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Consol. Court No. 10–00371

[Sustaining third results of administrative redetermination on investigation of sales at less than fair value of certain coated paper from the People's Republic of China.]

Dated: Decided: November 23, 2015

Daniel L. Porter, *James P. Durling*, and *Claudia D. Hartleben*, Curtis, Mallet-Prevost, Colt & Mosle LLP, of Washington DC, for the plaintiffs and plaintiff-intervenor.

Alexander V. Sverdlov, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for defendant. With him on the brief were *Benjamin C. Mizer*, Principal Deputy Assistant Attorney General, *Jeanne E.*

Davidson, Director, and *Claudia Burke*, Assistant Director. Of Counsel on the brief was *Mykhaylo A. Gryzlov*, Senior Attorney, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce.

Terence P. Stewart, *William A. Fennell*, and *Stephanie M. Bell*, Stewart and Stewart, of Washington, DC, and *Gilbert B. Kaplan*, *Joseph W. Dorn*, and *Daniel L. Schneiderman*, King & Spalding, LLP, of Washington DC, for the defendant-intervenors.

OPINION

Musgrave, Senior Judge:

The defendant's International Trade Administration, U.S. Department of Commerce ("Commerce") has submitted its third *Final Results of Redetermination Pursuant to Court Remand* ("*Redetermination*" or "RR3") on the antidumping duty investigation into *Certain Coated Paper from the PRC.*[1] Familiarity with the case[2] is presumed. To summarize, the investigation was remanded for (1) further insight into the use of market economy purchase ("MEP") prices for certain inputs procured from the Kingdom of Thailand by or for the plaintiffs (herein "APP-China"), and (2) further explanation of the targeted dumping methodology utilized.

On remand, Commerce determined to disregard the MEP prices for the relevant inputs from Thailand because they had likely benefitted from subsidies and therefore were likely distorted. This changed the calculation of the normal value for APP-China but not the number of APP-China sales that were found to be targeted. *See* RR3 at10. Commerce also considered whether its current differential pricing methodology involving the Cohen's *d* test was a more appropriate measure of whether the targeted sales were "pervasive" than the prior *Nails* test. *Id*. at 8–11. After considering the question, Commerce determined that it was not; therefore it continued to rely on the *Nails* test in determining that APP-China's targeted was not "pervasive." *Id.* However, due to the changes in APP-China's calculated normal value occasioned by the foregoing, Commerce determined that it was appropriate to apply the average-to-transaction ("A-T") comparison to APP-China's targeted sales, and to apply the standard average-to-average ("A-A") comparison to the remainder. *Id*. at 9

[1] *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China*, 75 Fed. Reg. 59217 (Sept. 27, 2010), PDoc 360, as amended by *Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China: Amended Final Determination of Sales at Less than Fair Value and Antidumping Order*, 75 Fed. Reg. 70203 (Nov. 17, 2010) ("*Final Determination*"), and accompanying issues and decision memorandum ("*IDM*"), PDoc 353. The period of investigation ("POI") covers January 1, 2009 through June 30, 2009.

[2] *See Gold East Paper (Jiangsu) Co. v. United States*, 37 CIT ___, 918 F. Supp. 2d 1317 (2013) ("*Gold East I*") (remanding), 38 CIT ___, 991 F. Supp. 2d 1357 (2014) ("*Gold East II*") (remanding), 39 CIT ___, 61 F. Supp. 3d 1289 (2015) ("*Gold East III*") (remanding).

n.42. APP-China's final dumping margin was 3.64 percent. *Id*.

APP-China contests Commerce's decision to reject the Thai input prices, and the defendant-intervenors ("Appleton") argue for remand of the targeted dumping issue, in particular the agency's decision to rely on the *Nails* test instead of differential pricing analysis. These issues are addressed in turn.

I

APP-China argues that Commerce's disregard of Thai prices for certain inputs represents an unexplained and unlawful reversal from the second remand determination. *See generally* APP-China Br. at 2 11. The court concludes otherwise.

As previously noted, Commerce may disregard prices for inputs purchased from market-economy countries based on its prior findings that a country maintained broadly-available, non-industry-specific export subsidies, if there is no evidence that the subsidy had been terminated and the flow of benefits had ceased. *See Gold East III*, 39 CIT at ___, 61 F. Supp. 3d at 1297–98. Among other things, Commerce's normal practice when analyzing whether claimed MEPs for inputs are useable is to provide parties with an opportunity to submit "evidence that the program has been terminated and flow of the residual benefits has ceased". *See id.*, 39 CIT at ___ n.16, 61 F. Supp. 3d at 1297 n.16 (quoting Commerce's practice). Commerce in the second remand explained its practice but at the time believed that its use had been precluded by the law of the case. *Gold East III*, however, clarified that the practice was not inconsistent therewith and could be used. *See id.*, 39 CIT at ___, 61 F. Supp. 3d at 1297–98. Thus, during the third remand, Commerce applied its normal practice and analyzed the evidence that had been submitted during the second remand in accordance with its established standards. *See* RR3 at 6, 15.

Commerce explained that the evidence indicated that the Thai Tax Certificates for Export program had previously been countervailed as a generally-available export subsidy. *See* RR3 at 6, citing *Certain Apparel From Thailand: Final Results of Countervailing Duty Administrative Review*, 62 Fed. Reg. 63071 (Nov. 26, 1997) ("*1997 Apparel Review*"). Absent evidence that the program was terminated and the flow of benefits ceased, Commerce considers that the benefits under the program continue, and in this matter Commerce found that such evidence had not been provided.[3] Based on the information of

[3] RR3 at 6 ("[d]espite the opportunities to provide such evidence in the original investigation and subsequently in response to Commerce's reopening of the record in the second remand, APP-China has not provided any evidence that the tax coupon program has been terminated and the flow of benefits has ceased"). By contrast, Commerce found that the petitioners had submitted information showing that recent changes to the Thai laws

record, therefore, Commerce determined that there was reason to believe or suspect that Thai prices were distorted by subsidies and that APP-China's claimed MEPs therefor should be disregarded. RR3 at 6.

APP-China argues that Commerce improperly changed its position from the second remand, or that it did not articulate the basis for a different conclusion when "the legal standard did not change and there is no new factual evidence." APP-China Br. at 3. However, the legal standard itself did not change, Commerce's understanding of it did after the prior decisions on the case were clarified in the latest remand opinion. Commerce detailed how this changed understanding led to a different result. *See* RR3 at 6, 15 (noting that "given . . . clarification that [Commerce's] normal practice is not at odds with [prior judicial] decisions," there was no reason "to depart from [the] normal practice here").

APP-China contends that the presumption Commerce uses contravenes the Federal Circuit's holding in *AK Steel Corp. v. United States*, 192 F.3d 1367 (Fed. Cir. 1999). APP-China Br. at 3–4. In APP-China's view, that case stands for the proposition that Commerce "must provide evidence to support a reasonable inference that the subsidy continues into the period of investigation." *Id*. (emphasis omitted). *AK Steel* considered what evidence was required to support finding that a countervailable subsidy actually existed for purposes of actually imposing a countervailing duty order. *See generally AK Steel*, 192 F.3d at 1370. The Federal Circuit explained that when analyzing this issue in the context of a full-blown countervailing duty investigation, the fact that a subsidy existed at some point is insufficient; it must be found to have existed during the relevant period. *AK Steel*, 192 F.3d at 1376. *AK Steel* is therefore inapposite, because the standard for finding the existence of a subsidy in the countervailing duty context necessary to support imposition of a countervailing duty is higher, and therefore different, from a "reason to believe or suspect" standard that permits disregard of prices Commerce reasonably believes or suspects are distorted.[4] The prior remand order explicitly recognized

continued the subsidy program. *See* generally RR3 at 4; *Gold East III*39 CIT at ___, 61 F. Supp. 3d at 1295–96.

[4] The court has previously observed that the "reason to believe or suspect" standard is "a relatively low threshold." *Zhejiang Mach. Imp. & Exp. Corp. v. United States*, 31 CIT 159, 169, 473 F. Supp. 2d 1365, 1374 (2007) (internal quotes and citations omitted). It does not require that Commerce conduct a formal investigation or determine that the particular supplier or product at issue benefitted from a specific subsidy: "Congress did not intend to require Commerce to conduct formal investigations in situations like this, and did not intend Commerce to definitively determine whether prices actually *are* subsidized." *Zhejiang*, 31 CIT at 168, 473 F. Supp. 2d at 1374 (italics in original); *see also China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 27 CIT 1553, 1557, 293 F. Supp. 2d 1334, 1338 (2003)

that this standard can be satisfied when a subsidy program is shown to have existed in the past, and no evidence is presented showing that the program has been terminated and the flow of benefits has ceased. *See Gold East III*, 39 CIT at ___, 61 F. Supp. 3d at 1298–99. On remand, Commerce found that to be the case based on prior countervailing duty proceedings that found broadly available, non-industry-specific export subsidies in Thailand, and APP-China submitted no evidence showing that the program had been terminated. *See* RR3 at 6, 15. And substantial evidence of record supports that determination. *See id*.

APP-China's argument that Commerce's remand analysis does not satisfy the test set out in *Fuyao II* fails for the same reason. *See* APP-China Br. at 5–7. The decision in *Gold East III* clarified that *Fuyao II* is just one way that Commerce may evaluate whether the evidence before it gives it a reason to believe or suspect that prices have been distorted, and is not the only "reasonable method." *Gold East III*, 39 CIT at ___, 61 F. Supp. 3d at 1298–99; *see also CS Wind Vietnam Co. v. United States*, 38 CIT ___, ___, 971 F. Supp. 2d 1271, 1292 (2014) (making a similar observation). Commerce did not have to satisfy the particular test of *Fuyao II* as long as it "articulated with sufficient clarity" why it has "a valid belief or suspicion that input prices are distorted." *Gold East III*, 39 CIT at ___, 61 F. Supp. 3d at 1299. Commerce has done so here.

Commerce first recognized that it had previously countervailed the Thai tax coupon program as an export subsidy and pointed to a determination in which it had done so. *See* RR3 at 6, 18. Commerce described this program as one through which the Thai government "issue[d] tax certificates to exporters of record to rebate indirect taxes and import duties levied on inputs into exported products." *Id*. at 18 n.77. Next, Commerce explained that, under its practice, once the agency has determined that a particular program is countervailable, there is a presumption that the subsidy continues to exist absent evidence that the program has been terminated or benefits have ceased. *Id*. at 6–7; *see Gold East III*, 39 CIT at ___, 61 F. Supp. 3d at 1297. Commerce noted that APP-China has placed no information on the record to suggest that the program has been terminated or that benefits have ceased, and therefore this presumption has not been rebutted. RR3 at 6. Finally, Commerce explained that the existence

("[t]he 'reason to believe or suspect' standard articulated in the House Report by which Commerce's actions must be evaluated establishes a lower threshold than what is required to support a firm conclusion"). All that is required is that Commerce have some evidence supporting its suspicion that subsidy programs may exist. *See generally Zhejiang*, 31 CIT at 168–70, 473 F. Supp. 2d at 1374–75.

and availability of the countervailable export subsidy makes it reasonable to assume that the export prices of Thai goods are distorted. *Id*. at 6–7. *Cf. China Nat'l Mach. Imp. & Exp. Corp. v. United States*, 27 CIT 1553, 1558, 293 F. Supp. 2d 1334, 1339 (2003) ("Commerce's actions are reasonable because a company like CMC's suppliers may have benefitted from a generally available subsidy program given the competitive nature of the industry and by virtue of having engaged in foreign trade"). Commerce's remand thus articulates the basis for finding Thai prices distorted: it explains that the evidence of prior broadly-available, non-industry-specific export subsidies gives rise to an inference that prices may remain distorted by such subsidies, and justifies disregarding those prices in the absence of contrary evidence. No more is required.

Turning away from the legal standard, APP-China challenges how Commerce evaluated the evidence before it. But these challenges have no greater merit. For example, APP-China complains that Commerce improperly found the existence of generally-available subsidies based on only one piece of evidence --the *1997 Apparel Review*. APP-China Br. at 5. But that ignores that Commerce also observed that it repeatedly "countervailed the Tax Certificates for Export Program as an export subsidy, first in *1989 Iron Pipe Investigation*," as well as the *1997 Apparel Review*. RR3 at 18 (citations omitted). Each of these determinations was supported by a fully-developed administrative record showing that Thai exporters were, in fact, receiving subsidies.

Contrary to APP-China's assertions, the mere fact that time had passed since these determinations were made does not, in itself, demonstrate that the subsidy terminated and the flow of benefits has ceased. *See* APP-China Br. at 5. Rather, under Commerce's normal practice (recognized in *Gold East III* as consistent with prior judicial decisions) APP-China was required to provide affirmative evidence to rebut the presumption that the program continues. The fact that the orders countervailing the tax coupon program had been revoked since 2000 does not constitute such information because, as previously stated, "[r]evocation is a discrete agency action, and the act thereof does not invalidate the prior administrative findings and conclusions upon which the issuance of the countervailing or antidumping duty order being revoked was validly predicated." *Gold East III*, 39 CIT at ___, 61 F. Supp. 3d at 1297 (citing *Canadian Wheat Bd. v. United States*, 32 CIT ___, ___, 580 F. Supp. 2d 1350 (2008), *aff'd* 641 F.2d 1344 (Fed. Cir. 2011)). Indeed, revocation of a countervailing duty order may occur for any number reasons, *e.g.*, a lack of interest by the domestic industry or no likelihood of continuation or recurrence of material injury. That an order is revoked therefore does not automati-

cally mean that the export subsidy program was terminated and the flow of benefits ceased; APP-China was required to provide affirmative evidence that this happened, which it apparently did not. *See* APP-China Br. at 4 (conceding that "affirmative evidence of the record may not directly demonstrate that the subsidy program examined in 1997 (*i.e.*, Tax Certificates for Exports programs) has been terminated.").

APP-China's suggestion that the information petitioners submitted during the investigation may pertain to a different subsidy program than the one found to be countervailable in the *1997 Apparel Review* is not relevant for the same reason. *See* APP-China's Br. at 8. Simply put, Commerce is not required to provide affirmative evidence that the subsidy found in the *1997 Apparel Review* remains unchanged in all respects to infer that prices may continue to be distorted -- rather, APP-China must provide affirmative evidence that the program was terminated and the flow of benefits has ceased. Commerce expressly declined to decide on remand whether the evidence submitted by petitioners "provide[d] an additional basis for the reason to believe or suspect" that prices may have been distorted, explaining that such a finding is not necessary. *See* RR3 at 16. APP-China's critiques of that evidence are therefore unavailing. *See* APP-China Br. at 8–9.

As an alternative argument, APP-China speculates that the information submitted by petitioners may nevertheless show that the subsidy program was somehow modified to no longer providing a subsidy. *See* APP-China Br. at 10. However, APP-China did not persuade Commerce that any subsequent modifications to the law under which the program was originally established have led to termination of the program and cause the flow of the benefits to cease, and Commerce found no reason to assume that they did.[5] Commerce considered that the evidence provided by petitioners was "even more remote," Def's Resp. at 10, because it did not relate to the program directly but rather to amendments to the law under which the program was originally established, but APP-China did not offer any analysis of the alleged changes or how they may affect the program, nor did it explain how these unspecified amendments could reasonably alleviate the reason to believe or suspect that exports from Thailand may have been subsidized. APP-China simply stated that some unspecified changes took place and, thus, Commerce should assume the program terminated. This type of speculation is not enough to displace Commerce's reasoning.

[5] Commerce explains that countries that provide countervailable subsidies to their industries may modify their program from time to time, but that many modifications are of a technical nature and do not lead to the termination of a program. Def's Resp. at 10.

APP-China also argues that the tax program is a fact-specific export subsidy, not a broadly-available one, and therefore cannot be considered to benefit APP-China's suppliers. APP-China Br. at 6. Pointing to Commerce's 2001 countervailing duty investigation into hot-rolled carbon steel products from Thailand, APP-China argues that Commerce's findings suggest that the program was designed "to rebate indirect taxes and import duties on inputs used to produce exports" and that the program provided a benefit only when it exceeded a certain allowable amount. *Id*. (internal quotes omittes), citing *Affirmative Countervailing Duty Determination: Certain Hot-Rolled Carbon Steel Flat Products From Thailand*, 66 Fed. Reg. 50410 (Oct. 3, 2001) ("*2001 Hot-Rolled Carbon Steel Flat Products*"). APP-China contends that Commerce was required to find that APP-China's suppliers satisfied both conditions before disregarding the prices APP-China paid. *Id*.

Commerce's response is that such findings are only required if it needed to establish for certain the particular amount of a subsidy that actually existed, whereas the statutory requirement that it have a "reason to believe or suspect" that prices may be subsidized requires no such showing. Commerce also notes that in the *1997 Apparel Review*, it found that the Tax Certificates for Export program is an export subsidy, which can benefit companies in a number of different ways. Def's Resp. at 11, referencing *Certain Apparel From Thailand: Preliminary Results of Countervailing Duty Administrative Review*, 62 FR 46475, 46477 (Sep. 3, 1997), unchanged in *1997 Apparel Review*, and *Wheatland Tube Corp. v. United States*, 17 CIT 1230, 1231, 841 F. Supp. 1222, 1224 (1993) (explaining that "tax certificates rebate indirect taxes and duties on both physically incorporated inputs, and non-physically incorporated inputs (*e.g.* fuel, office equipment and services)" and "remission of indirect taxes and duties on the non-physically incorporated inputs is countervailable").[6] Commerce further argues that the fact that one company in an unrelated industry in the *2001 Hot-Rolled Carbon Steel Flat Products* investigation was found to have not taken advantage of the subsidy program does not mean that the subsidy was not broadly available or that there is no reason to believe or suspect that APP-China's producers could have taken advantage of the subsidy, and again, for that matter, APP-China had an opportunity to submit affirmative evidence showing that its suppliers were not eligible for this subsidy program but apparently did not do so. *See id*. at 11–12.

[6] Commerce also notes that APP-China does not contend that its suppliers do not use non-physically incorporated items (such as fuel, office equipment or services).

In the absence of such evidence, it was not unreasonable for Commerce to presume the continued existence of a broadly-available, non-industry-specific program that may have distorted APP-China's suppliers' prices, and in the final analysis, APP-China does not point to any affirmative evidence showing that the subsidy program was terminated and the flow of benefits had ceased. Instead, APP-China essentially asks the court to infer as much based on its own weighing of the evidence on the record, which the court cannot do. The question is not whether the court agrees with Commerce's conclusion or whether it would have reached the same result as Commerce if the matter were here *de novo*, the question is rather whether the agency's decision is reasonable and supported by the record as a whole. *See Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006) (citing *Mitsubishi Heavy Indus., Ltd. v. United States*, 275 F.3d 1056, 1060 (Fed. Cir. 2001)). Commerce's determination satisfies that standard; accordingly, it will be sustained.

II

For its part, Appleton continues to argue that Commerce should have employed the Cohen's *d* test in its targeted dumping analysis. According to Appleton, Commerce's current Cohen's *d* test is the best way to determine whether the respondent's targeted dumping was "pervasive" and therefore appropriate to determining whether the remedy normally applied to targeted sales should be used on all sales made by respondents. However, Appleton's comments do not show that Commerce's decision to use the *Nails* test was unreasonable.

The question of whether a respondent's targeting is pervasive derives from Commerce's earlier regulation which has since been withdrawn. *See* 19 C.F.R. §351.414(c)(1) (2004). That regulation provided that Commerce would "normally" account for a respondent's targeting by applying the average-to-transaction (A-T) comparison only to targeted sales, and apply the standard -- and statutorily preferred -- average-to-average (A-A) comparison to the remainder. *Id.*; *see also* 19 U.S.C. §§ 1677f-1(d)(1)(A) (defining A-A as the preferred methodology); 1677f-1(d)(1)(B)(ii) (permitting the use of the average-to-transaction methodology only if Commerce explained why one of the default approaches could not account for the observed pattern of price differences).

The regulation provided that applying the A-T comparison to all of a respondent's sales would be appropriate if the respondent's targeting was "pervasive" or impossible to segregate. *See Antidumping Duties; Countervailing Duties*, 61 Fed. Reg. 7308, 7350 (Feb. 27, 1996); *Antidumping Duties; Countervailing Duties*, 62 Fed. Reg.

27296, 27375 (May 19, 1997) (Preamble). Because *Gold East I* found the attempt to withdraw that regulation in 2008 ineffective, the regulation continued to apply to the proceeding at bar. *See generally Gold East I*, 37 CIT ___, ___, 918 F. Supp. 2d 1317, 1327–28 (2013) (directing Commerce to apply the regulation in this case). Thus, the orders of remand requested Commerce to consider the best way to measure "pervasiveness", for example through Commerce's prior targeted dumping analysis known as the *Nails* test, or through its new, recently developed, differential pricing methodology including the Cohen's *d* analysis. *See Gold East III*, 39 CIT at ___, 61 F. Supp. 3d at 1305–06.

Considering the question, Commerce determined that the *Nails* test was a more appropriate way to measure pervasiveness under the old regulation because Commerce's current differential pricing methodology was developed after the withdrawal of the regulation that established the pervasiveness requirement and was not designed to evaluate the regulation's criteria. RR3 at 10. In Commerce's words, the differential pricing "analysis was not designed to evaluate, and does not address" the requirements of "the withdrawn targeted dumping regulation." *Id*. Accordingly, Commerce continued to rely on the *Nails* test. *Id*. Using that test, Commerce concluded that "the percentage of targeted sales in this case is not large enough to demonstrate that the targeted dumping is so pervasive or widespread as to justify" applying the A-T comparison to all of APP-China's sales. Commerce therefore applied the A-T test only to the targeted sales.

Commerce points out that Appleton does not dispute that there is no basis to apply the A-T comparison more broadly if the *Nails* test is used to measure "pervasiveness" --that is, they do not dispute that, under the *Nails* test, APP-China's targeted sales are neither pervasive nor impossible to segregate. *See generally* Appleton Br. at 3–11. Nor do they appear to dispute that the differential pricing analysis was not developed until after the old regulation was withdrawn, and therefore was not designed to satisfy its criteria. *See id.* Instead, Appleton claims that the *Nails* test was also not designed to determine pervasiveness because it was first applied after the old regulation was withdrawn -- and therefore should not be preferred over the Cohen's *d* test. Def-Ints' Br. at 8. However, Commerce contends it adopted the *Nails* test before it withdrew the old regulation -- and first applied it while that regulation was still in effect. Def's Resp. at 14, referencing *Mid-Continental Nails Corp. v. United States*, 34 CIT 512, 523, 712 F. Supp. 2d 1370, 1380 (2010) ("[r][evocation is not an

admission by Commerce that the [*Nails*] test is unlawful"). Commerce, in other words, contends that the test was designed while "pervasiveness" was still a criterion that had to be measured, and in fact measured that criterion.[7]

Appleton also argues that the Cohen's *d* test should be used to answer the "pervasiveness" question because it is a valid statistical tool that represents a refinement over the *Nails* test. Def-Ints' Br. at 7. Responding, Commerce contends the argument fails for two reasons.

Commerce first contends Appleton's argument conflates different concepts, in that the differential pricing analysis is a refinement of determining whether sales satisfy the statutory criteria of forming a pattern of prices that differ significantly among consumers regions or time periods, not a refinement for determining whether targeted sales are pervasive. Commerce states that the reason for this is that the differential pricing analysis was developed at a time when Commerce understood the pervasiveness requirement to no longer apply, and that unlike the *Nails* test the differential pricing analysis "does not even measure the extent of targeted dumping *per se* -- rather, it measures all sales, those above and below normal value that exhibit a pattern of significant price differences" -- and using differential pricing analysis to measure "pervasiveness" of targeted (and dumped) sales "would therefore be extending the test far beyond its intended usage." Def's Resp. at 15, referencing RR3 at 21–22.

The above explanation seems contrived.[8] However, that is not fatal, because Commerce's other point is still valid, to wit, that Appleton's argument is essentially asking the court to substitute its judgment for that of the agency regarding which methodology is best suited to measuring regulatory criteria, and in the absence of demonstrated unreasonableness of the agency's chosen methodology, it would be inappropriate for a court to substitute judgment for that of Commerce on resolving the problem. *See*, *e.g., Chang Chun Petrochemical Co. v. United States*, 37 CIT ___, ___, 953 F. Supp. 2d 1300, 1306 (2013) (declining to direct Commerce to use a targeted dumping methodology established in 2008 in a 2004 case).

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[7] Commerce also contends *Gold East III* "explicitly disagreed with Petitioners' claim that 'pervasiveness' is a new criteria that the *Nails* test did not examine." Def's Resp. at 15, referencing *Gold East III*, 39 CIT at ___, 61 F. Supp. 3d at 1304.

[8] For example, it must be the case, of course, that differential pricing does in fact "measure," or at least indicate, the "extent" of targeted dumping in a sense, for if it does not do so then it runs the risk of being arbitrary and capricious.

Conclusion

Because the methodology that Commerce employed in its remand redetermination was reasonable, the results will be sustained and judgment entered accordingly.

Dated: November 23, 2015
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 15–132

XEROX CORP. Plaintiff, UNITED STATES, Defendant.

Before: R. Kenton Musgrave, Senior Judge
Court No. 05–00474

[On customs duty classification of certain static converters, judgment for the plaintiff.]

Dated: Decided: November 23, 2015

John M. Petterson, *Elyssa R. Emsellem*, *Maria E. Celis*, *Richard F. O'Neill*, and *Russell Andrew Semmel*, Neville Peterson, LLP, of New York, NY, for the plaintiff.

Marcella Powell, Trial Counsel, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington DC, for the defendant. On the brief were *Benjamin C. Mizer*, Acting Assistant Attorney General, and *Amy M. Rubin*, Assistant Director. Of counsel on the brief was *Chi S. Choy*, Attorney, Office of the Assistant Chief Counsel for International Trade Litigation, U.S. Customs and Border Protection, of Washington DC.

OPINION

Musgrave, Senior Judge:

Cross-motions for summary judgment before the court concerning an entry of two "pre-clean dicorotron high voltage power supply" units imported through the Port of New York in year 2004 dispute the customs duty classification thereof under the Harmonized Tariff Schedule of the United States ("HTSUS").[1] The parties agree that the power supplies are static converters covered by heading 8504 ("[e]lectrical transformers, static converters (for example, rectifiers) and inductors; parts thereof") and suitable for physical incorporation into the plaintiff's "iGen3 Digital Production Press." The subheading appropriate for their classification depends upon the classification of the iGen3. Thus, the dispute is over whether the units are entitled to

[1] Unless otherwise indicated, all references herein to headings, subheadings, chapters, sections, and notes are to those of the year 2004 version of the HTSUS.

duty-free entry under subheading 8504.40.60 as "power supplies for automatic data processing machines or units thereof of heading 8471", or whether they are subject to 1.5% *ad valorem* customs duties under subheading 8504.40.95 as "other" static converters (*i.e.*, for machines not of heading 8471). U.S. Customs and Border Protection ("Customs") having classified the power supplies under the latterk, and having denied the plaintiff's protest thereof, the plaintiff having timely filed and its summons and complaint, predicated upon payment of all liquidated duties, charges and fees,[2] jurisdiction is here properly invoked upon 28 U.S.C. §§ 1581(a) and 2631(a). For the following reasons, the plaintiff persuades that judgment in its favor is appropriate.

I. *Standard of Review*

The court reviews Customs' protest decisions *de novo*. 28 U.S.C. § 2640(a)(1). Classification for customs duty purposes is a two-step process of determining the meaning of relevant tariff provisions (a question of law) and determining whether the "nature" of the merchandise (a question of fact) falls within the tariff provision as properly construed. *E.g.*, *Orlando Food Corp. v. United States*, 140 F.3d 1437 (Fed. Cir. 1998).

Proper classification under the HTSUS is directed by the General Rules of Interpretation ("GRIs") and, if relevant, the Additional U.S. Rules of Interpretation ("ARIs"). *E.g., Orlando Food Corp. v. United States*, 140 F.3d 1437, 1439 (Fed. Cir. 1998). The GRIs are not optional but statutory,[3] and they are applied in numerical order. *See Honda of America Mfg. v. United States*, 607 F.3d 771, 773 (Fed. Cir. 2010). GRI 1 provides that a tariff classification, "shall be determined according to the terms of the headings and any relative section or chapter notes." [4] GRI 6 also provides in relevant part that "the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related subheading notes and, *mutatis mutandis*, to the above rules, on the understanding that only subheadings at the same level are comparable."

"The terms of the HTSUS are construed according to their common

[2] *See* Compl. ¶3; Ans. ¶3.

[3] *See Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999).

[4] GRI 1, HTSUS; *see also Bauerhin Technologies Ltd. Partnership v. United States*, 110 F.3d 774, 777 (Fed. Cir. 1997) ("we begin our inquiry by examining the descriptions of the relevant headings, subheadings, and accompanying notes"); *Orlando Food Corp. v. United States*, 140 F.3d 1437, 1440 (Fed. Cir. 1998); *Libas, Ltd. v. United States*, 193 F.3d 1361, 1364 (Fed. Cir. 1999) (noting that the chapter and section notes of the HTSUS are statutory law, not optional interpretive rules).

commercial meanings." *Millenium Lumber Distribution Ltd. v. United States*, 558 F.3d 1326, 1329 (Fed. Cir. 2009). Additional guidance, considered neither binding nor dispositive, may be found among the Explanatory Notes ("ENs") of the Harmonized Commodity Description and Coding System ("HCDCS") maintained by the World Customs Organization, which are considered "generally indicative of the proper interpretation of the [Harmonized Tariff System]". *Lynteq, Inc. v. United States*, 976 F.2d 693, 699 (Fed. Cir. 1992) (quoting H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549 (1988)), *reprinted in* 1988 *U.S.C.C.A.N.* 1547, 1582. *See also* T.D. 89–80, 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989) (ENs "are generally indicative of the proper interpretation of these headings").

In its analysis, the court also accords a measure of deference to Customs classification rulings in proportion 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).[5] In the final analysis, however, the court also has "an independent responsibility to decide the legal issue of the proper meaning and scope of HTSUS terms." *Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005), citing *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1358 (Fed. Cir. 2001). *See Jarvis Clark Co. v. United States*, 733 F.2d 873, 878 (Fed. Cir. 1984).

II. *Undisputed Facts*

Among the parties' papers, the following are averred as material facts not in dispute. The power supply unit controls the flow of electricity into the iGen3 from external power sources and also regulates the voltage within the interior of the iGen3. *See* Joint Statement of Material Facts Not In Dispute ("JSMF")[6] ¶¶ 3 & 4. In its condition

[5] "The weight [accorded to an administrative] judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore*, 323 U.S. at 140.

[6] All citations in the JSMF to support the parties' joint averments are omitted herein. To the extent a certain level of technical detail may be deemed relevant, the parties agree on the following: that the power supply unit ("Part No. 105K26780") regulates the AC voltage of the dicorotron wire "over a range of 3920 to 6860 V rms, with voltage tolerances within +/- 3.5% of the set point over the output voltage range", JSMF, ¶¶ 1, 9; that the AC voltage corresponds to an input voltage range of 0.4 to 4.6 VDC and an expected AC output current in a rms range of 0 to 30 mA, *see id*. ¶ 10; that the power supply unit regulates the DC current of the dicorotron shield over a range of -50 to -200 μA, with current tolerances within +/- 5% of the set point; *id*. ¶ 11; that the DC current corresponds to an input voltage range of 1.5 to 4.6 VDC and an expected output voltage range of -3600 to -2000 VDC, *id*. ¶¶ 12–13; and that the power supply unit is also designed to discharge power rapidly when the iGen3 is turned off and also via an output control that is designed to shut the power down and turn off the iGen3 if threshold levels for a number of electrical control parameters are exceeded, *id*. ¶¶ 7–8 .

as imported, the power supply is in the form of a board-level assembly, with a 12 pin input power connector, a 50 pin signal connector, a high voltage output connector, and a high voltage return connector, all fastened to a steel mounting plate that allows it to be mounted in the iGen3. *See id*. ¶¶ 5 &6.

The iGen3 itself is a high-speed digital multifunction color laser printer designed and used for both high-volume and "short run, on demand" printing of documents. It is a customizable, modular design capable of multiple front-end paper feeder units and back-end finishing units (*e.g.*, collating, stapling) configured to the main "image output terminal" ("IOT") in which the merchandise at bar is incorporated. The basic configuration of the iGen3 includes a feeder, stacker, and a "digital front end" ("DFE") print server, also called a controller.[7] Feeders, stackers and DFEs are imported separately from the iGen3 and are not at issue in this action. *Id*. ¶ 30.

Both the "90" and the "110" models measure six feet in width and eight feet in height at the (highest) point of the IOT, but at 23 feet eight inches in length the110 model exceeds the 90 model by three feet. *See id*. ¶¶ 19–20. The iGen3 90 weighs 7,071 lbs and has a base price of $405,000; the iGen3 110 weighs 7,892 lbs and has a base price up to $610,000. The iGen3 prints at a rated speed of either 90 or 110 letter-sized (A4) color sheets per minute[8] (up to 6,600 per hour) at a resolution of 600 by 4800 dots per inch using a line screen of up to 200 lines per inch with 256 gray levels. It can accommodate sheet sizes up to 14.33" by 20.5" and paper weights from 16-lb bound up to 130-lb cover, coated or uncoated media, with a standard holding capacity of 30,000 sheets. Pl's Br. on Mot. for J. ("Pl's Br.") at 2–3; JSMF ¶¶ 22–27. The iGen3 can print on specialty stocks and labels in sheets as large as 14.33" x 22.5" (364 x 572 mm), and measures the color between every impression for consistency from sheet to sheet. JSMF ¶ 28.

The iGen3 does not feature a scanner, is not used for digital copying, and does not have a facsimile function. Pl's Br. at 3.

Image printing on an iGen3 first requires receipt of a digital file at the particular DFE (controller) that has been made part of the iGen3

[7] The parties agree that these DFEs are compatible with the iGen3: DocuSP Controller, Creo Spire Color Server, and EFI Fiery Color Server. JSMF ¶ 31. The plaintiff explains that these servers are basic computer systems constructed on either a Sun Fire or Intel and Microsoft PC platform; can process digital images using a wide range of print languages, including but not limited to Adobe Postscript, public document format (PDF), and tagged image file format (TIFF); and can communicate with computer networks using Ethernet or TCP/IP network languages with network protocols including IPX/SPX, TCP/IP, HTTP, IPP and AppleTalk. Pl's Br. at 3.

[8] Hence, the model number designations of iGen3 90 and iGen3 110.

configuration. *Cf*. JSMF ¶ 32 ("[o]nce a digital file has been created on an originating computer or work station, the file is then transmitted to the DFE"). Once received, the DFE then "rasterizes" the digital file, converting it into a bitmap (pixels or dots), and once the rasterization process is complete, the file is then transmitted to the iGen3 for production. *Id*. ¶¶ 33–34. The DFE also performs additional color management functions in the process. Pl's Br. at 3.

To produce images, the iGen3 operates by the "xerography" process. JSMF ¶ 35. The digital file, now in the form of a bitmap, instructs the laser in the iGen3 to turn on and turn off, discharging specific points on a photoreceptor belt in the shape of a dot or pixel, which discharge will eventually attract toner to the dot. *See id*. The power supplies in the iGen3 charge the toner to an opposite potential to the discharged dot area on the photoreceptor, which causes the toner to basically jump from one area onto the photoreceptor belt. *Id*. ¶ 36. The toner particle is transferred from the photoreceptor to the printer by putting a charge behind the paper, opposite to the charge of the toner on the photoreceptor, which causes the toner to be pulled away from the belt and become stuck to the paper. *Id*. ¶ 37. The paper is then run through a fusing operation, in which heat and pressure melts the toner to the paper and prevents it from falling off. *Id*. ¶ 38.

The defendant emphasizes the plaintiff's marketing and selling of the iGen3 as a "digital production press."[9] Customers who have purchased the iGen3 include "graphic communication companies, printers, and print-for-pay" companies. *Id*. ¶ 41. "The 'non-commercial' *printers that* have purchased the iGen3 included '[c]'ompanies like Target, Walmart, United Airlines, universities, [and] 'vertical markets'" (*sic erat scriptum* ; italics added). *Id*. ¶ 42. For example, a "Lands End" catalog can be printed on an iGen3. *See id.*¶ 43. The iGen3 is an "imaging system" that provides "new services," including "high quality color at a cost that makes sense even for short runs, print jobs -- from books to brochures and from statements to sell sheets". *Id*. ¶ 44. The iGen3 offers "versatile, high quality print" that

[9] According to the "Specifications" section of a document entitled "Press Forward", *see* Ex. A to Pl's Br. (iGen3 Brochure), the iGen3 has the following "Technology Features":

> **SmartPress Imaging**
> Third generation technology; single-point transfer printing; closed-loop controls; benchmark gamut of CMYK dry inks; replace dry inks while running.
> **SmartPress Paper Handling**
> Mixed stocks in a single run; dual-edge registration; straight paper path; wide-radius inverter for second-side imaging; collated sets; wheeled stacker cart.
> **SmartPress Sentry**
> Built-in intelligence; automatically adjust to paper characteristics; monitors every print; provides on-line diagnostics and remote support.

JSMF ¶ 40.

rivals offset printing. *Id*. ¶ 45. The iGen3 reduces operating costs by, among other things, eliminating warehousing costs and inventory disposal rates. *Id*. ¶ 46. The benefits of the iGen3 are that it produces "offset-like quality on a digital platform," variable and customized content, and "commercial level quality" impressions. *Id*. ¶ 47. The iGen3 increases the "return on investment" by increasing the effectiveness and response to printed communications. *Id*. ¶ 48. The iGen3's "Key Applications" include short run, on demand "printing of brochures, books, flyers, postcards, newsletters, catalogues, manuals, Point of Purchase materials, sell sheets and more!" *Id*. ¶ 50. And, the iGen3's output has the "look and feel of offset printing." *Id*. ¶ 51. Customers that purchase the iGen3 must attend a mandatory three-week training program. *Id*. ¶ 49.

Subsequent to the parties' submission of their JSMF, the plaintiff also submitted averments claimed as material, but which the defendant disputes. Specifically, the plaintiff further averred that the iGen3 only handles digital files that are created on computers or units of computer systems, which the defendant denied on the ground that the terms "handles" and "units of a computer system" are vague. The defendant, in turn, averred that the iGen3 has the ability to produce impressions from digital files that are created on a personal computer or work station and transmitted to the DFE in the proper format and also that the iGen3 also has the ability to produce impressions from digital files that are created by a digital scanner and transmitted to the DFE in the proper format. *Cf*. Pl's Supplemental Statement of Material Facts Not in Dispute ("Pl's Supp. MF") ¶ 52, *with* Def's Response thereto (" Def's Supp. MF Resp.") ¶ 52 (citations omitted).

The plaintiff also averred that the iGen3 is solely used with an automatic data processing machine, and is connected to the central processing unit through a network, including the DFE server, and that the iGen3 can exchange data with the central processing unit, which the defendant denied on the ground that this purported fact is unintelligible and that the cited testimony is unclear as to whether the iGen3 is connected to the central processing unit ("CPU") of the DFE or some other computer or workstation. Specifically, the defendant pointed out that in his deposition Mr. Maszerowski testified that a CPU is a "freely programmable computer", and the defendant claimed Mr. Maszerowski is incorrect, as a CPU is a "[t]he part of a computer in which operations are controlled and executed." *Cf.* Pl's Supp. MF ¶ 53, *with* Def's Supp. MF Resp. ¶ 53 n.1, citing Ex. I of Pl's Supp. MF ¶ 53 and the *Oxford Dictionaries*' online definition of "central processing unit". The defendant also averred that the cited testimony indicates that "information" comes "back" from the server and

that scanned images can be received from the server but does not indicate that the information or scanned images are sent from the iGen3 to the server. *Id*. The defendant further averred that the iGen3 is connected to and works in conjunction with the DFE. *Id*.

Lastly, the plaintiff also averred that the iGen3 connects to standard automatic data processing machines and networks using Ethernet, TC/PIP, Apple Talk, and prints files from any type of computer that is capable of connecting to a network, which the defendant denied on the ground that the phrase "standard automatic data processing machine" is vague. The defendant averred in response that the iGen3 cannot print "files from any type of computer that's capable of connecting to a network"; that the iGen3 connects directly to the DFE; that the iGen3 can only process files that have been converted into a bitmap by the DFE; and that each DFE supports a set of specific file formats.[10] Pl's Supp. MF ¶ 54; Def's Supp. MF Resp. ¶54, referencing Ex. I of Pl's Supp. MF.

While helpful to a fuller understanding of the issues, the disputed averments are immaterial to resolution of this case, given sufficient overlap of agreement on the "nature" of the iGen3 Digital Production Press into which the imported merchandise would be incorporated, which has reduced argument over the meaning of the competing tariff provisions to the point where summary judgment is appropriate as contemplated in USCIT Rule 56 and by *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986) and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). *See, e.g., Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006) ("[w]hen the nature of the merchandise is undisputed . . . the classification issue collapses entirely into a question of law"); *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365–66 (Fed. Cir. 1998) and cases cited.

[10] Specifically: that the Xerox FreeFlow Print Server supports Adobe® PostScript® Level 1, 2, 3; Adobe® Acrobat® 7.0, PDF 1.6, PDF/X; TIFF, PCL5c, and PCL6XL; that the Xerox FreeFlow Print Server can also use data streams from AFP/IPDS, LCDS, or a VIPP or VI workflows; that the Creo Spire Color Server supports Postscript level 1, 2, 3, PDF/Acrobat, EPS, EPSF, DCS, DCSF, Print-ready RTP jobs, Creo VPS, and Xerox VIPP; that the EFI Fiery Color Server supports Postscript level 1, 2, 3, PDF 1.5/Acrobat 6, PDF/X-1a and 3, EPS, DCS 2.0, TIFF and TIFF/IT, and JPEG. Pl's Supp. MF ¶ 54; Def's Supp. MF Resp. ¶54, referencing Ex. I of Pl's Supp. MF. The defendant additionally averred that each DFE can only receive files from "client environments" (originating computers or workstations) that run specific operating systems; that the Xerox FreeFlow Server and Creo Spire Color Server can only receive files running from originating computers or workstations that run Windows 98/ME/NT 4.0/2000/XP, Macintosh OS 8.0 and higher, and OS X native; and that the EFI Fiery Color Server can only receive files from originating computers or workstations that run Windows 98/MT/XP/NT 4.x/2000, Macintosh OS 9.6 or higher, OSX v10.2.4, and UNIX with TCP/IP. Def's Supp. MF Resp. ¶54.

III. *Relevant Statutory Provisions*

The following provisions of the HTSUS, year 2004 version, are relevant to this dispute, in particular the classification of the iGen 3:

CHAPTER 84 -- NUCLEAR REACTORS, BOILERS, MACHINERY AND MECHANICAL APPLIANCES; PARTS THEREOF

Notes

5. (A) For purposes of heading 8471, the expression "automatic data processing machines" means:

(a) Digital machines, capable of (1) storing the processing program or programs and at least the data immediately necessary for execution of the program; (2) being freely programmed in accordance with the requirements of the user; (3) performing arithmetical computations specified by the user; and, (4) executing, without human intervention, a processing program which requires them to modify their execution, by logical decision during the processing run;

(B) Automatic data processing machines may be in the form of systems consisting of a variable number of separate units. Subject to paragraph (E) below, a unit is to be regarded as being a part of a complete system if it meets all the following conditions:

(a) It is of a kind solely or principally used in an automatic data processing system;

(b) It is connectable to the central processing unit either directly or through one or more other units; and

(c) It is able to accept or deliver data in a form (codes or signals) which can be used by the system;

* * *

(D) Printers, keyboards, X-Y coordinate input devices and disk storage units which satisfy the conditions of paragraphs (B)(b) and (B)(c) above, are in all cases to be classified as units of heading 8471.

(E) Machines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine are to be classified in

the headings appropriate to their respective functions or, failing that, in residual headings.

* * *

Heading/Subheading

8443	Printing machinery used for printing by means of printing type, blocks, plates, cylinders and other printing components of heading 8442;[11] ink-jet printing machines, other than those of heading 8471; machines for uses ancillary to printing; parts thereof:	
	Offset printing machinery:	
8443.11	Reel-fed:	
8443.11.10 00	Double-width newspaper printing presses	3.3%
8443.11.50 00	Other	Free
8443.12.00 00	Sheet-fed, office type (sheet size not exceeding 22 x 36 cm)	Free
8443.19	Other:	
8443.19.10 00	Weighing 900 kg or less	Free
8443.19.50 00	Weighing more than 900 kg but less than 1,600 kg	
	Free Weighing 1,600 kg or more	Free
8443.19.90 00	Letterpress printing machinery, excluding flexographic printing:	
8443.21.00 00	Reel-fed	2.2%
8443.29.00 00	Other	Free
8443.30.00 00	Flexographic printing machinery	2.2%
8443.40.00 00	Gravure printing machinery	2.2%
	Other printing machinery:	
8443.51	Ink-jet printing machinery:	
8443.51.10 00	Textile printing machinery	2.6%
8443.51.50 00	Other	Free
8443.59	Other:	
8443.59.10 00	Textile printing machinery	2.6%
8443.59.90 00	Other	Free
	* * *	
8471	Automatic data processing machines and units thereof; magnetic or optical readers, machines for transcribing data onto data media in coded form and machines for processing such data, not elsewhere specified or included:	
	* * *	

[11] Heading 8442 covers "Machinery, apparatus and equipment (other than the machine tools of headings 8456 to 8465), for type-founding or typesetting, for preparing or making printing blocks, plates, cylinders or other printing components; printing type, blocks, plates, cylinders and other printing components; blocks, plates, cylinders and lithographic stones, prepared for printing purposes (for example, planed, grained or polished); parts thereof".

8471.60	Input or output units, whether or not containing storage units in the same housing:			
	Other:			
	* * *			
	Printer units:			
	Assembled units incorporating at least the media transport, control and print mechanisms:			
8471.60.51 00	Laser:			
	Capable of producing more than 20 pages per minute			Free
8471.60.52 00	Other			Free
8471.60.53 00	Light bar electronic type			Free
8471.60.54 00	Ink jet			Free
8471.60.55 00	Thermal transfer			Free
8471.60.56 00	Ionographic			Free
8471.60.57	Other			Free
	30	Daisy wheel		
	60	Dot matrix		
	90	Other		
	Other:			
8471.60.61 00	Laser:			
	Capable of producing more than 20 pages per minute			Free
8471.60.62 00	Other			Free
8471.60.63 00	Light bar electronic type			Free
8471.60.64 00	Ink jet			Free
8471.60.65 00	Thermal transfer			Free
8471.60.66 00	Ionographic			Free
8471.60.67	Other			Free
	30	Daisy wheel		
	60	Dot matrix		
	90	Other		
	* * *			
8472	Other office machines (for example, hectograph or stencil duplicating machines, addressing machines, automatic banknote dispensers, coin-sorting machines, coin-counting or wrapping machines, pencil-sharpening machines, perforating or stapling machines):			
8472.10.00 00	Duplicating machines			1.6%
8472.20.00 00	Addressing machines and address plate embossing machines			2.1%
8472.30.00 00	Machines for sorting or folding mail or for inserting mail in envelopes or bands, machines for opening, closing or sealing mail and machines for affixing or canceling postage stamps			1.8%
8472.90	Other:			
8472.90.10 00	Automatic teller machines			Free

8472.90.40 00	Pencil sharpeners		2.6%
8472.90.60 00	Numbering, dating and check-writing machines		Free
8472.90.70 00	Accessory and auxiliary machines which are intended for attachment to an electrostatic photocopier and which do not operate independently of such photocopier		Free
8472.90.80 00	Printing machines other than those of heading 8443 or 8471		Free
8472.90.90	Other		1.8%
	40	Desktop note counters and note scanners	
	60	Other currency and coin handling machines	
	80	Other	

IV. *Analysis*

The central issue here is whether the iGen3 is itself classifiable as a unit of an ADP system, as contended by the plaintiff, or whether it is excluded from that designation on the ground that, working in conjunction with an automatic data processing machine, the iGen3 is a machine performing a "specific function *other than* data processing" within the meaning of Note 5(E) of Note 5 to chapter 84 (italics added) as contended by the defendant.

The defendant's position here, that the iGen 3 is not a "unit" of an ADP machine of heading 8471, is consistent with its prior administrative rulings on the classification of the iGen3 itself and similar merchandise. In Headquarters ("HQ") Ruling 967514 (June 6, 2005), which reconsidered New York ("NY") Ruling I81178 (May 20, 2002), Customs classified the iGen3 in subheading 8472.90.80. *See also* HQ 965051 (May 1, 2002), discussed *infra*. In HQ 967514, Customs concluded that because the iGen3 "has the characteristics of a digital production press for the printing industry" and performs "short run, on demand" printing,[12] Note 5(E) of chapter 84 applies because short run, on demand is not a data processing function based on the analyses of previous ruling letters. Customs thus considered the iGen3 "precluded" from classification in heading 8471 and correctly classifiable in heading 8472.90.80, with the power supply unit in subheading 8504.90.95. *See* HQ 967514.

Following that ruling, upon actual importation of the power supply units at bar, Customs adhered to HQ 967514 and classified them as

[12] Customs defined short run, on demand printing therein as "the ability to economically print 1000 or less documents, for a customer order, with the unique capabilities of a digital press, including speed, volume output, use of a wide variety of stocks, and mixed stocks in a single run, and automatic collation." HQ 967514.

"other" static converters under subheading 8504.40.95. The plaintiff filed its protest thereof on May 5, 2005, which Customs denied on the authority of HQ 967514 and NY I81178, *i.e.*, that the iGen3 is classifiable as an "other" office machine under heading 8472, and thus the power supply "to be incorporated into this unit" was not classified as part of unit of an automatic data processing ("ADP") machine.

The genesis of HQ 967514 appears to have been HQ 959651 (July 9, 1997),[13] in which Customs considered whether the "AGFA Chromapress digital color printing system" is classifiable as an ADP machine or as printing machinery. The applicant argued that the Chromapress is an ADP printer in accordance with Notes 5(B) and 5(D) to chapter 84. Customs, however, concluded that it "is more than just an ADP printer, it is an entire printing system [that] acts as a functional unit designed to replace off-set printing presses", and that Note 5(E) to chapter 84 clearly states that machines performing a specific function are to be classified in the heading appropriate to their respective functions, which is a "separate prerequisite" that must be met in order to classify a machine as a unit of an ADP machine. *See* HQ 959651 at 3, quoting HQ 957491 (July 31, 1996).

In that decision, Customs reinforced its conclusion by reference to the ENs to chapter 84.[14] *Id*. at 3–4. After reviewing sales literature for the Chromapress that claimed efficiencies in "short-run color printing" as well as the 1993 New York Times article "Gutenberg Goes Digital" and a 1995 "Print on Demand Business" article, Customs concluded that the Chromapress is a "functional" unit by reason of Note 4 to Section XVI[15] and Note 5(E) to chapter 84 and is therefore classifiable, according to its function, in heading 8443 as "printing"

[13] *See also* HQ 957981 (July 9, 1997) (classification of "Xeikon DCP-1 digital color printer").

[14] At the time (and unchanged to the present), EN 84.71 provided, in relevant part, on the interpretation of "machines incorporating or working in conjunction with an [ADP] machine and performing a specific function", as follows:

> In accordance with the provisions of the last paragraph of Note 5 to Chapter 84, the following classification principles should be applied . . . :
>
> (i) A machine incorporating an automatic data processing machine and performing a specific function *other than* data processing is classifiable in the heading corresponding to the function of that machine or, in the absence of a specific heading, in a residual heading, and not in heading 84.71.
>
> (ii) Machines presented with an automatic data processing machine and intended to work in conjunction therewith to perform a specific function *other than* data processing, are to be classified as follows: the automatic data processing machine must be classified separately in heading 84.71 and the other machines in the heading corresponding to the function which they perform unless, by application of Note 4 to Section XVI or Note 3 to Chapter 90, the whole is classified in another heading of Chapter 84, Chapter 85 or of Chapter 90.

HCDCS, EN 84.71(E) (italics added).

[15] Note 4 to Section XVI provides: "Where a machine (including a combination of machines) consists of individual components (whether separate or interconnected by piping, by trans-

machinery. *Id*. at 4–5. Customs dismissed the argument that EN 84.43 for heading 8443 limits printing machinery to those types of machines that print by means of type, printing blocks, plates, or cylinders of heading 8442, on the ground that nothing in the legal text of heading 8443 provides for no such limitations, and "[i]t must also be remembered that the tariff statutes were enacted 'not only for the present but also for the future, thereby embracing articles produced by technologies which may not have been employed or known to commerce at the time of the enactment.'" *Id*. at 6, quoting *NEC America, Inc. v. United States*, 8 CIT 184, 186, 596 F. Supp. 466, 468 (1984), *quoting Corporacion Sublistatica, S.A. v. United States*, 1 CIT 120, 126, 511 F. Supp. 805, 809 (1981).

Subsequently, in HQ 965051 (May 1, 2002), Customs addressed the classification of the "Heidelberg Digimaster 9110", a high speed, high volume printer, or "digital imaging system," with an output rate of 110 pages per minute and designed for the 300,000 to 800,000 copies per month market.[16] Relying on HQ 959651 and HQ 957981, *supra*, Customs similarly held that the fact that the Digimaster 9110 "is used primarily as a short-run digital printer rather than as a standard digital copy machine . . . [is] a function other than data processing, and the Digimaster 9110 is thus precluded from classification under heading 8471". HQ 96501 at 2. In so ruling, Customs distinguished various New York ruling letters to which the Digimaster 9110 applicant pointed, which had classified "a variety of multi-function fax/copier/printers as units of ADP machines", on the ground that they were dependant upon Customs' application of GRI 3(b) to determine the essential character of machines that could send and receive facsimiles, digitally reproduce documents scanned into memory, and print ADP output:

> These machines, however, are distinguishable from the Digimaster 9110, in that they functioned as stand-alone copiers *with the additional abilities* to fax and function as ADP printers, while the Digimaster 9110 is imported without the digital scanner . . . .

Id. (italics added).

There are several observations to be made at this point. First, in

mission devices, by electric cables or by other devices) intended to contribute together to a clearly defined function covered by one of the headings in chapter 84 or chapter 85, then the whole falls to be classified in the heading appropriate to that function." Note 4 to Section XVI.

[16] The Digimaster 9110 allows the printing of documents from stored files, scanned documents (after installation of the optional scanner) and/or data print streams, and is designed for short run, on demand printing as well as desktop publishing and printing manuals, booklets and graphics. HQ 965051 at 1.

Digidesign, Inc. v. United States, 39 CIT ___, 44 F. Supp. 3d 1366 (2015), Customs defended its classification of imported "control surfaces" consisting of switches, faders, and knobs on consoles that allowed a user to edit, mix, and manipulate music in digital file format fed to music editing software on a connected computer. The court accepted Customs' argument that Note 5(E) excluded the merchandise from classification as ADP units on the basis of the "working in conjunction with" language of Note 5(E), due to the fact that the control surfaces were capable of stand-alone functionality in analog modalities that did not involve data processing.[17] Notable here is that Customs' position in *Digidesign* stands in contrast to its rationale in HQ 965051, as indicated by the quoted passage above.

Second, it is of some significance to the matter at bar that in contrast to HQ 959651, *supra*, but similar to the recent classification of the iGen3 in HQ 967514, Customs in HQ 965051 found the Digimaster properly classifiable as an "office machine not more specially provided for" under subheading 8472.90.80 (*i.e.*, "printing machines other than those of heading 8443 or 8471"). The reason provided for not classifying the merchandise, consistent with HQ 959651, in heading 8443 -- which, as mentioned, specifically covers "printing machinery" -- was that, effective January 1, 2002, the article description of heading 8443 was modified and, according to Customs at the time, that heading "is now reserved for printing machines that operate by means of printing type blocks, plates, cylinders and other printing components of heading 8442, HTSUS, or ink-jet printing machines, other than those of heading 8471". HQ 965051 at 3. Nonetheless, it is fairly clear from that ruling, although it is unstated, that Customs continued -- and continues -- to regard printers such as the Digimaster to be the functional equivalent of a large-scale commercial printing industry printer, such as an offset printing press, but due to the statutory change in the language of heading 8443 and its interpretation thereof, Customs settled for classification in heading 8472 ("other

[17] *Digidesign* relied on *BenQ* to interpret Note 5(E). *See BenQ America Corp. v. United States*, 646 F.3d 1371 (Fed. Cir. 2011). *BenQ* concerned the classification of monitors equipped with connectors for receiving data from a personal computer, digital camera, VCR, DVD player and other devices. Although the Federal Circuit did not interpret Note 5(E) in a *stare decisis* sense, it observed that Note 5(E) "is limited to" machines performing a specific function other than data processing and incorporating or working in conjunction with an automatic data processing machine, and deduced that "when 'performing a specific function other than data processing,' such as when the monitors are serving as video monitors for other devices such as DVD players and VCRs, the monitors are 'working in conjunction' with those other devices, not with an automatic data processing machine." 646 F.3d at 1379 (footnote omitted).

office machines", specifically subheading 8472.90.80, which covers "Other: . . . Printing machines other than those of heading 8443 or 8471").

Third, the year 2002 version (3d ed.) of EN 84.72 further describes each of these[18] types of office machines, but it provides no further indication of what a printing machine "other than those of heading 8443 or 8471" would constitute in the "other office machine" context -- only that the term "office machines" is to be taken in a wide general sense to include all machines used in offices, shops, factories, workshops, schools, railway stations, hotels, *etc*., for doing "*office work*" (*i.e.*, work concerning the writing, recording, sorting, filing, *etc*., of correspondence, documents, forms, records, accounts, *etc*.) -- and this explanation has essentially been repeated up through the current (2012; 5th ed.) version of EN 84.72.

C

The parties have agreed that the iGen3 satisfies the requirements of Note 5(B)(b) and 5(B)(c), in that the iGen3 is connected by cables directly to a dedicated DFE print controller, which is connected to computer or workstation, and can only perform print operations upon receipt of digital files or commands. The plaintiff also contends, and the defendant does not appear to dispute, that Note 5(D) excuses printers, *inter alia*, from satisfying the conditions of Note 5(B)(a). The plaintiff thus contends Note 5(E) is inapplicable because the iGen3 onlyperforms the data processing function of "digital printing" and "would not function without the transmission of data from the ADP machine or system". Pl's Br. at 24. It argues that there is no "line" "beyond which a printing apparatus becomes so big and technologically advanced that it is no longer a printer, [n]or so small and mechanically simple that it is no longer a press." Pl's Br. at 22.

To the extent the plaintiff argues that "every printing apparatus that prints data transmitted from an ADP is a unit of an ADP machine of heading 8471", the defendant responds that "simply cannot

[18] As indicated above, heading 8472 covers "Other office machines (for example, hectograph or stencil duplicating machines, addressing machines, automatic banknote dispensers, coin-sorting machines, coin-counting or wrapping machines, pencil-sharpening machines, perforating or stapling machines)", and the specific subheadings of "printing machinery" of heading 8472 in addition to printing machines other than those of 8471 are for duplicating machines, addressing machines and address plate embossing machines, machines for sorting or folding mail or for inserting mail in enveloped or bands, machines for opening, closing or sealing mail, and machines for affixing or cancelling postage stamps, automatic teller machines, pencil sharpeners, numbering, dating and check writing machines, accessory and auxiliary machines which are intended for attachment to an electrostatic photocopier and which do not operate independently of such photocopier, desktop note counters and note scanners, and other currency and coin handling machines, and "other" office machines.

be the case" because printers of Note 5(D) are subject to Note 5(E) by virtue of Note 5(B), and because headings 8443, 8472, and 8479 can all cover, among other things, printing apparatus that connect to ADP machines and print the output of ADP machines. Def's Resp. and Cross Mot. at 14–15, referencing subheadings 8443.51.10, 8443.51.50), 8472.90.80, and 8479.89.96. Emphasizing the plaintiff's marketing of the iGen3 as a "digital production press,"[19] the defendant's essential contention is that the iGen3 performs a "specific function" other than ADP in the form of short run, on demand printing, that "printing is not inherently a data processing function," and that while printing may use a new method, *e.g.*, digital technology, "the end result is still printing, *i.e.*, the reproduction of text and illustrations onto paper." Def's Resp. and Cross Mot. at 14 n.9; *see also* Def's Reply at 8–9.

To the extent that is true, it lays bare the inherent contradiction between Note 5(D) and Note 5(E) to chapter 84. Whether referring to the encasement of a printer or the specific "case" of a classification situation,[20] the meaning of "in all cases" in Note 5(D) would seem to be clear. And yet, Note 5(D) is still "subject to" the "specific function" exclusion of Note 5(E). Thus, is there an identifiable point in the HTSUS at which a digital printer becomes a printer that performs a specific function "other than" data processing? If so, it is certainly

[19] *I.e.*, as an "imaging system" that provides "new services," including "high quality color at a cost that makes sense even for short runs, print jobs-- from books to brochures and from statements to sell sheets." Ex. A to Pl's Br., "Press Forward" (iGen3 Brochure) at 2. The marketing materials also emphasize the iGen3's ability to quickly and economically produce complex materials in varying quantities (*i.e.*, the iGen3 is "the first digital production press that's totally at home in an inplant print shop or a commercial print environment", offering "the flexibility, quick turn-around times, and economics that characterize digital printing while producing output with the look and feel of offset printing"; with the ability "to print exact quantities instead of thousands extra in an effort to bring down the per unit cost as in the offset world" the iGen3 "is the complement to your offset environment[,] . . . providing offset quality and a digital workflow, offering the best of both worlds", and "eliminat[ing] the manual preparation for offset, which makes color economical only as the quantities reach very high levels"). *See id.* at 4, 8. The defendant also emphasizes the marketing of the iGen3's ability to produce high quality color materials ("iGen3's SmartPress Technology™ adjusts ink and imaging for each sheet that passes through the Press . . . . The Press runs a wide array of stocks. . . . The Press measures the color between every single impression, for consistency from sheet to sheet and shift to shift"). *See id*. at 3. Summarizing, the defendant argues that "the theme that runs through [plaintiff]'s marketing materials is that the iGen3 is a 'digital press' that has the technical capabilities to produce materials that have the appearance of materials printed on an offset printing press and that the iGen3's primary purpose is to increase a company's business by offering new services and by increasing the effectiveness of its marketing opportunities." Def's Resp. and Cross Mot. at 17, referencing Ex. B to Pl's Br. (FreeFlow® Print Server Specifications).

[20] *But cf*. subheading 8471.60 (describing "[i]nput or output units, whether or not containing storage units in the same *housing*") (italics added).

vague, because the function of all digital printers, apparently,[21] is to print digital output and/or process digital data to some degree. Therefore, in order to resolve the contentions here, the meaning of a "specific function" of Note 5(E) must at a minimum be interpreted in the sense of "as distinct from" data processing.

The Explanatory Notes define "data processing" as that which "consists in handling information of all kinds, in pre-established logical sequences and for a specific purpose or purposes." EN 84.71(I), at 1575; *Optrex Am., Inc. v. United States*, 30 CIT 192, 214 (2006). Of note here is the fact that the HTSUS drafters did not consider printing *per se* to be a Note 5(E) exception to Note 5(D), insofar as they provided for various "printer units" of ADP machines that are clearly and specifically provided for in heading 8471. *Cf.* Note 5(D) to ch. 84 *with* subheading Note 1 to ch. 84 ("[f]or the purposes of subheading 8471.49, the term 'systems' means automatic data processing machines whose units satisfy the conditions laid down in note 5(B) to chapter 84 and which comprise at least a central processing unit, one input unit (for example, a keyboard or a scanner), and one *output unit* (for example, a visual display unit or a *printer*") (italics added) & subheadings 8471.60.51.00 through 8471.60.67.90 (input or output units, whether or not containing storage units in the same housing: laser, light bar electronic type, ink-jet, thermal transfer, ionographic, daisy wheel, dot matrix, and other). In other words, given the organization of the year 2004 HTSUS, the inescapable conclusion is that the drafters by or at that time must have concluded that the meaningful output of data, in a useful or useable form, is a necessary part of the complete ADP process, *i.e.*, not only the process of rasterizing a digital file but also the printing of the rasterized image onto a substrate with a substance such as an ink or dye, because machines that print digital output have been (at least at that time) themselves considered "output units" of ADP machines.[22]

[21] *Cf.* Pl's Reply at 3 n.2 ("[a] smaller printer will also contain a DFE controller to handle communications with the computer network, but this will be a small, board-level unit contained in the printer housing itself") *with* Transcript of Oral Argument at 17:10–17:24 ("[T]he digital front end . . . is sort of an adapted computer, and the mainframe will send data to the adapted computer . . . A digital stream will come to the front end, to the printer, and . . . [i]t will convert it, it will adjust it, or it will route it to the proper software, it will use the software, and it will print your product[.]"), 34:15 ("[all printers have a digital front end, even little, tiny black-and-white printers").

[22] It further goes without saying that the output of an ADP machine must be rendered in a useful form, whether in a more permanent form or not, in order to be meaningful. "Digital printing" is thus a function of data processing, as contended by the plaintiff. And all ADP printing, whether short or long run, is "on demand" and digital, regardless of whether the imaging technology is laser, thermal, dot matrix, *et cetera*. Were the defendant's contention taken to its logical conclusion, of "printing" as not inherently being a data processing

The defendant's essential contention is that iGen3 printing is not "mere" printing but high-end, "special function" printing such as that encompassed by the ink-jet printers discussed in the 2002 version of EN 84.71 that was in existence at the time of importation:

> In accordance with Note 5(D) to this Chapter, printers, keyboards, X-Y coordinate input devices and disc storage units which satisfy the conditions of items (b) and (c) above, are in all cases to be classified as constituent units of data processing systems.
>
> The foregoing provision is, however to be considered in the overall context of Note 5 to Chapter 84 and is therefore applicable subject to the provisions of paragraph (E) of that Note, by virtue of the introductory part of paragraph (B) thereof. Thus, ink-jet printers working in conjunction with an automatic data processing machine but having, particularly in terms of their size, technical capabilities and particular applications, the characteristics of a printing machine designed to perform a specific function in the printing or graphic industry (production of prepress colour proofs, for example) are to be regarded as machines having a specific function classifiable in heading 84.43.

Def's Resp. and Cross-Motion Br. at 12 & Def's Reply at 4, quoting Def's Cross-Motion Br. Addendum, EN 84.71 at 1577.[23] The defendant argues that the above example demonstrates that there is, in fact, a "line" distinguishing a printing apparatus as not classifiable in heading 8471 depending upon a machine's characteristics in terms of size, technical capabilities, and applications, and that the plaintiff's own marketing materials for the iGen3 show that it "has the characteristics (size, technical capabilities, and applications) of a printing machine designed to complement, or even rival, the functions of an

function, then the drafters would have concluded that no digital printing is classifiable under heading 8471, which is clearly not the case.

[23] Which version of the Explanatory Notes the defendant provides in its Addendum is unclear, as the 2002 version is not so paginated. Although the 2002 version retains that language, but without the defendant's copy's pagination, the second paragraph of the above quoted passage was eliminated from EN 84.71in the 2007 version, from which point (to the present) the Explanatory Notes have provided only an essential restatement of Note 5(E):

> If the unit performs a specific function other than data processing, it is to be classified in the heading appropriate to that function or, failing that, in a residual heading (see Note 5(E) to this Chapter). If an apparatus . . . is not performing a data processing function, it is to be classified according to its characteristics by application of General Interpretive Rule 1, if necessary in combination with General Interpretive Rule 3 (a).

E.g., EN to 84.71 (2012) at XVI-8471–4. Although the law in effect at the time of Customs' decision on the protest applies on review thereof, *see*, *e.g.*, *Morris Costumes, Inc. v. United States*, 30 CIT 1898 (2006), neither Customs' rulings nor the ENs are binding to or dispositive of the decision to be made in the here and now.

offset printing press by performing the specific function of economical [short run, on demand] printing of complex materials in high quality color for the graphic arts and printing industries." Def's Resp. and Cross-Motion Br. at 15.

The defendant's emphasis on the iGen3 as a "rival" of an offset printer of heading 8443 appears to contradict Customs' classification of the iGen3 as an "other office machine" of heading 8472, specifically an "other" printing machine "other than those of heading . . . 8471" of subheading 8472.90.80, but be that as it may, the plaintiff's reply is that ADP systems come in all sizes and complexities, of course, from non-networked desktop personal computers to large-scale mainframe or distributed capacity networks with hundreds or thousands of users in a single location, and they are not limited to a "mere" network or desktop printer by statute, *i.e.*, that nothing in the statute itself suggests that a printer of heading 8471 is constrained by its size or speed, and that the defendant identifies no "technical capabilities" of the iGen3 that would disqualify it from classification as an ADP printer or a unit of an ADP machine. The plaintiff points out that whereas the iGen3 could print 500 insurance policies in a single print run, with different details and data in each, something no traditional offset printer can do, given sufficient data buffering (which might be provided by connection to a DFE) a common desktop printer could do the same thing, albeit much more slowly. Pl's Reply at 13.

The court agrees with the plaintiff that the nature, exactly, of "short run, on demand" printing, which the defendant claims is a specific non-data processing function, is vague, and therefore problematic. A common work group printer attached to an ADP network is capable of printing 1000 or fewer (or more) documents for a specific order and might have several paper trays, holding different print stocks that can be used in a single run, and such a printer is classifiable -rightly, the plaintiff adds -- as an ADP output unit. *E.g.*, NY J86411 (July 21, 2003). In other words, short run, on demand printing is exactly what any ADP printer unit attached to an ADP system or network is capable of doing.

Is there a basis in the HTSUS for distinguishing the *quality* of the output of a digital printer in the manner apparently advocated by the defendant for purposes of classification (*e.g.*, "look and feel" of offset printing)? Apparently not. The court can agree with the defendant that printing, *qua* printing, is not inherently a data processing function, but it is not possible, in the context of this case, to distinguish the quality of digital print in its own right among the provisions of the HTSUS that control the outcome here, *i.e.*, as a "special function" of Note 5(E), due to the manner in which printers in the subheadings of

heading 8471, 8443, and 8472 are specified and arranged in the year 2004 version of the HTSUS. All the relevant provisions appear to implicate only the machines' operations, not the quality of what they can produce.

Certainly heading 8443 covers "printing machinery used for printing," and one might surmise that offset printers can provide excellent quality, but that part of the heading is only qualified "by means of printing type, blocks, plates, cylinders and other printing components of heading 8442" as noted by Customs in HQ 965051. While heading 8443 also[24] specifically covers "ink-jet printing machines other than those of heading 8471" (clearly indicating that not all ink jet printers are classifiable in heading 8443), the iGen3 (a) is not an ink-jet printer, (b) it is not the functional equivalent of an ink-jet printer, and, more importantly, (c) it is not a "specific function" printer, as it is multi-functional. *See* JSMF ¶ 30.

The meaning of a "specific function" machine of Note 5(E) appears to have been intended in the sense of a "dedicated" function, as indicated by the type of ink-jet printer (to which the defendant points) dedicated to "production of pre-press colour proofs" mentioned in EN 84.71 (2002 or earlier).[25] The "specific function" distinction is, in any event, vague in the context of this case, as ink-jet printers are, generally speaking, rather known for their multi-functionality, especially insofar as their unique technology allows printing of a wide variety of substances, such as edible inks or even organic tissue, onto a wide variety and size of substrates or surfaces, such as rice paper, glass, wood, fabric, or even automobiles.[26] *Cf., e.g., Kopykake Enterprises, Inc. v. the Lucks Company*, 264 F.3d 1377 (Fed. Cir. 2001); *Mead Digital Systems Inc. v. A.B. Dick Co.*, 723 F.2d 455, 456 (6th Cir. 1983) ("ink jet printing[ ] is now used by businesses which require high speed printing or printing on soft or other unusual surfaces" and "[i]nk jet printers are particularly well-suited for computer print-outs

[24] Not pertinent here, heading 8443 lastly covers "machines for uses ancillary to printing, and parts thereof".

[25] An example thereof might be the IRIS series of ink-jet printers, first introduced in the mid1980s as a continuous flow ink system specifically designed for interface with digital pre-press systems. *See*, *e.g., Andren & Associates v. Scitex American Corp.*, No. 95-C-276, 1996 U.S. Dist. LEXIS 16954, (N.D. Ill. Nov.8, 1996) (contract dispute over Iris model 4012). *Cf.* Uwe Stainmueller and Jürgen Gulbins, *The Art of Digital Fine Art Printing* (Mar. 2006 ed.), pp. 1–21 ("[t]he IRIS printer, at an early stage of inkjet history, provided a reasonably high print speed and considerable resolution and image quality, while print permanence and maintenance were problems") *with Avecia, Inc. v. United States*, 30 CIT 1956, 1359–62 (describing evolution of color ink-jet inks in addressing such problems).

[26] A further distinction from ink-jet printers, or rather ink-jet printing technology, is that laser printers like the iGen3 appear limited at this point in time by size, type and thickness of substrate that can be accommodated, in contrast to ink-jet printing technology, and at least insofar as the papers here indicate. *See*, *e.g.*, Pl's Br. at 2–3; JSMF ¶¶ 22–28.

and labeling"). Implicitly, by contrast, the digital printers specified as covered by heading 8471 are not so limited or dedicated, and neither is the iGen3, the parties having agreed that it is multi-functional.

The defendant, however, makes much of the fact that the plaintiff marketed the iGen3 as a complement to or even a rival of offset printing, or that some use the iGen3 to perform print jobs that in an earlier age might have been relegated to offset. These points also do not dispose of the iGen3's classification, because the iGen3's functionality is far more flexible than that of a traditional offset printer. Traditional printers cannot vary the content of the document or image, let alone perform short run, on demand printing, which, the parties apparently agree, is a function of a digital process. Performing such a process does not remove the printer from the definition of an ADP unit; it simply indicates a situation where an operation, formerly performed by a non-ADP device, is now performed as an ADP function.[27]

Unlike headings 8443 and 8472, heading 8471 encompasses a laser printer as a unit of an ADP machine of heading 8471, as indicated in the subheadings therefor, whereas neither heading 8443 nor heading 8472 nor the subheadings thereof specify laser printers, only "other" printers. Unlike heading 8443, which has classification provisions for "other" offset printers based on weight, nothing in heading 8471 indicates that printers thereof must not exceed a certain size, nor is there any indication of "special" functionality that would exclude printers that meet the requirements of Note 5(B) from heading 8471. And unlike headings 8443 and 8471, heading 8472 (in which Customs determined the iGen3 classifiable) and its subheadings, *see supra*, describe printers that are even further removed from descriptive coverage of the iGen3 for the reasons aforesaid. Heading 8472 is intended to cover the kind of "office work" machinery explained by EN 84.72, and it is clear, in accordance with such explanation, that the iGen3 is not mere "office work" machinery and is unlike any of the printers described by heading 8472. *Cf.* NY J86411, *supra*.

The iGen3, being a far more technologically sophisticated machine than an offset printer of heading 8443 or the kinds of "other office machine" printers specified by heading 8472, apparently does not

[27] In this regard, the plaintiff makes a compelling point: "Under the [defendant's] logic, a computer keyboard or a printer might be classified as a 'typewriter' because they perform writing functions (keystrokes, placing marks on paper) formerly done by a typewriter. Indeed, when pounding away on a keyboard, even in 2015, a typical computer user is likely to say that he or she is 'typing,' though there might be no typewriter in the vicinity. Similarly, computers today are used to perform a wide range of functions formerly performed by the 'word processors' of heading 8469, but they are not classified in that heading because heading 8471 and its associated chapter notes more fully and specifically describe them." Pl's Reply at 14.

"function" like an offset printer or the other office machine printers of heading 8472, and there is no requirement in heading 8471 that printers thereof cannot exceed a certain print quality. Nor, for that matter, is there any indication of print quality in heading 8443 or subheadings thereof. The only distinction among the subheadings of heading 8471 is with respect to the number of pages per minute that are printable. Subheading 8471.60.51.00 in particular covers an ADP machine "output unit[ ]" in the form of a "laser" printer "[c]apable of producing more than 20 pages per minute", which provision of the year 2004 version of heading 8471 provides the most accurate HTSUS description of that aspect of the iGen3's functionality.

Lastly, the court notes in passing that the fact that language of subheading 8471.60.51.00, along with other printer subheadings of heading 8471, has since been moved to within heading 8443 does not speak in favor of holding the iGen3 classifiable at the time of its importation in 2004 under that heading (8443), but actually makes the conclusion that the iGen3 is classifiable under the language of that subheading, as it existed at the time under heading 8471, more compelling.

V. *Conclusion*

All in all, the evolution of Johannes Gutenberg's machine to unimpressive digital print is rather impressive. That the iGen3 can perform operations formerly or alternatively performed by non-ADP machines does not mean that it is not an ADP unit, because, as Customs earlier pointed out, the tariff nomenclature is designed to adapt to changing technologies. *See* HQ 959651, *supra*, at 6 (citations omitted). The meaning of automatic data processing machine "will be held to embrace all articles subsequently created [that] come within its scope." *Sears, Roebuck & Co. v. United States*, 46 C.C.P.A. 79, 82 (1959). Accordingly, judgment will be entered in the plaintiff's favor.

Dated: November 23, 2015
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE