

U.S. Customs and Border Protection

Slip Op. 12–141

DOWNHOLE PIPE & EQUIPMENT LP AND DP-MASTER MANUFACTURING CO., LTD. Plaintiffs, v. UNITED STATES, Defendant, and VAM DRILLING USA, TEXAS STEEL CONVERSIONS, INC., ROTARY DRILLING TOOLS, TMK IPSCO, and U.S. STEEL CORP., Defendant-Intervenors.

Before: Nicholas Tsoucalas, Senior Judge
Court No.: 11–00081

OPINION AND ORDER

Held: Plaintiffs’ Motion for Judgment on the Agency Record is granted in part because the final determination issued by the Department of Commerce was not supported by substantial evidence and is not in accord with the law as to drill pipe green tube and labor wage rate surrogate values, but is denied in all other respects.

Dated: November 20, 2012

Lehnardt & Lehnardt, LLC, (Mark B. Lehnardt); Chen Law Group, LLC, (Irene H. Chen) for Downhole Pipe & Equipment, LP and DP- Master Manufacturing Co., Ltd., Plaintiffs.

Stuart F. Delery, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Courtney S. McNamara*); Office of Chief Counsel for Import Administration, United States Department of Commerce, *Nathaniel J. Halvorson*, Of Counsel, for the United States, Defendant.

Schagrin Associates, (Roger B. Schagrin, John W. Bohn, and Michael J. Brown) for VAM Drilling USA, Texas Steel Conversions, Inc., Rotary Drilling Tools, TMK IPSCO; *Skadden Arps Slate Meagher & Flom, LLP, (Jeffrey D. Gerrish, Luke A. Meisner, and Robert E. Lighthizer)* for United States Steel Corp., Defendant-Intervenors.

TSOUCALAS, Senior Judge:

Introduction

Plaintiffs Downhole Pipe & Equipment, LP, and DP-Master Manufacturing Co., Ltd. (“Downhole” and “DP-Master,” respectively, and “DP,” collectively) move pursuant to USCIT Rule 56.2 for judgment upon the agency record challenging the determination of the International Trade Administration of the United States Department of Commerce (“Commerce”) in *Drill Pipe From the People’s Republic of China (“PRC”),* 76 Fed. Reg. 1,966 (Jan. 11, 2011) (“*Final Determination*”). VAM Drilling USA, Inc., Rotary Drilling Tools, Texas Steel

Conversions Services, Inc., United States Steel Corp., (collectively, “defendant-intervenors”), and Commerce oppose DP’s motion.

BACKGROUND

On December 30, 2009, VAM Drilling USA, Inc., TMK IPSCO, Texas Conversion Services, Inc., Rotary Drill Tools, and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Works International Union, AFL-CIO, CLC (collectively, “petitioners” or “domestic industry”) filed petitions with Commerce seeking the imposition of antidumping and countervailing duties on drill pipe from the PRC. Letter from Roger B. Schagrin to the Secretary of Commerce, Re: Petitions for the Imposition of Anti-dumping and Countervailing Duties: Drill Pipe From the PRC, Public Rec. 1 at 1–4.¹ The parties do not dispute that drill pipe is a specialized high-strength iron alloy tube manufactured in three phases. “First, seamless tubes — called ‘green tubes’ — are produced from raw steel.” Pls.’ Am. Mem. Supp. Mot. J. Agency R. (“Pls.’ Br.”) at 3–4. Second, a manufacturer uses complex and expensive processes to “upset” and heat treat green tube so as to thicken the ends and increase the yield strength to the desired American Petroleum Institute (“API”) grade. *Id.* at 3–6. Raw green tube can be processed into “oil country tubular goods” (“OCTG”) — tubular products other than drill pipe, such as casing and finished tubing — as well, but the parties dispute the interchangeability of drill pipe green tube and OCTG green tube. *See* Pls.’ Br. at 32–33; Def.’s Mem. Opp’n Pls.’ Br. (“Def.’s Br.”) at 11–15. Lastly, a manufacturer friction-welds a specialized “tool joint” to the ends of the heat-treated and upset tube to complete the drill pipe. *Id.* at 3, 7–8. A manufacturer may also apply a protective coating or other post-production enhancements to the drill pipe. *See* Pls.’ Br. at 30–31, 35–36.

DP-Master purchases raw green tubes that it upsets and heat-treats to desired API specifications. DP-Master manufactures some, but not all, of its tool joints in-house and friction-welds them to the upset and heat-treated green tubes. DP-Master uses an unaffiliated third party subcontractor — referred to in these proceedings as a “toller” — to apply a protective phosphate coating to its completed drill pipes. DP-Master sells finished drill pipe and other goods directly to companies in the U.S. PR 62 at A-5 to A-6, A-26 to A-27, Ex. A-19; PR 107 at D-5 to D-6.

¹ Hereinafter all documents in the public record will be designated “PR” and all documents in the confidential record designated “CR” without further specification except where relevant.

Domestic industry proposed a broad scope for the antidumping and countervailing duty investigations: “[D]rill pipe . . . whether or not conforming to [API] or non-API specifications, whether finished (with or without tool joints attached) or unfinished (including green tubes), and without regard to the specific chemistry of the steel . . . [and excluding] tool joints not attached to drill pipe.” PR 1 at 7. In its comments from January 15, 2010 and its comments from January 19, 2010, DP-Master argued that the proposed scope overlapped with an existing investigation into OCTG from China. PR 14 at 2–5; PR 19 at 1–4. Commerce and domestic industry then agreed on revised scope language, which among other changes included a new exception: “The scope does not include . . . unfinished tubes for casing or tubing covered by any other antidumping or countervailing duty order.” PR 20 at 2. Commerce initiated the investigation based on industry support calculated using the revised scope. *Drill Pipe from the PRC: Initiation of Antidumping Duty Investigation*, 75 Fed. Reg. 4,531 (Jan. 28, 2010) (“*Initiation*”).

During the investigation, Commerce directed parties to report factor of production data using “actual quantities consumed to produce the merchandise under investigation.” PR 53 at D-2. In the event that a party could not provide such information, it was to “provide a detailed explanation of all efforts undertaken to report the actual quantity of each [factor of production] consumed to produce the merchandise.” *Id.* DP-Master notified Commerce that it was having difficulty obtaining the requested factor of production information from its phosphate toller. PR 107 at D-5 to D-6; PR 115 at 6. Nevertheless, once it did report what limited factor of production data it could obtain from its toller, DP-Master did not reveal that it had actually provided data based on purchased quantities instead of actual quantities consumed. *Drill Pipe from the PRC: Issues and Decision Memorandum for the Final Determination* (Jan. 3, 2011), PR 258 at 45 (“*I&D Memorandum*”).

In *Drill Pipe from the PRC: Preliminary Determination of Sales at Less than Fair Value and Affirmative Determination of Critical Circumstances, and Postponement of Final Determination*, 75 Fed. Reg. 51,004 (Aug. 18, 2010) (“*Preliminary Determination*”),² Commerce found that DP-Master was selling drill pipe in the U.S. at less than fair value. Commerce selected India as the primary surrogate coun-

² Commerce published corrections to the *Preliminary Determination* to address a ministerial error concerning Baoshan Iron and Steel Co., a respondent below not participating in the present action. *Drill Pipe from the PRC: Notice of Correction to the Preliminary Determination of Sales at Less Than Fair Value and Affirmative Determination of Critical Circumstances, and Postponement of Final Determination*, 75 Fed. Reg. 51,014 (Aug. 18, 2010).

try, and used Indian data to calculate surrogate values for two key drill pipe inputs relevant to this case. First, Commerce calculated a surrogate value for green tube by averaging listings for prices and offers for J/K-55 grade tube, a finished product similar to green tube, from the January and March 2009 issues of “Metal Bulletin Research” (“MBR”). PR 186 at 7. Second, Commerce established a surrogate value for the tool joints that DP-Master purchased using average unit values of imports under Indian Harmonized Tariff Schedule (“IHTS”) category 8431.43.90.³ *Id.* Commerce maintained the *Initiation* scope over DP-Master’s objections, but, given “concerns regarding the imprecision of the definition of ‘green tubes suitable for drill pipe,’” Commerce declared that it would remove green tube from the scope unless a more definite physical distinction between drill pipe green tube and OCTG green tube emerged in future submissions. PR 187 at 8.

In the *Preliminary Determination*, Commerce also found that DP-Master was “unable to obtain” certain data from its phosphate toller. *Id.* at 28. To fill gaps in the data, DP-Master offered “estimated [factors of production] based on [its] knowledge of the production process,” which Commerce found to be “a reasonable proxy to account for the production costs associated with [DP-Master’s] . . . tolled merchandise.” *Id.* When Commerce sought to verify the information DP-Master did obtain and report, however, it discovered “for the first time” that DP-Master did not report quantities in the manner Commerce requested, and that DP-Master could not provide records necessary for verification. *I&D Memorandum* at 45–47.

Following verification and the final comment period, Commerce issued the *Final Determination*, six aspects of which are presently on appeal. First, Commerce narrowed the scope by adding three physical criteria to the description of subject green tube. Second, in calculating DP-Master’s surrogate financial ratio, Commerce elected to use financial information solely from the Indian company Oil Country Tubular, Ltd. Third, contrary to its finding in the *Preliminary Determination*, Commerce determined that the average unit value of imports under IHTS categories 7304.29 and 7304.23 was the best available surrogate value for drill pipe green tube. Fourth, at DP-Master’s urging, Commerce abandoned IHTS category 8431.43.90 and instead used the same surrogate value it chose for the tool joints DP-Master produced in-house to calculate the surrogate value for the tool joints DP-Master purchased. Without prompting from DP-Master, however,

³ Commerce calculated average unit values from IHTS categories using the Global Trade Atlas, which is published by Global Trade Information Services, Inc. Global Trade Information Services compiles information it receives directly from the Indian Ministry of Commerce. PR 186 at 2.

Commerce multiplied the in-house tool joint surrogate value by the applicable financial ratio to account for the selling, general and administration expenses (“SG&A”), profit, and overhead that would be reflected in prices offered on the open market. Fifth, Commerce calculated the surrogate value for labor by averaging rates in all countries that produced subject goods, regardless of how much each country actually produced. Lastly, Commerce found that DP-Master’s failures with respect to reporting its phosphate toller’s factor of production data warranted the application of facts otherwise available and an adverse inference therefrom. *I&D Memorandum* at 10–12, 14–22, 24–32, 44–47.

Subsequent to the filing of this action, the United States Court of Appeals for the Federal Circuit (“Federal Circuit”) held that the simultaneous application of nonmarket methodology and countervailing duty law was contrary to the Tariff Act of 1930. *GPX Int’l Tire Corp. v. United States*, 666 F.3d 732 (Fed. Cir. 2011), *superseded by statute*, Application of Countervailing Duty Provisions to Nonmarket Economy Countries, Pub. L. No. 112–99, 126 Stat. 265 (effective Mar. 13, 2012). Commerce also issued a countervailing duty order against DP-Master below. *Drill Pipe from the PRC: Countervailing Duty Order*, 76 Fed. Reg. 11,758 (Mar. 3, 2011) (“*Countervailing Duty Order*”).

JURISDICTION and STANDARD OF REVIEW

The court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) and section 516A(a)(2)(B)(iii) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(B)(iii) (2006).⁴ Additionally, the court will uphold Commerce’s determinations in administrative reviews unless they are “unsupported by substantial evidence on the record, or otherwise not in accordance with the law.” 19 U.S.C. § 1516a(b)(1)(B)(I).

DISCUSSION

DP argues that the *Final Determination* is contrary to law and unsupported by the record with respect to: scope; surrogate financial ratio; surrogate values for drill pipe green tube, purchased tool joints, and labor; and the partial application of adverse facts available. DP also challenges the *Final Determination* as contrary to law on the basis that it is being applied simultaneously with the *Countervailing Duty Order*. See *GPX Int’l Tire Corp.*, 666 F.3d at 737. For the reasons outlined below, the *Final Determination* is affirmed in all respects except with regard to the surrogate values for drill pipe green tube and labor.

⁴ All further citations to the Tariff Act of 1930 are to the relevant provisions of Title 19 of the United States Code, 2006 edition, and all applicable supplements thereto.

I. Scope

DP argues that “the record lacks substantial evidence to support Commerce’s three criteria for including green tube within the scope” of the *Final Determination*⁵ because some green tube fitting its criteria are also subject to antidumping and countervailing duty orders on OCTG.⁶ Pls.’ Br. at 32; see *OCTG from the PRC*, 75 Fed. Reg. 28,551 (May 21, 2010) (antidumping duty order); *OCTG from the PRC*, 75 Fed. Reg. 3,203 (Jan. 20, 2010) (countervailing duty order). DP-Master does not export green tube to the U.S., and neither it nor any party below have requested a scope determination pursuant to 19 C.F.R. § 351.225 (2012). Instead, DP requests that “this Court . . . remand to Commerce to exclude green tube from the scope of the orders, to recalculate industry support, and to revoke the AD and CVD orders if industry support is lacking.” Pls.’ Br. at 33. Because DP seeks remand to reassess an industry support figure calculated using the *Initiation* scope based on a purported deficiency in the *Final Determination* scope, its challenge turns on whether modifying the scope during the course of an antidumping investigation requires Commerce to recalculate industry support.

To initiate an antidumping duty investigation, Commerce must “determine that the petition has been filed by or on behalf of an industry.” 19 U.S.C. § 1673a(c)(1)(A)(ii). The Act requires Commerce to complete the industry support determination within twenty days of the filing of a petition. *Id.* § 1673a(c)(1)(A). Although interested parties may comment in the interim, “[i]t is for Commerce to determine whether those requirements have been met, and [it] has broad discretion in reaching its decision.” *Minebea Co. v. United States*, 16 CIT 20, 21, 782 F. Supp. 117, 119 (1992), *aff’d*, 984 F.2d 1178 (Fed. Cir. 1993); see *Gulf States Tube Div. of Quanex Corp. v. United States*, 21 CIT 1013, 1015–19, 981 F. Supp. 630, 634–38 (1997). “After [Commerce] makes a determination with respect to initiating an investigation, the determination regarding industry support shall not be

⁵ The scope of the *Final Determination* covers:

unfinished drill collars (including all drill collar green tubes) and unfinished drill pipe (including drill pipe green tubes, which are tubes meeting the following description: seamless tubes with an outer diameter of less than or equal to 6 5/8 inches[,] . . . containing between 0.16 and 0.75 percent molybdenum, and containing between 0.75 and 1.45 percent chromium). The scope does not include tool joints not attached to the drill pipe, nor does it include unfinished tubes for casing or tubing covered by any other antidumping or countervailing duty order.

Final Determination, 76 Fed. Reg. at 1967.

⁶ DP identifies “P-110” as a finished OCTG product made from green tube that is seamless, can have an outside diameter of less than 6 5/8 inches, and is typically (though not required to be under API standards) alloyed with molybdenum and chromium within the parameters of the *Final Determination*. See Pls.’ Br. at 32; CR 103 at 33–34, 45.

reconsidered.” 19 U.S.C. § 1673a(c)(4)(E). In other words, “Commerce is prohibited from reconsidering industry support after the initiation of an investigation.” *P.T. Pindo Deli Pulp & Paper Mills v. United States*, 36 CIT , , 825 F. Supp. 2d 1310, 1323 (2012) (citing 19 U.S.C. § 1673a(c)(4)(E)); see *Yantai Xinke Steel Structure Co. v. United States*, 36 CIT , , Slip Op. 12–95, at 11 (July 18, 2012) (“[R]equiring [Commerce] to examine record evidence in addition to that contained in the petition in no way disturbs the ‘finality’ of its decision to initiate an investigation.”).

DP’s sole argument — that some green tube used to produce OCTG meet the technical specifications of the *Final Determination* and are thus subject to two antidumping orders — has little bearing on Commerce’s decision to initiate the investigation. 19 U.S.C. § 1673a(c)(4)(E). In fact, DP-Master conceded below that *Initiation* scope, “distinguishing green tube by end-use, *might have remedied the overlap* if it had been published before the OCTG investigation was initiated.”⁷ PR 33 at 3 (emphasis added). The *Final Determination* scope contains the same end-use distinction as the *Initiation*, but DP does not analyze the purported overlap in light of this potentially remedial exception. See Pls.’ Br. at 32–33. Because Commerce is “prohibited” from reevaluating industry support during the course of an investigation regardless of whether the scope is modified, see *P.T. Pindo Deli Pulp*, 36 CIT at , 825 F. Supp. 2d at 1323, and because DP does not challenge the *Initiation* scope here, DP’s request for remand to reevaluate industry support must be denied.

Even if DP’s challenge were procedurally appropriate, it would fail on a substantive basis. See *id.* at , 825 F. Supp. 2d at 1323 (prohibition against Commerce from reconsidering industry support “does not limit” the court’s power to review it). “Commerce owes deference to the intent of the proposed scope of an antidumping investigation as expressed in an antidumping petition,” *Ad Hoc Shrimp Trade Action Comm. v. United States*, 33 CIT , , 637 F. Supp. 2d 1166, 1174–75 (2009), and Commerce properly identified domestic industry’s intent to investigate drill pipe green tube. In the *Initiation*, Commerce observed that it was “clear throughout Petitioners’ submissions that their use of the term ‘drill pipe’ includes ‘green tubes’ for drill pipe production only,” not green tubes for OCTG production. PR 22, Att. II at 8. In supplements to the petition, domestic industry described how the OCTG and drill string channels of distribution are distinct and

⁷ Commerce initiated the OCTG investigation well before it settled on the revised scope language to initiate the present investigation. See *OCTG from the PRC*, 74 Fed. Reg. 20,706 (May 5, 2009) (initiation notice). DP-Master may actually have been referring to the publication of the countervailing duty order on OCTG from the PRC. Compare PR 20 at 1–2, with *OCTG from the PRC*, 75 Fed. Reg. 3,203 (Jan. 20, 2010) (countervailing duty order).

that “the companies that process green tubes into finished drill pipe intimately know the few producers of the appropriate green tube.” PR 7 at 5–6. Domestic industry also provided three prior International Trade Commission determinations describing why technical specifications and customer expectations led it to treat green tube for drill pipe as a “distinct like product” from green tube for OCTG. *Id.* Ex. 1 (excerpts from *OCTG from Argentina, Austria, Italy, Japan, Korea, Mexico, and Spain*, USITC Pub. 2911, Inv. Nos. 701-TA-363 and 701-TA-364 and 731-TA-711–717 (1995) (investigation notice), *OCTG from Argentina, Italy, Japan, Korea and Mexico*, USITC Pub. 3434, Inv. Nos. 701-TA-364 and 731-TA-711 and 731-TA-713–716 (June 2001) (first sunset review), and *OCTG from Argentina, Italy, Japan, Korea, and Mexico*, USITC Pub. 3923, Inv. Nos. 731-TA-711 and 731-TA-713–716 (June 2007) (second sunset review)). Given the end-use exception and the extensive evidence showing a distinction in channels of distribution, customer expectations, and technical specifications, it would not be appropriate for this court to usurp Commerce’s exercise of discretion in defining the scope of the *Initiation*. See *Ad Hoc Shrimp Trade*, 33 CIT at , 637 F. Supp. 2d at 1174–75. A thorough review of the record reveals that Commerce properly determined that the petition met the support threshold required to commence the investigation, CR 15 Att. 2; PR 22 Att. 2, and as such, DP’s request must be denied.

II. Surrogate Values

“Commerce ordinarily determines the normal value of subject merchandise of an exporter or producer from a nonmarket economy . . . country ‘on the basis of the value of the factors of production utilized in producing the merchandise.’” *Shantou Red Garden Foodstuff Co. v. United States*, 36 CIT , , 815 F. Supp. 2d 1311, 1316 (2012) (quoting 19 U.S.C. § 1677b(c)(1)). This procedure seeks “to assess the ‘price or costs’ of factors of production” of subject merchandise in a comparable market economy “in an attempt to construct a hypothetical market value of that product” in the nonmarket economy. *Nation Ford Chem. Co. v. United States*, 166 F.3d 1373, 1375 (Fed. Cir. 1999). Because “the process of constructing foreign market value for a producer in a nonmarket country is difficult and necessarily imprecise,” *id.* at 1377 (quoting *Sigma Corp. v. United States*, 117 F.3d 1401, 1407 (Fed. Cir. 1997)), Commerce must use the “best available information” to select surrogate prices for each factor of production. 19 U.S.C. § 1677b(c)(4). Commerce “normally will use publically available information to value factors,” 19 C.F.R. § 351.408(c)(1), and it prefers to use infor-

mation “reflect[ing] a broad market average,” “contemporaneous with the period of review,” “specific to the input in question,” and “exclusive of taxes on exports.” *Fuwei Films (Shandong) Co. v. United States*, 36 CIT , , 837 F. Supp. 2d 1347, 1350–51 (2012).

In evaluating Commerce’s selection of the best available surrogate value under the substantial evidence standard, “[t]he Court’s role is not to make that determination anew, but rather to decide ‘whether a reasonable mind could conclude that Commerce chose the best available information.’” *China First Pencil Co. v. United States*, 34 CIT , , 721 F. Supp 2d 1369, 1375 (2010) (quoting *QVD Food Co. v. United States*, 34 CIT , , 721 F. Supp. 2d 1311, 1315 (2010), *aff’d*, 658 F.3d 1318 (Fed. Cir. 2011)). It is critical that Commerce’s selection “establishes the antidumping margins as accurately as possible.” *Zhejiang DunAn Hetian Metal Co. v. United States*, 652 F.3d 1333, 1341 (Fed. Cir. 2011) (quoting *Shakeproof Assembly Components v. United States*, 268 F.3d 1376, 1382 (Fed. Cir. 2001)). Nevertheless, Commerce has “broad discretion to determine the ‘best available information’ in a reasonable manner on a case-by-case basis.” *Goldlink Indus. Co. v. United States*, 30 CIT 616, 619, 431 F. Supp. 2d 1323, 1327 (2006) (quoting *Timken Co. v. United States*, 25 CIT 939, 944, 166 F. Supp. 2d 608, 616 (2001)).

A. Surrogate Financial Ratio

Commerce selected Oil Country Tubular, Ltd. (“OCTL”) as the only financial surrogate for DP-Master in both the *Preliminary Determination* and *Final Determination*. DP argues that Commerce should have averaged financial statements from OCTL with those from Jindal Saw, another Indian producer. DP’s challenge is twofold: first, DP questions OCTL’s suitability as a surrogate on the basis that it has a lower drill pipe production capacity, provides more services, and produces a wider variety of expensive goods than DP- Master; second, DP disputes Commerce’s finding that Jindal Saw was too vertically integrated to be comparable to DP-Master. In essence, DP argues that OCTL is just as poor a match for DP Master’s production experience as Jindal saw, meaning that Commerce’s decision to use only OCTL as a surrogate was unsupported by substantial evidence.

To account for factory overhead, SG&A, and profit in a nonmarket economy context, Commerce uses financial statements from “one or more surrogate companies.” *Fujian Lianfu Forestry Co. v. United States*, 33 CIT , , 638 F. Supp. 2d 1325, 1353 (2009). “To serve as an adequate proxy for the respondent companies being reviewed, the surrogate companies selected ideally should produce comparable

merchandise” in the surrogate country. *Id.* (citing 19 C.F.R. § 351.408(c)(4)). In selecting an adequate proxy, “Commerce ‘narrow[ed] the list of financial statements meeting this criterion by consider[ing] the quality and specificity of the statements,’” *Qingdao Sea-Line Trading Co. v. United States*, 36 CIT , Slip Op. 12–39 at 36 (Mar. 21, 2012) (citing *Dorbest Ltd. v. United States*, 604 F.3d 1363, 1374 (Fed. Cir. 2010)), including whether they show a comparable level of vertical integration. *Mittal Steel Galati S.A. v. United States*, 31 CIT 1121, 1139, 502 F. Supp. 2d 1295, 1311 (2007); see *Air Prods. & Chems., Inc. v. United States*, 22 CIT 1125, 31 F. Supp. 2d 999 (1998). Although “Commerce generally finds that the greatest number of financial statements yields the most representative data from the relevant manufacturing sector,” *Fujian Lianfu*, 33 CIT at , 638 F. Supp. 2d at 1353, “Commerce is not justified in sacrificing quality for quantity.” *Dorbest Ltd. v. United States*, 30 CIT 1671, 1717, 462 F. Supp. 2d 1262, 1302 (2006). As such, Commerce must avoid averaging financial statements that would have an unjustifiably distortive effect on the resulting surrogate financial ratio. *Id.* at 1716–24, 462 F. Supp. 2d at 1301–08.

The first prong of DP’s argument focuses on differences between OCTL and DP-Master. DP argues that “OCTL’s [oil tubular goods] production capacity vastly overshadows its drill pipe production capacity, which itself is only 1/10 of DP-Master’s.” Pls.’ Br. at 30–31. Commerce found that DP-Master and OCTL were at an “identical level of integration” because both “purchas[e] green tube that is then processed into drill pipe.” *I&D Memorandum* at 22. As DP argues elsewhere, oil tubular goods are comparable to drill pipe because the production of both requires modification of raw green tubes. Pls.’ Br. at 5–6, 13, 24, 32–33; CR 103 at 2–10 & Ex. 2. Because the processes for producing drill pipe and oil tubular products are at least comparable, see 19 C.F.R. § 351.408(c)(4), DP’s attempt to discredit OCTL’s suitability on the basis that it has a lower capacity to produce drill pipe is unpersuasive. DP also argues that “OCTL provides services, such as phosphating, plastic coating, reconditioning, and rethreading of drill pipe, and field inspection of tubulars,” whereas “DP-Master outsources some [of those] services . . . and does not engage in any reconditioning, rethreading, or field inspection,” and that “OCTL manufactures a much wider range of products[] than DP-Master,” including many advanced and expensive specialty tools. Commerce recognized that OCTL offers many goods and services that DP-Master does not and that such production experience weighs against its viability as a surrogate. *I&D Memorandum* at 22.

The second prong of DP's argument is that Commerce improperly rejected Jindal Saw as a surrogate because it "does not appear to be as fully-integrated as Commerce believed." Pls.' Br. at 32. DP supports its argument with a quote from a Jindal Saw 2009–2010 annual report: "Jindal 'focused on value added production' and reduced production of pig iron by 81.7% 'to [a] negligible level.'" Pls.' Br. at 31 (quoting PR 218 at 29, 71) (alteration in Pls.' Br.). This quotation is irrelevant for two reasons. First, although pig iron is an input for some steel products, there is no indication that Jindal Saw used its pig iron to make pipes.⁸ See PR 218 at 26–29. Second, contrary to DP's assertion, the annual report shows that Jindal Saw's consumption of raw iron ore and iron fines *increased* by 20% along with its production of pipes. PR 218 at 71. In other words, DP's selective quotation does not undermine Commerce's finding that Jindal Saw is more vertically integrated than DP-Master because it "begin[s] its production at the iron ore stage." *I&D Memorandum* at 22.

Furthermore, the same annual report demonstrates that Jindal Saw produces "certain out of scope merchandise that [DP-Master] does not," just like OCTL. See *I&D Memorandum* at 22. In addition to non-drill pipe metal tube products, Jindal Saw "provides various value added products like pipe coatings, bends and connector castings," PR 218 at 19, which DP does not claim to provide. Jindal Saw also produces and sells steel plates, steel coils, and pig iron, *id.* at 29, products DP does not claim to produce. Finally, Jindal Saw's wholly-owned subsidiary "owns and operates businesses in three core sectors of the Indian economy," none of which bear any relation to producing drill pipe or other oil extraction products: "Water, Waste Water and Solid Waste Management[;] Domestic Transportation & Logistics[; and] Transportation Equipment Fabrication." *Id.* at 8, 63–64, 89–90. Jindal Saw reaches as wide across as it does far down the stream of production, and as such it is equally subject to the criticism DP applies to OCTL.

Commerce's decision to use only OCTL as a financial surrogate is supported by substantial evidence in the record. OCTL and Jindal Saw both produce nonsubject goods, but Jindal Saw has a high level of vertical integration that neither DP-Master nor OCTL possess. On these facts, Commerce's choice not to average OCTL's data with

⁸ The annual report lists pig iron with other finished products, not raw materials. PR 218 at 71. Furthermore, the quoted 81.7% reduction in pig iron appears on a table labeled "Company's sales mix" alongside sales of steel plates, steel coils, and steel pipes. PR 218 at 29, 71. These facts imply that Jindal produced pig iron for sale, not as an input for green tubes.

distortive data from Jindal Saw was reasonable. Therefore, DP's request to remand for redetermination of the financial surrogate ratio must be denied.

B. Surrogate Value for Drill Pipe Green Tube

In the *Preliminary Determination*, Commerce calculated a \$1262.50 surrogate value for green tube by averaging prices and offers for J/K-55 grade tube listed in the January and March 2009 issues of MBR. As Commerce stated, “[MBR] is a widely respected steel industry journal produced outside the context of this case . . . [and] J/K55 is the most similar in yield strength to drill pipe green tubes, a key characteristic in green tubes.” PR 186 at 7. In the *Final Determination*, however, Commerce opted instead to use average unit values of goods imported under IHTS categories 7304.29 and 7304.23 to calculate a \$2,511.67 surrogate value. *I&D Memorandum* at 31–32. One of the reasons Commerce changed its mind was that, in its opinion, the IHTS categories actually “capture” green tube, whereas the MBR issues described J/K-55 grade tube, a product “that is only comparable to” green tube.⁹ *Id.* DP contends that Infodrive India listings for IHTS categories 7304.29 and 7304.23 show that imports under both categories were actually *devoid* of green tube and dominated by high-priced finished products, meaning that Commerce did not base its determination on substantial evidence.¹⁰ Pls.’ Br. at 15–17.

This Court has recognized Infodrive’s utility in specifying descriptions of products at the moment of import as a supplement to aggregated IHTS data. *See Dorbest Ltd.*, 30 CIT at 1695–98, 462 F. Supp. 2d at 1284–86 (2006); *Zhejiang*, 652 F.3d at 1342. Infodrive is not a perfect tool, *Zhejiang*, 652 F.3d at 1342, and so Commerce need not rely on Infodrive data that is incomplete or demonstrably inaccurate. *Globe Metallurgical, Inc. v. United States*, 33 CIT , , Slip Op. 09–37 at 7–8 (May 5, 2009), *appeal dismissed per stipulation*, 449 Fed. App’x 9 (Fed. Cir. 2010); *Calgon Carbon Corp. v. United States*, 35 CIT , , Slip Op. 11–21 at 17 (Feb. 17, 2011). Nevertheless, this Court has consis-

⁹ Commerce also rejected the MBR data as derived from a time frame “so isolated . . . as to be potentially subject to temporary market fluctuations” and listing mere “offers for sale,” whereas the IHTS categories are transaction prices “fully contemporaneous with the POI [representing] broad market average prices in India during the entire POI.” *Id.* at 31–32.

¹⁰ DP also alleges that Commerce issued its determination contrary to law because “Commerce . . . based its green-tube SV determination on a limitation that only HTS categories could be considered for selection as SV.” Pls.’ Br. at 17. Nothing in the *Final Determination* suggests that Commerce rejected DP-Master’s proposed surrogates solely because they were not IHTS categories. DP’s confusion may be a result of Commerce’s justification for describing IHTS categories 7309.23 and 7309.29 as more product specific than other Indian HTS data. *See I&D Memorandum* at 31 (“[DP-Master] has placed no evidence on the record demonstrating that a different HTS category is *more* appropriate for green tubes” (emphasis added)).

tently found that Commerce is obliged to address Infodrive data offered in rebuttal if it specifies a “definite and substantial percentage” of imports under a particular IHTS category. *Calgon Carbon*, 33 CIT at , Slip Op. 11–21 at 17; see *Zhengzhou Harmoni Spice Co. v. United States*, 33 CIT , , 617 F. Supp. 2d 1281, 1325 (2009); *Longkou Haimeng Mach. Co. v. United States*, 32 CIT 1142, 1162–65, 581 F. Supp. 2d 1344, 1361–64 (2008).

In the *Final Determination*, Commerce admitted that the Infodrive data was substantially complete and an accurate representation of imports under IHTS category 8431.43.90 in the context of explaining its selected surrogate value for tool joints. *I&D Memorandum* at 26. When it evaluated the Infodrive data with respect to green tube, however, Commerce dismissed DP-Master’s argument in one sentence: “Infodrive data placed on the record by [DP-Master] definitively show entries of green tube under . . . categories [7309.23 and 7309.29].” *I&D Memorandum* at 31. Although DP-Master argued “that these [IHTS] categories are ‘overwhelmed’ by products further along in the production process than raw green tube,” Commerce found that they were not “necessarily unrepresentative of the input” and were in fact “product-specific to the green tubes used in the production of drill pipe.” *Id.* In response to the instant motion, Commerce reiterates its position: “While J/K 55 demonstrably cannot be used to make drill pipe, the basket categories did, in fact contain prices for the green tube at issue.” Def.’s Br. at 19. Put simply, Commerce found that because IHTS averages actually “captured” green tube, as demonstrated by the Infodrive data, it was the best available surrogate value. See *I&D Memorandum* at 31–32.

Commerce’s description of the Infodrive data in the *Final Determination* is misleading to the point where it is impossible to determine whether its reliance on the IHTS data was reasonable. See *Calgon Carbon*, 33 CIT at , Slip Op. 11–21 at 17–19. Commerce determined that the IHTS data was a reasonable surrogate because the Infodrive listings “definitively show entries of green tube,” *I&D Memorandum* at 31, but of the hundreds of entries listed on the Infodrive tables, only three might be properly categorized as “definitively” green tube: two 9/9/09 entries describing “RAW-PIPE SEAMLESS” and “RAW - TBG SEAMLESS” and one 9/5/09 entry describing “RAW-PIPESEAMLESS.” See PR 162 Ex. SV-45 (tables for imports under 7304.23.90 at page 4). DP argues that there are no entries for green tube, Pls.’ Br. at 16, and indeed these three entries are also described as being “WALL MATERIAL,” implying that they may be unsuitable for the production of drill pipe. See PR 162 Ex. SV-45 (tables for imports under 7304.23.90 at page 4). Neither party thoroughly ex-

plains the other entries for “seamless pipe”¹¹ at present, but DP-Master did submit a detailed analysis of the Infodrive data below tending to show that there are in fact no green tube entries. See PR 162 at 7–17. DP-Master corroborated its interpretation below with evidence indicating that Indian green tube imports would be low during the period of investigation because of “measures taken [in late 2008] by the Indian government[] to restrict imports [of green tube] . . . from low-price producers in China.” PR 138 Ex. 3 at 10. Commerce did not address this evidence in the *Final Determination*.

Defendant-intervenors argue that the IHTS data is accurate because the finished casing and tubes actually imported under those categories are comparable to drill pipe green tube. Intervenor-Def.’s Mem. Opp’n Pls.’ Br. (“Intervenor-Def.’s Br.”) at 5–8. Specifically, “while the [IHTS] categories selected by Commerce may include products more fully advanced than green tube, these categories also include OCTG casing and tubing that have less demanding performance characteristics and may be produced from less expensive materials using less expensive processing than green tube for drill pipe.” Intervenor-Def.’s Br. at 7. As DP correctly points out, Pls.’ Reply at 3 n.2, Commerce hints at this same argument in its response to the instant motion: “[A]fter identifying green tube within the Indian customs data, Commerce determined that the data was *sufficiently* product specific.” Def.’s Br. at 19 (emphasis added). In the *Final Determination*, however, Commerce explicitly rejected MBR data for J/K-55 tubing because J/K-55 is “a product that the record demonstrates cannot be used to produce drill pipe.” *I&D Memorandum* at 31. Both J/K-55 tubing and the IHTS 7309.23 and 7309.29 imports are comparable to drill pipe green tube, and both J/K-55 and the IHTS 7309.23 and 7309.29 imports cannot be used to produce drill pipe. Consequently, if Commerce meant to say in the *Final Determination* that the IHTS categories were product specific because they captured *related* goods, then it did not adequately describe why it dismissed the MBR data. Defendant-intervenors cannot use the benefit of hindsight to justify the *Final Determination* with an analysis Commerce demonstrably could not have relied upon below.

¹¹ The record establishes a distinction between raw seamless green tube on the one hand, and finished seamless tubing on the other. CR 98 2–9 & Att. 1; CR 103 at 2–10. Given the unspecific descriptions for tube entries and the absence of entries for green tube suitable for drill pipe, the Infodrive listings are, at a minimum, ambiguous as to what kinds of pipes and tubes actually entered India under categories 7309.23 and 7309.29. See PR 162 Ex. SV-45. Even the most generous interpretation of the Infodrive data cannot support Commerce’s explicit finding that the data “definitively show entries of green tube.” *I&D Memorandum* at 31.

Commerce’s rebuttal of each of DP’s four alternative surrogates¹² in response to the instant motion does not cure its inadequate explanation of its reliance upon the IHTS data. *See Longkou Haimeng*, 32 CIT at , 581 F. Supp. 2d at 1363–64. Although Commerce is not required to address every counterargument or piece of evidence before it, *see Taian Ziyang Food Co. v. United States*, 33 CIT , , 637 F. Supp. 2d 1093, 1141 (2009), its failure here to explain evidence apparently contrary to a finding central to its determination leaves the court without the means necessary to affirm it as supported by the record. *See Taian Ziyang Food Co. v. United States*, 35 CIT , , 783 F. Supp. 2d 1292, 1331–32 (2011) (remand appropriate where there remained “serious unanswered questions” as to Commerce’s justification for selecting apparently distorted import statistics as the best available surrogate). On remand, Commerce is not barred from selecting the IHTS data — it need only explain why such data is more representative of the price for drill pipe green tube than other potential surrogate values in light of Infodrive data that appears to demonstrate that categories 7309.23 and 7309.29 do not actually “capture” green tube and are highly distorted by expensive, finished tubular goods.

C. Surrogate Value for Purchased Tool Joints

Commerce used average unit values of imports under IHTS 8431.43.90 to calculate the tool joint surrogate value in the Preliminary Determination. DP-Master objected, offering two alternatives: “petitioners’ actual experience . . . even though it is non-public and from the [U.S.],” and a value “that could be calculated from the [factors of production] information DP-Master submitted on the record prior to the preliminary determination . . . [that] would have reflected commercial reality.” PR 191 at 8–10. Commerce chose the latter in the *Final Determination*, adding “surrogate ratios for overhead, SG&A, and profit . . . to as closely as possible approximate the experience of purchasing [tool joints] from an unaffiliated supplier.” *I&D Memorandum* at 28. DP now contends that it was unreasonable for Commerce to have chosen this surrogate valuation method because petitioners’ tool joint data was in fact the best available infor-

¹² DP’s four alternatives are as follows: First, and what DP characterizes as “possibly the best viable alternative,” are May 2009 MBR descriptions of “prices” and “offers” for Indian seamless OCTG. Second, DP offers the January and March 2009 Indian prices and offers for JK-55 that Commerce used in the Preliminary *Determination* with a deflation adjustment “to account for [downward] global pricing trends.” Third, DP constructs a value by taking the cost of alloy billets and adding proprietary amounts representing the cost of processing billets into green tube. Lastly, given “that drill pipe green tube is always seamless,” DP suggests averaging Indian prices for seamless tube and adding a proprietary adjustment for chemistry. Pls.’ Br. at 19–20.

mation, and because the chosen \$10,529.40 surrogate value is much higher than the \$5571.40 value selected for tool joints DP-Master produced in-house and the comparably priced proprietary value of tool joints petitioners purchased in the U.S. Pls.' Reply at 9–10.

Commerce acted reasonably when it declined to use petitioners' data as the best available information on the record. See *QVD Food Co.*, 34 CIT at , 721 F. Supp. 2d at 1315 (citing *Goldlink*, 30 CIT at 619, 431 F. Supp. 2d at 1327). DP admits that petitioners' prices are derived from U.S. market prices and that the U.S. market is not economically comparable to the PRC, Pls.' Br. at 25–26, and it does not dispute that the chosen surrogate value is derived entirely from the primary surrogate country, India. *I&D Memorandum* at 28. DP also admits that petitioners' data is proprietary, whereas the chosen surrogate is based on public information. Pls.' Br. at 25–26. DP argues at great length that petitioners' prices are a “precise product match” for the tool joints DP-Master purchased, e.g., Pls.' Br. at 25, but it does not contest that the chosen surrogate value is also product specific.¹³ See *id.* at 24–29; *I&D Memorandum* at 27–28. Faced with a choice between two product-specific surrogate valuation methods spanning the period of investigation, this court cannot say that Commerce erred when it selected the method that was based on public data from the primary surrogate country over proprietary data from a country not economically comparable to the U.S. See *Goldlink*, 30 CIT at 619, 431 F. Supp. 2d at 1327 (“[T]he Court must defer to Commerce” if its determination below is reasonable.).

DP employs a false comparison of the \$10,529.40 surrogate value with the \$5571.40 constructed value for the tool joints it produces to raise doubts about Commerce's choice. The \$5571.40 tool joint value lacks the profit, SG&A, and overhead considerations that would be reflected in the price of tool joints offered for sale in a surrogate market, and so \$5571.40 is not an accurate representation of purchased tool joint value. See *I&D Memorandum* at 28. Furthermore, given the nature of the tool joint market, the record shows that the chosen surrogate value is not aberrational when compared to the

¹³ The most direct argument DP makes challenging product specificity has no basis in the law. DP argues that “because the [chosen surrogate] is not a value for tool joints at all, but rather is based upon the sum of values of other products,” Commerce ignored “the statutory requirement to ‘determine the normal value of the subject merchandise on the basis of the factors of production utilized in producing the merchandise.’” Pls.' Br. at 29. However, this Court has held that “assigning a surrogate value to the factors of production going into the production of . . . intermediate inputs” when valuing those intermediate inputs is in fact consistent with the law. *Anshan Iron & Steel Co. v. United States*, 27 CIT 1234, 1238–41 (2003) (not published in the Federal Supplement).

proprietary average value of tool joints purchased in the U.S. The parties agree that tool joints are highly specialized and expensive components that are not comparable to other kinds of pipe fittings. See *I&D Memorandum* at 26–27. Tool joints are only produced “in a few countries,” none of which are market economies comparable to the PRC. *I&D Memorandum* at 28. Because tool joints are so specialized and because there are so few tool joint producers in the world, it was reasonable for Commerce to accept variation among potential surrogate values, especially when comparing normalized prices in a developing nonmarket economy to actual prices in an advanced market economy.

“[T]he process of constructing foreign market value for a producer in a nonmarket economy country is difficult and necessarily imprecise.” *Nation Ford Chem.*, 166 F.3d at 1377 (quoting *Sigma*, 117 F.3d at 1407). That DP also presents a well-reasoned case for why Commerce could have chosen petitioners’ data as the best available does not change the fact that this court cannot usurp Commerce’s sound judgment in selecting a different viable surrogate. See *Peer Bearing Co. v. United States* 25 CIT 1199, 1201–02, 182 F. Supp. 2d 1285, 1292 (2001). Because Commerce’s choice here was reasonable, DP’s challenge must fail. See *Goldlink*, 30 CIT at 619, 431 F. Supp. 2d at 1327.

D. Surrogate Value for Labor

DP argues that, when calculating the labor wage rate surrogate value, Commerce averaged the wage rate of thirty-one countries that produced comparable merchandise without distinguishing between producers and “significant producers” as required under 19 U.S.C. § 1677b(c)(4)(B). As a result, Commerce included low-producing countries in the surrogate wage rate average like Swaziland, even though it only exported \$469 worth of comparable merchandise. Commerce concedes that it should reconsider its labor wage rate determination in light of *Shandong Rongxin Import and Export Co. v. United States*, 35 CIT , , 774 F. Supp. 2d 1307, 1315–16 (2011). Accordingly, DP’s request to remand for reconsideration of the surrogate labor wage rate is granted.

III. Partial Application of Adverse Facts Available

DP argues that “Commerce’s application of adverse facts available . . . because of an independent troller’s failure to report certain information regarding consumption of material inputs is unsupported by substantial evidence and is contrary to law.” Pls.’ Br. at 35. Under 19 U.S.C. § 1677e(b), Commerce may apply an adverse inference when a party has “failed to cooperate by not acting to the best of its ability to comply with a request for information.” *Id.* “Failure to cooperate” is

evaluated under an objective and subjective standard. *Nippon Steel Corp. v. United States*, 337 F.3d 1373, 1382 (Fed. Cir. 2003). First, Commerce must show that “a reasonable and responsible [party] would have known that the requested information was required to be kept and maintained under the applicable statutes, rules and regulations,” and second, “that the respondent under investigation . . . either: (a) fail[ed] to keep and maintain all required records, or (b) fail[ed] to put forth its maximum efforts to investigate and obtain the requested information from its records.” *Id.* at 1382–83; *Ad Hoc Shrimp*, 33 CIT at , 637 F. Supp. 2d at 1304.

Commerce relied on DP-Master’s failures in deciding to apply an adverse inference, not its toller’s poor recordkeeping.¹⁴ *I&D Memorandum* at 47. On April 7, 2010, Commerce instructed DP-Master to provide “a detailed explanation of all efforts undertaken to report the actual quantity of each [factor of production]” if it could not report its toller’s actual consumption. *I&D Memorandum* at 47 (citing PR 53 at G-1 to G-5 & §§ C, D). DP-Master provided information that was not based on its toller’s actual consumption, but it *failed* to offer any explanation until verification. PR 226 at 2. DP-Master was also instructed to inform Commerce “immediately” if it would not be able to assemble materials required for verification of its responses due to a recalcitrant third party. *I&D Memorandum* at 47; PR 53 at G-1. DP-Master provided information but *failed* to notify Commerce that it was unable to assemble documents required for verification. *Id.* At verification, DP-Master revealed “for the first time” that it neither provided information in the manner requested nor assembled records necessary for verification of that information. *Id.* at 45.

DP-Master’s actions — lulling Commerce into believing it had provided information in the manner requested when it in fact had not, and then suddenly admitting that it had not provided reliable information at verification — are closer to the kind of “deliberate concealment or inaccurate reporting” that “*surely* evince[] a failure to cooperate” than to the mere “inadequate inquiries” sufficient for application of an adverse inference. *See Nippon*, 337 F.3d at 1383 (emphasis added). Although DP-Master notified Commerce that it was having difficulty securing information from its toller, DP does not and cannot dispute that Commerce provided “extensive instructions .

¹⁴ Commerce did use the toller’s inadequate recordkeeping as a basis to apply facts otherwise available. *I&D Memorandum* at 45. DP does not contest this aspect of Commerce’s determination. *See* Pls.’ Br. at 35–36; Pls.’ Reply at 11–13; *Nippon*, 337 F.3d at 1381 (“The mere failure of a respondent to furnish requested information — for any reason — *requires* Commerce to resort to other sources of information to complete the factual record upon which it makes its determination.” (emphasis added)).

. . . numerous times over the course of the investigation” to the effect that DP-Master should notify Commerce if it was unable to provide information in the manner requested. *I&D Memorandum* at 47; *Wuhan Bee Healthy Co. v. United States*, 31 CIT 1182, 1191 (2007) (not published in the Federal Supplement) (objective prong satisfied where “a reasonable and responsible respondent would have brought any problems surrounding its supporting documentation to Commerce’s attention before the verification”). DP also does not and cannot dispute that DP-Master failed to provide a detailed explanation of its efforts to get actual-consumption data before verification as requested. *See Sidenor Indus. SL v. United States*, 33 CIT , , 664 F. Supp. 2d 1349, 1358 (2009) (subjective prong satisfied where respondent failed to act as requested even though it was able to do so).

The record belies DP’s contention that it is “not the party who failed to cooperate,” Pls.’ Br. at 35 (emphasis omitted), and so this court cannot say that the application of an adverse inference to DP-Master’s unverifiable submissions was unreasonable or contrary to law.¹⁵ *Wuhan Bee*, 31 CIT at 1191–93. DP-Master’s inability to acquire trustworthy information cannot serve as an excuse for its failure to notify Commerce as requested. *See Nippon*, 337 F.3d at 1382–83; *Wuhan Bee*, 31 CIT at 1191–93. Consequently, Commerce acted reasonably and in accordance with the law when it applied an adverse inference to the information it could not verify.

IV. Simultaneous Application of Nonmarket Economy Methodology and Countervailing Duty Law

DP’s motion — dated February 8, 2012 — argues for remand on the basis of the Federal Circuit’s decision in *GPX International Tire Corp.*, 666 F.3d at 734. That decision invalidated Commerce’s simultaneous application of countervailing duty law and nonmarket economy methodologies below, which was its usual approach under

¹⁵ DP offers two additional arguments that have no bearing on Commerce’s determination below. First, DP suggests that an adverse inference is inappropriate because it otherwise provided verifiable information “with only minor discrepancies.” Pls.’ Br. at 36. Commerce, however, applied an adverse inference “only . . . to the portion of [DP-Master’s] response dealing with its phosphate treatment toller’s factors [of production],” *I&D Memorandum* at 47, and so DP-Master’s cooperation during the rest of the investigation is irrelevant. Second, DP asserts in its reply that “Commerce only cites to its own threats regarding cooperation and [adverse facts available], but it does not . . . cite to any record information indicating how [DP-Master] was uncooperative in any way.” Pls.’ Reply at 13. Given that Commerce found that DP-Master failed to provide a “detailed explanation of all efforts undertaken to report the actual quantity of each [factor of production]” its toller consumed, *I&D Memorandum* at 47, it is no surprise that Commerce would be unable to locate and cite such a document in the record. In any event, DP’s argument does not deter from the fact that Commerce explained its decision with ample citations to the record. *See id.* at 44–47; *Nippon*, 337 F.3d at 1382–83.

then-existing law. The Federal Circuit decided *GPX* on December 19, 2011, almost a year after DP appealed the *Final Determination* to this court. *Id.* Just over a month after DP filed the instant motion, Congress passed Public Law 112–99, amending the Tariff Act of 1930. 126 Stat. 265. Public Law 112–99 clarifies that “merchandise on which countervailing duties shall be imposed . . . includes a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the [U.S.] from a nonmarket economy.” 19 U.S.C. § 1671(f)(1). On deciding a motion to rehear the case, the Federal Circuit recognized that with the passage of Public Law 112–99, “Congress clearly sought to overrule . . . *GPX*.” *GPX Int’l Tire Corp. v. United States*, 678 F.3d 1308, 1311 (Fed. Cir. 2012). Accordingly, the Federal Circuit held that “the statute prior to the enactment of the new legislation did not impose a restriction on Commerce’s imposition of countervailing duties on goods imported by [nonmarket economy] countries to account for double counting.” *Id.* at 1312.

Recognizing that Public Law 112–99 “permits Commerce to apply [countervailing duties] concurrently with the [nonmarket economy] methodology,” DP argues for the first time in its reply that Public Law 112–99 is unconstitutional because it violates DP’s equal protection, due process, and ex post facto rights and that “the law may have other constitutional infirmities.” Pls.’ Reply at 14–15. “Arguments raised for the first time in a reply brief are not properly before this court,” *United States v. Ford Motor Co.*, 463 F.3d 1267, 1276–77 (Fed. Cir. 2006), and such arguments are usually deemed to be waived. *Novosteel SA v. United States*, 284 F.3d 1261, 1273–74 (Fed. Cir. 2002); see *Ford Motor Co.*, 463 F.3d at 1276–77. Here, however, DP did not have an opportunity to present its constitutional objections before it filed its reply because Public Law 112–99 did not become effective until March 13, 2012 — well after it filed the instant motion. DP’s good faith effort to preserve its objections is dissimilar from other parties’ failure in previous cases to present arguments available to them at the time of filing the main brief, and therefore, waiver is inappropriate. See *Novosteel SA*, 284 F.3d at 1273–74; *Ford Motor Co.*, 463 F.3d at 1276–77.

A more fundamental concern is that Commerce and domestic industry have not yet been afforded a full opportunity to be heard. The unique circumstances of this case may deem the application of waiver inappropriate, but it is impossible at present for the court to address the important constitutional issues briefed only in two short paragraphs in DP’s reply. Indeed, beyond challenging the substance of DP’s arguments, Commerce or domestic industry may justifiably raise concerns about standing, mootness or estoppel. Therefore, DP’s

request for a remand on its due process, equal protection, and ex post facto objections is denied without prejudice to renew after Commerce returns with its remand determination.

CONCLUSION

For the foregoing reasons, the court concludes that the *Final Determination* is in accord with the law and is supported by substantial evidence, except with respect to Commerce's explanation of its findings regarding the surrogate value for drill pipe green tube and to its findings regarding the surrogate labor wage rate as applied to DP-Master. On remand, Commerce must either select a new surrogate value or explain why IHTS categories 7309.23 and 7309.29 are more representative of the price for drill pipe green tube than other potential surrogate values in light of Infodrive data that appears to demonstrate that the categories do not actually "capture" green tube imports, and are highly distorted by expensive, finished tubular goods. This court also reserves judgment on any constitutional issues until after Commerce returns with its remand results.

ORDER

In accordance with the above, it is hereby

ORDERED that this case is remanded to the United States Department of Commerce, International Trade Administration, to reconsider its findings regarding drill pipe green tube and labor wage rate surrogate values; and it is further

ORDERED that the *Final Determination* is affirmed in all other respects; and it is further

ORDERED that the remand results are due within ninety (90) days of the date this opinion is entered. Any responses or comments are due within thirty (30) days thereafter. Any rebuttal comments are due within fifteen (15) days after the date responses or comments are due.

Dated: November 20, 2012
New York, New York

/s/ NICHOLAS TSOUCALAS
NICHOLAS TSOUCALAS SENIOR JUDGE

Slip Op. 12–142

PSC VSMPO – AVISMA CORPORATION and VSMPO – TIRUS, U.S., INC., Plaintiffs, v. UNITED STATES, Defendant, and U.S. MAGNESIUM LLC, Defendant-Intervenor.

Before: Judith M. Barzilay, Senior Judge
Consol. Court No. 08–00321

JUDGMENT

Following the Federal Circuit’s decision in *PSC VSMPO-AVISMA Corp. v. United States*, 688 F.3d 751 (Fed. Cir. 2012), reversing and remanding this court’s decision in the above captioned case, it is hereby

ORDERED that the *Final Results* of Commerce’s 2006/2007 administrative review of the antidumping duty order covering magnesium metal from the Russian Federation are reinstated and sustained.

Dated: November 20, 2012
New York, NY

/s/ Judith M. Barzilay
JUDITH M. BARZILAY, SENIOR JUDGE



Slip Op. 12–143

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

Before: Nicholas Tsoucalas, Senior Judge
Consol. Court No.: 11–00006

MEMORANDUM ORDER

Held: Remand results accepted in their entirety, with costs to be taxed against plaintiff.

Dated: November 21, 2012

Riggle & Craven, (*David A. Riggle*) for Tianjin Magnesium International Co., Ltd., Plaintiff.

Stuart F. Delery, Acting Assistant Attorney General; *Jeanne E. Davidson*, Director, *Claudia Burke*, Assistant Director, Commercial Litigation Branch, Civil Division, United States Department of Justice (*Renee Gerber*); Office of Chief Counsel for Import Administration, United States Department of Commerce, *Thomas M. Beline*, Of Counsel, for the United States, Defendant.

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

TSOUCALAS, Senior Judge:**Introduction**

This court, having considered the remand determination and the response briefs, finds that the Department of Commerce (“Commerce”) substantially complied with this court’s order in *Tianjin Magnesium International Co. v. United States*, 36 CIT , Slip. Op. 12–63 (May 16, 2012), and accordingly accepts the remand results in their entirety.

In multiple proceedings before Commerce, including those leading to the present action, Tianjin Magnesium International Co. (“TMI”) engaged in intentionally fraudulent conduct in an attempt to obtain lower dumping margins. *Tianjin Magnesium*, 36 CIT at , Slip. Op. 12–63 at 3–7. Although the court is not aware of any identical misconduct during this appeal, the court finds it troubling that TMI employed other tactics designed to mislead the court and the other parties to this action. Specifically, TMI did not submit its rebuttal brief objecting to the chosen financial surrogate on time in the proceedings below — rendering the argument procedurally deficient on appeal for TMI’s failure to exhaust — but nevertheless chose to repeat its objection before this court without adequately disclosing or explaining its failure below. *See* Pl.’s Mem. Supp. Mot. J. Agency R. at 13–24. TMI continued to argue the point in its reply brief despite exhaustive and accurate refutations from both Commerce and defendant-intervenors. *See id.* at 2–10; Def.’s Mem. Opp’n Pl.’s Mot. J. Agency R. & Def. Intervenor’s Mot. J. Agency R. at 17–19; Def.-Intervenor’s Mem. Opp’n Pl.’s Mot. J. Agency R. at 5–11.

“Although its discretionary power to award costs has been infrequently exercised,” *Former Employees of Bass Enterprises Production Co. v. United States*, 13 CIT 372, 374 (1983) (not reported in the Federal Supplement), the Court of International Trade unquestionably retains the authority to do so. USCIT R. 54(d); *see* 28 U.S.C. §§ 1920, 1923, 1924 (2006). TMI’s actions constitute a frivolous drain of the court’s resources, potentially within the scope of the court’s authority to impose sanctions under Local Rule 11(c). *See* USCIT R. 11(b)(2), (c). Given TMI’s conduct, this court finds awarding costs to be an appropriate exercise of its discretion. *See* USCIT LR 54(d)(1); 28 U.S.C. §§ 1920, 1923, 1924. TMI’s actions will not be tolerated in future proceedings before this court.

In accordance with the foregoing, it is hereby

ORDERED that the remand results are accepted in their entirety; and it is further

ORDERED that costs will be taxed after defendant and defendant-intervenor submit their affidavits of itemized costs pursuant to USCIT R. 54(d) and after plaintiff has had an opportunity to respond thereto; and it is further

ORDERED that this action is dismissed.

Dated: November 21, 2012
New York, New York

/s/ NICHOLAS TSOUCALAS
NICHOLAS TSOUCALAS SENIOR JUDGE

ERRATA

Please make the following changes to *Tianjin Magnesium International Co., Ltd. v. United States*, No. 11-00006, Slip Op. 12-143:

-page 2, header: change “**Court No. 11-000806**” to “**Court No. 11-00006**”

-page 3, header: change “**Court No. 11-000806**” to “**Court No. 11-00006**”

November 27, 2012.

Slip Op. 12–144

SAMSUNG INTERNATIONAL, INC., Plaintiff, v. UNITED STATES, Defendant.

Before: Jane A. Restani, Judge**Court No. 10–00015**

Public Version

[Plaintiff’s motion for summary judgment in classification case denied. Defendant’s cross-motion for summary judgment granted.]

Dated: November 21, 2012

Felicia L. Nowels, Akerman Senterfitt, of Tallahassee, FL, argued for plaintiff.

Marcella Powell, International Trade Field Office, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of New York, NY, argued for defendant. With her on the brief were *Stuart F. Delery*, Acting Assistant Attorney General, and *Barbara S. Williams*, Attorney in Charge. Of counsel on the brief was *Paula Smith*, Office of Assistant Chief Counsel, International Trade Litigation, U.S. Customs and Border Protection.

OPINION**Restani, Judge:****Introduction**

This matter is before the court on cross-motions for summary judgment by Plaintiff Samsung International, Inc. (“Samsung”) and Defendant United States (“the Government”) pursuant to USCIT Rule 56. Samsung challenges the U.S. Bureau of Customs and Border Protection’s (“Customs”) liquidation of certain entries and its denial of Samsung’s protests relating to the classification of plasma televisions and video monitors.¹ Pl.’s Mot. and Mem. in Supp. for Summ. J. (“Pl.’s Br.”) 1. Samsung argues its imported plasma televisions and video monitors are eligible for preferential duty free treatment under the North American Free Trade Agreement (“NAFTA”). *Id.* This issue turns on the classification of Samsung’s Plasma Display Panel Module (“PDP Module”), which is manufactured in Korea and is a component of the imported televisions and video monitors. For the reasons below, the court denies Samsung’s motion for summary judgment and grants the Government’s cross-motion for summary judgment.

¹ Samsung challenges the deemed denial of Protest Numbers 2506–06–100070, 2506–06100030 and 2506–06–100010. Def.’s Resp. to Pl.’s Statement of Undisputed Material Facts (“Def.’s Resp.”) ¶ 6. These protests cover ten different entries: 583–2168979–4, 583–0146277–4, 583–2166642–0, 583–2166835–0, 583–2168144–5, 583–2167288–1, 583–2166681–8, 5832165690–0, 583–2165857–5, and 583–2165862–5. Pl.’s Br. 2 n.3. The summons in this case originally listed additional entries. These entries have been severed from this action and transferred to Court No. 11–00019. Order of Jan. 28, 2011, Docket No. 11–00019.

FACTS

The parties do not dispute the following facts related to the procedural background of this case. Samsung imported flat panel plasma televisions and video monitors (“the imported goods”) into the United States from Mexico between December 2004 and June 2005 under subheading 8528.12.72, Harmonized Tariff Schedule of the United States (“HTSUS”), and 8528.21.70, HTSUS, respectively.² Pl.’s Br. 2; Statement of Undisputed Material Facts (“Pl.’s Facts”) ¶ 1; Def.’s Resp. ¶ 1. The imported goods contained either a V3 or V4 version of the PDP Module. Pl.’s Facts ¶ 14; Def.’s Resp. ¶ 14.

Samsung timely filed a request for NAFTA post-importation duty refunds on the imported goods. Pl.’s Facts ¶ 3; Def.’s Resp. ¶ 3. Customs denied the request based on two prior Customs rulings: NY K83248 and NY K83886. Pl.’s Facts ¶ 4; Def.’s Resp. ¶ 4. These rulings had classified plasma screens combined with various electronic assemblies as “flat panel screen assemblies” (“FPSAs”) under HTSUS 8529.90.53. *See* NY K83248 (Feb. 20, 2004), Pl.’s Ex. 21 at 8 (classifying as a FPSA a glass plasma screen combined with an “address assembly, the scan A & B assemblies and various connector assemblies”); NY K83886 (Mar. 9, 2004), Pl.’s Ex. 21 at 9 (classifying as a FPSA a glass plasma screen combined with “electronic assemblies and various connector assemblies”). Customs found that Samsung’s PDP Modules were FPSAs because they consisted of a glass plasma screen combined with various electronics assemblies. Def.’s Resp. to Pl.’s First Interrog., Def.’s Ex. X at ¶ 7. Because the applicable NAFTA Rules of Origin did not accord NAFTA preferential treatment to televisions and video monitors that incorporated FPSAs originating from non-NAFTA countries, Customs concluded that Samsung’s imported goods, which incorporated the Korean-made FPSAs, were not entitled to NAFTA preferential treatment and denied Samsung’s duty refund request. *Id.* ¶ 8; *see also* Pl.’s Facts ¶ 4; Def.’s Resp. ¶ 4.

Samsung timely filed protests and applications for further review of the denial of its requested NAFTA refunds, arguing that the incorporated PDP Modules did not constitute FPSAs of HTSUS 8529.90.53. Pl.’s Facts ¶ 6; Def.’s Resp. ¶ 6. Customs did not issue a denial of Samsung’s protests and applications for further review. Pl.’s Facts ¶ 7; Def.’s Resp. ¶ 7. In November 2009, Samsung timely filed a request for accelerated disposition. Pl.’s Facts ¶ 8; Def.’s Resp. ¶ 8. Commerce did not respond to the request for accelerated disposition and the

² Citations herein are to the 2004 HTSUS. The 2005 HTSUS does not differ in any material respect.

protests were deemed denied under 19 U.S.C. § 1515(b) and 19 C.F.R. § 174.22(d). Pl.'s Facts ¶ 9; Def.'s Resp. ¶ 9.

In August 2004, prior to Samsung's importation of the imported products, a NAFTA Customs subgroup issued a definition of "flat panel screen assemblies." Pl.'s Facts ¶¶ 65–66; Def.'s Resp. ¶¶ 65–66. The NAFTA subgroup stated that "[f]or purposes of tariff item 8529.90.ee, the phrase 'flat panel screen assemblies' means an assembly consisting of at least drive electronics, control electronics and a display device, other than LCD technologies." NAFTA Customs Subgroup, Clarification of TV technologies: Flat panel screen assemblies (Aug. 4, 2004) ("NAFTA Clarification"), Def.'s Ex. A at 3; see Pl.'s Facts ¶ 67; Def.'s Resp. ¶ 67. The NAFTA Clarification also stated that "[i]f at least one of the components of the definition of 'flat panel screen assemblies' is not incorporated, such assembly shall not be classifiable within tariff item 8529.90.ee." NAFTA Clarification at 3 n.2. The NAFTA subgroup did not define control electronics, drive electronics, or display device. *Id.*; see Pl.'s Facts ¶ 68; Def.'s Resp. ¶ 68. In October 2006, after the goods were imported and NAFTA treatment denied, but before the protests were deemed denied, Customs issued the *Pioneer Revocation Ruling*, HQ W967693 (Oct. 12, 2006) ("*Pioneer Ruling*"), Def.'s Ex. E; Pl.'s Facts ¶ 71; Def.'s Resp. ¶ 71.³

The parties do not dispute the following facts related to the components and function of the PDP Modules. Both the V3 and V4 versions of the PDP Module were manufactured in Korea. Pl.'s Facts ¶ 13; Def.'s Resp. ¶ 13; Def.'s Statement of Undisputed Facts ("Def.'s Facts") ¶ 3; Pl.'s Resp. to Def.'s Statement of Undisputed Facts ("Pl.'s Resp.") ¶ 3. The V3 PDP Module consisted of glass panels, a X Driver, a Y Driver, a Column Driver, a Logic Board, Logic Buffers, a chassis, and a power supply. Pl.'s Facts ¶ 46; Def.'s Resp. ¶ 46. The glass panels contained plasma glass, X electrodes, Y electrodes, and Column electrodes.⁴ Pl.'s Facts ¶ 48; Def.'s Resp. ¶ 48. The V4 Module contained the same components, but its Logic Board was not attached to the Module at the time of importation. Pl.'s Facts ¶¶ 43–44; Def.'s Resp. ¶¶ 43–44. The Logic Board of the V3 PDP Module⁵ contained

³ The *Pioneer Ruling* revoked the two prior rulings cited by Customs to deny Samsung's request for NAFTA preferential treatment. Def.'s Ex. E at 1. The *Pioneer Ruling* adopted the NAFTA Clarification's definition of a FPSA. *Id.* at 4–5. After a notice and comment period and after consulting dictionary definitions, Customs developed definitions of control and drive electronics. *Id.* at 5–8. Customs concluded the plasma display module at issue, which did not contain a logic board, was not a FPSA because it lacked control electronics. *Id.* at 8.

⁴ When the electrodes are energized by an electrical signal, they activate the plasma gas and illuminate a pixel, which produces an image on the screen. Pl.'s Facts ¶¶ 47–48; Def.'s Resp. ¶¶ 47–48.

⁵ The Logic Board of the V4 Module is not further described in the undisputed facts of either party.

several integrated circuits, including a Sequence Processor, Data Processor, Data Distributor, read only memory processors, and a Decoder. Def.'s Facts ¶ 8; Pl.'s Resp. ¶ 8. Once in Mexico, the PDP Modules were combined with a Main Board, which was manufactured in Mexico, front and rear covers, cables, and various connectors, fasteners, and other parts to produce the finished video monitors and televisions. Pl.'s Facts ¶¶ 18, 31; Def.'s Resp. ¶¶ 18, 31.

The Main Board receives signals, in various formats from an outside source, such as a DVD player or a cable box, processes all of these signals, and converts the signals into a Low Voltage Differential Signal ("LVDS"). See Pl.'s Facts ¶ 38; Def.'s Resp. ¶ 38. The LVDS signal is a compressed image data signal composed of synchronization signals (V-sync and H-sync signals)⁶ and raw image data signals, which include "Red Green Blue" information. Pl.'s Facts ¶¶ 28, 39; Def.'s Resp. ¶¶ 28, 39. The Main Board sends the data in LVDS format to the Logic Board, which is located on the PDP Module. Pl.'s Facts ¶¶ 38–39; Def.'s Resp. ¶¶ 38–39.

Because the Drivers on the PDP Module cannot understand a LVDS signal, the Logic Board's Decoder takes the LVDS signal from the Main Board and converts it into a format that the Drivers can understand. Def.'s Facts ¶¶ 15, 16; Pl.'s Resp. ¶¶ 15, 16. The Decoder then sends the video information and instructions to the Logic Board's Sequence Processor.⁷ Def.'s Facts ¶ 17; Pl.'s Resp. ¶ 17. The Sequence Processor converts the sync signals into timing information. Def.'s Facts ¶ 19; Pl.'s Resp. ¶ 19. The Sequence Processor then takes the video information and instructions from the Decoder and converts those instructions in accordance with the timing information derived from the sync signal. Def.'s Facts ¶ 18; Pl.'s Resp. ¶ 18. The signal is then sent to the Data Processor, which performs part of the "subfield pattern" process.⁸ Def.'s Facts ¶ 28; Pl.'s Facts ¶ 25. Finally,

⁶ The sync signals dictate the synchronization of the display, meaning when the display starts and ends a frame. Pl.'s Facts ¶ 40; Def.'s Resp. ¶ 40.

⁷ Samsung argues this video information is not a "video" signal and instead is an electrical signal. Pl.'s Facts ¶ 29. Samsung does not dispute that a LVDS signal is a "compressed image data signal" that contains raw image data. Pl.'s Facts ¶ 28. The label of the signal is not material.

⁸ The Data Processor receives the video information and divides each frame into sub-fields. Def.'s Facts ¶ 28. Each sub-field has a different level of brightness from total black to total white. *Id.* ¶ 23. Each sub-field is divided into an addressing period, a sustaining period, and a reset period. *Id.* ¶ 21. First, in the addressing period, a voltage pulse is sent to the electrodes on the panel corresponding to the relevant sub-field. *Id.* ¶ 25. Second, the sustaining period provides the voltages that cause the pixel to emit light. *Id.* ¶ 26. How long the sustaining period lasts determines how brightly the pixel will glow, from total black to total white. *Id.* ¶ 23, 26. Third, the reset period clears up the residual charge from the previous frame. *Id.* ¶ 24. Plaintiff does not dispute these facts but argues they are irrelevant. Pl.'s Resp. ¶¶ 20–31.

the signal is sent to the Data Distributor. Def.'s Facts ¶ 29; Pl.'s Resp. ¶ 29. The Data Distributor stores the data in its memory and routes the data to the appropriate Driver. *See* Def.'s Facts ¶¶ 30–31. This ends the functions of the Logic Board. The Drivers take the information from the Logic Board and “make and deliver driving waveforms [i.e. electrical pulses],” that are sent to the respective electrodes (i.e. the X Driver sends a waveform to the X electrodes), thereby illuminating the pixels and plasma gas to create an image. Pl.'s Facts ¶ 60; Def.'s Resp. ¶ 60.

JURISDICTION AND STANDARD OF REVIEW

The court has jurisdiction over the denial of a timely protest under 28 U.S.C. § 1581(a). The proper classification of imported merchandise involves a two step analysis: (1) ascertaining the proper meaning of specific terms in the tariff provision, which is a question of law; and (2) determining whether the merchandise at issue comes within the description of such terms as properly construed, which is a question of fact. *Cummins Inc. v. United States*, 454 F.3d 1361, 1363 (Fed. Cir. 2006). Both questions are decided de novo. 28 U.S.C. § 2640(a)(1).

Summary judgment is appropriate if there is “no genuine issue as to any material fact” and “the movant is entitled to judgment as a matter of law.” USCIT R. 56(c). A classification case is ripe for summary judgment when there is no genuine dispute as to the underlying factual issue of exactly what the merchandise is. *Bausch & Lomb, Inc. v. United States*, 148 F.3d 1363, 1365 (Fed. Cir. 1998).

DISCUSSION

The issue in this case is whether Samsung's PDP Modules are classified as “flat panel screen assemblies” (“FPSA”) under 8529.90.53, HTSUS. If the PDP Modules are FPSAs, then the PDP Modules are not eligible for a “tariff shift” pursuant to the NAFTA Rules of Origin (“ROO”), as outlined below, and as a result, the imported goods are not eligible for NAFTA preferential treatment. If the PDP Modules are not FPSAs, then the tariff shift rule is satisfied, and the imported goods are considered products originating from a NAFTA territory and are entitled to NAFTA preferential treatment.

Under the NAFTA ROO, incorporated into HTSUS General Note 12, only “[g]oods originating in the territory of a party to [NAFTA]” are eligible for NAFTA preferential treatment. General Note 12(a). When a product is produced in a NAFTA country using materials or parts obtained from countries outside of NAFTA, the non-NAFTA originating part must be “transformed” in the NAFTA territory “so that . . . each of the non-originating materials used in the production of such goods undergoes a change in tariff classification” as described

in the ROO. General Note 12(b)(ii)(A).⁹ This change in the tariff classification of the non-originating material is known as a “tariff shift.”¹⁰

Here, the applicable NAFTA ROO prohibit a tariff shift from a FPSA to a video monitor or television reception apparatus. General Note 12(t), Chapter 85, No. 90, 92H.¹¹ In other words, a video monitor or television reception apparatus does not receive NAFTA preferential treatment if it was made using a FPSA produced in a non-NAFTA country.

I. HTSUS 8529.90.53

A. Heading 8529

Samsung and the Defendant agree that the subheading must be interpreted in light of its heading. Pl.’s Mem. in Opp’n to Def.’s Cross-Mot. for Summ. J. and in Reply to Def.’s Opp’n to Pl.’s Mot. for Summ. J. (“Pl.’s Reply”) 8–9; Mem in Supp. of Def.’s Cross Mot. for Summ. J. and in Opp’n to Pl.’s Mot. for Summ. J. (“Def.’s Br.”) 12–13.¹²

⁹ General Note 12(b)(ii)(A) states: “Goods originating in the territory of a NAFTA party” include goods that “have been transformed in the territory of Canada, Mexico and/or the United States so that . . . each of the non-originating materials used in the production of such goods undergoes a change in tariff classification described in subdivisions (r), (s) and (t) of this note or the rules set forth therein . . .”.

¹⁰ In determining whether a foreign material has undergone the requisite tariff shift, Customs first determines the tariff classifications for both the non-NAFTA material and the finished article. *See Bestfoods v. United States*, 110 F. Supp. 2d 965, 970 n.4, 24 CIT 552, 557 n.4 (2000) (reversed on other grounds by 260 F.3d 1320 (Fed. Cir. 2001)). In this case, it is undisputed that the finished articles, Samsung’s imported televisions and video monitors, were properly classified under subheading 8528.12.72, HTSUS (televisions) and 8528.21.70, HTSUS, (video monitors). Pl.’s Facts ¶ 1; Def.’s Resp. ¶ 1. Thus, the determination of whether the tariff shift has occurred depends on the classification of the non-NAFTA material, Samsung’s PDP Modules.

¹¹ General Note 12(t), Chapter 85, No. 90 defines the applicable tariff shift rule as: “A change to tariff items 8528.12.62, 8528.12.64, 8528.12.68 or 8528.12.72 [television reception apparatus] from tariff items 8528.12.04 or 8528.12.08 or any other heading, except from tariff item 8529.90.53.”

General Note 12(t), Chapter 85, No. 92H defines the applicable tariff shift rule as: “A change to tariff items 8528.21.55, 8528.21.60, 8528.21.65 or 8528.21.70 [video monitor] from tariff items 8528.12.05 or 8528.12.10 or any other heading, except from tariff item 8529.90.53.”

These ROO mean that if a component part produced outside of NAFTA that would be classified under any tariff item, except for 8529.90.53, enters into Mexico and is transformed into a finished product that is classified under the listed tariff items, including 8529.12.72 and 8528.21.70, then the finished product is a NAFTA originating item and is eligible for NAFTA preferential treatment, regardless of its inclusion of a non-NAFTA component.

¹² With its Reply, Plaintiff filed a Response Statement of Facts to Def.’s Reply to Pl.’s Statement of Undisputed Facts. This is not a filing permitted by USCIT Rule 56 and the court did not rely on it.

The proper interpretation of a tariff item begins with the “terms of the heading.” General Rules of Interpretation (“GRI”) 1. Heading 8529 refers to: “Parts suitable for use solely or principally with the apparatus of headings 8525 to 8528.” Headings 8528 includes, *inter alia*, video monitors and television reception apparatus, which are the relevant products here. 8528, HTSUS.¹³ Thus, in order to be classified in 8529, the item must be a part used solely or principally with some other apparatus of headings 8525 to 8528, including video monitors and television reception apparatus.

Heading 8529 applies only to “parts” used with articles classified in headings 8525 through 8528.¹⁴ A part is distinguished from a finished product and from an unfinished product that possesses the essential character of the finished product. *See* GRI 2(a) (stating that unfinished products possessing the essential character of a finished product are to be classified in the heading of the finished product). Thus, the proper construction of the term FPSA does not encompass a product that possess the essential character of a finished television or video monitor.

B. Subheading 8529.90.53

Samsung argues the proper classification of its PDP Modules is 8529.90.89 (Other; Of television receivers; Other).¹⁵ Defendant argues that Customs properly classified the PDP Modules as FPSAs of 8529.90.53 (Flat panel screen assemblies . . .).¹⁶ Because Samsung’s

¹³ Heading 8528 applies to: “Reception apparatus for television, whether or not incorporating radiobroadcast receivers or sound or video recording or reproducing apparatus; video monitors and video projectors”.

¹⁴ A “part” is “an essential element or constituent; integral portion which can be separated, replaced, etc.” *Rollerblade, Inc. v. United States*, 282 F.3d 1349, 1353 (Fed. Cir. 2002) (citing *Webster’s New World Dictionary* 984 (3d College ed. 1988)).

¹⁵ The subheadings of 8529.90 are:

Printed Circuit assemblies

Transceiver assemblies for the apparatus of subheading 8526.10, other than printed circuit assemblies

Parts of television receivers specified in additional U.S. note 10 to this chapter, other than printed circuit assemblies

Combinations of parts specified in additional U.S. note 10 to this chapter

Flat panel screen assemblies for the apparatus of subheadings 8528.12.62 . . .

Other, parts of printed circuit assemblies, including face plates and lock latches

Other parts of articles of heading 8525 and 8527, except parts of cellular telephones

Other

Of television receivers; . . .

Other - 8529.90.89

Other - 8529.90.99

¹⁶ Defendant argues that if the PDP Modules are not FPSAs of 8529.90.53, the proper classification is 8529.90.99 (Other; Other). Because the court concludes that the PDP Modules are FPSAs, the court does not reach Defendant’s alternative argument.

proposed subheading is an “Other” category, the court will first consider the proper construction of 8529.90.53.

Samsung argues that the proper construction of subheading 8529.90.53 is reflected in the NAFTA Clarification. Pl.’s Reply 7. Defendant argues that the proper construction of the subheading can be determined exclusively by the plain language of the heading or, in the alternative, with reference to the NAFTA Clarification. Def.’s Br. 13–16.¹⁷

Subheading 8529.90.53 applies to “Flat panel screen assemblies for the apparatus of subheadings 8528.12.62, 8528.12.64, 8528.12.68, 8528.12.72, 8528.21.55, 8528.21.60, 8528.21.65, 8528.21.70, 8528.30.62, 8528.30.64, 8528.30.66 and 8528.30.68.” The listed subheadings apply to various types of color plasma video monitors, television reception apparatus, and video projectors. The term “flat panel screen assemblies” is not defined in the HTSUS section notes, chapter notes, or in the HTS Explanatory Notes.

When the HTSUS and its legislative history do not define a tariff term, the correct meaning is the common meaning. *Rocknel Fastener, Inc. v. United States*, 267 F.3d 1354, 1356 (Fed. Cir. 2001). “The common meaning of a term used in commerce is presumed to be the same as its commercial meaning.” *Id.* at 1356 (citing *Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989)). “To ascertain the common meaning of a term, a court may consult ‘dictionaries, scientific authorities, and other reliable information sources’ and ‘lexicographic and other materials.’” *Id.* at 1356–57 (citing *Simod*, 872 F.2d at 1576).

Instead of dictionary definitions, both parties put forth a definition of FPSA developed by a NAFTA subgroup, referred to here as the NAFTA Clarification. The NAFTA Clarification stated, “[f]or purposes of tariff item 8529.90.ee, the phrase ‘flat panel screen assemblies’ means an assembly consisting of at least drive electronics, control electronics and a display device, other than LCD technologies.” Def.’s Ex. A at 3. Additionally, “[i]f at least one of the components of the definition . . . is not incorporated, such assembly shall not be classifiable within tariff item 8529.90.ee.” *Id.* at 3 n.2.

¹⁷ Defendant argues that the plain language of the heading is sufficient to establish the meaning of FPSA. An “assembly” refers to more than one item that is designed to be assembled together. *Webster’s Third New International Dictionary of the English Language Unabridged* (1981) (“assembly: a collection of parts so assembled as to form a complete machine, structure, or unit of a machine”). The plain meaning of the term FPSA therefore refers to multiple parts that may be assembled together to create something else. Obviously, a flat panel screen is included. It cannot be determined, based on the plain language alone, what additional parts must be included with the flat panel screen in order to constitute a FPSA. Further, because the *Pioneer Ruling* rejected this approach, the court will not address it, and the court need not address it to resolve this matter.

Although not controlling, the court concludes that the NAFTA Clarification is a reliable source that can assist the court in ascertaining the common meaning of FPSA. *See Rocknel Fastener*, 267 F.3d at 1357 (stating that the court may consult “other reliable information sources” when determining common meaning). The NAFTA Clarification is consistent with the terms of the subheading in that it refers to a collection of parts that can be combined with a flat panel screen. The experts who addressed the issue of whether the NAFTA definition reflects the common meaning of FPSA in the plasma industry stated that the NAFTA definition reflects the industry understanding of FPSAs. *See Declaration of Elliott Schlam* (“Schlam Declaration”), Def.’s Ex. B at ¶ 12 (“When the NAFTA Customs Subgroup defined ‘Flat Panel Screen Assemblies,’ it referred to the display device, the driver electronics and the control electronics. As discussed above it was clearly referring to the terminology used by the entire display industry.”).¹⁸ The NAFTA Clarification, however, did not define “drive electronics, control electronics and a display device.” Thus, the court must determine the common meaning of these terms before it can define FPSA.

1. Drive Electronics

Samsung argues that drive electronics “drive an object, by sometimes needing to reformat the data, to power and control another circuit by providing input to the other circuit” Pl.’s Br. 22. Samsung argues that the distinguishing characteristic between drive and control electronics is that drive electronics have “no independent intelligence” and cannot “alter the instructions contained in the signal” but instead “do what they are told.” Pl.’s Br. 22. Defendant argues the court should extend *Skidmore*¹⁹ deference to Custom’s

¹⁸ In determining the proper meaning of a tariff heading, the court considers expert opinions, not as fact witnesses, but as experts on the common meaning or understanding of a term in a particular industry. *See Kahrs Int’l, Inc. v. United States*, 791 F. Supp. 2d 1228, 1240–41 (CIT 2011). Expert opinions are merely advisory, however, and are given weight only to the extent they are consistent with lexicographic and other reliable sources. *Id.* Samsung’s experts do not address whether the NAFTA definition is appropriate or consistent with the common or commercial meaning. *See, e.g., Jin Ho Yang Report* (“Yang Report”), Pl.’s Ex. 7. Samsung argues that disregarding the NAFTA Clarification would be detrimental to NAFTA relations and would result in the inconsistent application of the ROO among the NAFTA parties. Pl.’s Reply 26–27. Thus, Samsung seems to agree that the court should accept the NAFTA Clarification as the common definition of FPSAs.

¹⁹ The court extends *Skidmore* deference to Customs rulings only to the extent that the ruling has the power to persuade. *See Warner-Lambert Co. v. United States*, 407 F.3d 1207, 1209 (Fed. Cir. 2005) (citing *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944)). Consistent with the court’s independent responsibility to decide legal issues, including the proper meaning of a tariff term, the court does not adopt the *Pioneer Ruling*’s definitions of drive and control electronics in toto. *See Rocknel Fastener*, 267 F.3d at 1357–58 (noting that the court has an

definition of drive electronics set forth in the *Pioneer Ruling*. Def.’s Br. 16–20. The *Pioneer Ruling* defined drive electronics as electronics that take information from the control electronics and “energize and de-energize the appropriate cell on the display in order to create an image.” *Pioneer Ruling* 5.

The parties provide the following dictionary definitions of “drive” as evidence of the common meaning of drive electronics:²⁰

Alan Freedman’s Computer Glossary (9th ed.), Pl.’s Ex. 20

drive 2: to provide power and signals to a device

The IEEE Standard Dictionary of Electrical and Electronics Terms (6th ed.), Pl.’s Ex. 20

drive 1: the equipment used for converting available power into mechanical power suitable for the operation of a machine

The Random House Dictionary of the English Language, Def.’s Ex. T

drive 35 (electronics): excitation

drive 2: to force to work or act

Funk & Wagnalls Standard College Dictionary, Def.’s Ex. U

drive 9: to provide the motive power for and cause to operate; make function

independent responsibility to interpret tariff terms). The *Pioneer Ruling* did not attempt to classify a logic board, which is the determinative issue here. In conducting its own analysis, the court considers the *Pioneer Ruling’s* definitions to some extent because Customs, after a notice and comment period, determined a common definition of drive and control electronics in the context of a FPSA as opposed to a complete television. See *Rubie’s Costume Co. v. United States*, 337 F.3d 1350, 1356 (Fed. Cir. 2003) (noting that the notice and comment process is a factor in determining the quality of Custom’s reasoning).

²⁰ Samsung attempts to establish a common definition of “drive electronics” by referencing prior Customs rulings relating to LCD televisions. Pl.’s Br. 19–21. Based on these prior rulings, Samsung argues that Custom’s and the industry’s longstanding definition of drive electronics included circuits that “process, convert, and synchronize signals to generate an image on the screen.” *Id.* at 20. These prior Customs rulings did not attempt to discern a common definition of drive electronics and the definition of drive or driver electronics was not at issue in any of these cases. These rulings merely describe the product at issue in an attempt to determine whether the products were dedicated for a particular use. See, e.g., HQ 952360 (Oct. 15, 1992), Pl.’s Ex. 21 at 3 (finding the LCD panel at issue was not classifiable in 8529 and instead was classified as a LCD under 9013); NY 881460 (Jan. 15, 1993), Pl.’s Ex. 21 at 9 (describing a LCD viewfinder for a camcorder as including an integrated circuit designed for “driving” the display). Moreover, even assuming Customs developed a common definition for drive electronics for LCD televisions, which Samsung has not shown to be the case, Samsung has not indicated why it would be proper to apply definitions developed by Customs for entirely different HTSUS headings and products. Accordingly, the court does not find the Customs rulings related to LCD televisions persuasive as to the issue here.

drive 11 (mechanical): a means of transmitting power, as from the motor of an automobile to the wheels

The record also contains the following definitions of “driver”:

Alan Freedman’s Computer Glossary (9th ed.), Pl.’s Ex. 20

driver 2: a device that provides signals or electrical current to activate a transmission line or display screen

The IEEE Standard Dictionary of Electrical and Electronics Terms (6th ed.), Pl.’s Ex. 20

driver 1: an electrical circuit that supplies input to another electronic circuit

driver 2: (A) a software module that invokes and, perhaps, controls and monitors the execution of one or more other software modules. (B) A computer program that controls a peripheral device and, sometimes, reformats data for transfer to and from the device

driver 3: a program, circuit or device used to power or control other programs, circuits or devices

IBM Dictionary of Computing, Def.’s Ex. H

driver 2: a system or device that enables a functional unit to operate

driver 4: a circuit that sends small electronic signals to a device

Merriam-Webster’s Collegiate Dictionary, Pl.’s Br. 21–22

driver 5a: the means for giving motion to a machine or machine part

driver g: an electronic circuit that supplies input to another electronic circuit

These dictionary definitions demonstrate that “drive” means providing power to a device in order to turn it on or cause it to act. “Driver” refers to an electrical device that supplies an input or electronic signal to another device in order to activate it. In the context of computer software, a driver “perhaps” controls another software module and “sometimes” reforms the data. Samsung argues that the defining characteristic of drive electronics is the inability to make independent judgments and change, manipulate, or create the image data contained within a signal. None of the above definitions for “drive” or “driver” reference the inability to make independent judgments. Furthermore, Samsung’s own experts state that “drive” is a generic term that can be applied to any undefined or unspecified electronic circuit. Yang Report, Pl.’s Ex. 7 at 20 (“[T]he term ‘drive’ as

used in Electrical Engineering encompasses all electronics and devices that are undefined and unspecific, making any attempts at defining the term very difficult.”). Although Samsung’s definition may be consistent with the function of some drive electronics, the court will not limit the definition of drive electronics in a manner not required by the common meaning.

Thus, the court concludes that drive electronics supply a signal or electrical current to another device in order to activate it or run it.

2. Control Electronics

Samsung argues that control electronics are electronics that possess a “decisionmaking” or “intelligent function” and can control “all aspects of the color television or video image display[.]” Pl.’s Br. 27; Pl.’s Reply 16. Specifically, Samsung argues that control electronics “create the instructions” used to control a television screen and that control electronics have the ability to “judge or independently make decisions.” Pl.’s Br. 24–26.

Defendant argues that the Court should extend *Skidmore* deference to Custom’s definition of control electronics as stated in the *Pioneer Ruling*. Def.’s Br. 16–21. The *Pioneer Ruling* defined control electronics as the electronics that “manage the data (timing and order), which is used to ultimately create an image on the display” and which “direct video signals and timing instructions to the drive electronics.” *Pioneer Ruling* 5. Samsung argues that if the court adopts Customs’ definition, the definition should be read to state that control electronics must have the ability to accept “video signals,” as opposed to Low Voltage Differential Signal (“LVDS”) signals, and have the ability to “instruct, regulate, manage and supervise” those video signals. Pl.’s Br. 24–26; Pl.’s Reply 16; *see infra* n.28.

The parties provide the following definitions of “control”:

IBM Dictionary of Computing, Def.’s Ex. H; Pl.’s Ex. 20

control 1: the determination of the time and order in which the parts of a data processing system and the devices that contain those parts perform the input, processing, storage, and output functions

McGraw-Hill Dictionary of Scientific and Technical Terms, Def.’s Ex. S

control 1: the section of a digital computer that carries out instructions in proper sequence, interprets each coded instruction, and applies the proper signals to the arithmetic unit and other parts in accordance with this interpretation

control 2: a mathematical check used in some computer operations. A means or device to direct and regulate a process or sequence of events

Oxford English Dictionary Online, Def.'s Br. 17

control: the fact of controlling, or of checking and directing action; the function or power of directing and regulating

control (computing): that part of a computer which controls the operation of the other units and in recent computers interprets the coded instructions

The parties also provides the following definitions of “controller”:

The Dictionary of Multimedia Terms & Acronyms (1999 ed.), Def.'s Ex. G

controller: in computer hardware, a processing component that manages the flow of data between the computer and peripheral devices.

IBM Dictionary of Computing, Def.'s Ex. H; Pl.'s Ex. 20

controller: a device that coordinates and controls the operation of one or more input/output devices, such as workstations, and synchronizes the operation of such devices with the operation of the system as a whole.

The IEEE Standard Dictionary of Electrical and Electronics Terms (6th ed.), Pl.'s Ex. 20.

controller 2: a device or group of devices that serves to govern, in some predetermined manner, the electric power delivered to the apparatus to which it is connected

controller 4: the component of a system that functions as the system controller. A controller typically sends program messages to and receives response messages from devices.

controller 5A: a functional unit in a computer system that controls one or more units of the peripheral equipment

controller 5C: a device through which one can introduce commands to a control system.

Webster's New International Dictionary, Def.'s Br. 17.

controller (electrical): any electric device for governing in some pre-determined way the power delivered to the apparatus

The definitions demonstrate that the term “control” refers to an electronic device or computer part that exercises “control” over another device or subsystem. This control function is described in vari-

ous ways, including carrying out instructions in a proper sequence, interpreting coded instructions, determining the time and order of the device's actions, managing the flow of data, coordinating and synchronizing operations, governing the electrical power sent to the device, and accepting commands and carrying out instructions.

Samsung argues that the distinguishing characteristic of control electronics is the ability to make "independent decisions" and the ability to alter the information or instructions contained in the signal. *See Answer to the Nine Questions: Answers Consolidated by Plasma TV Manufacturers ("Answers to the Nine Questions")*, Pl.'s Ex. 14 (unpublished document prepared by seven plasma television manufacturers during a different customs dispute); *Yang Report*, Pl.'s Ex. 7 at 9, 26 (defining control electronics as possessing the ability to choose among various ways of processing information or have the ability to create and change signals). None of the above dictionary definitions specifically reference an ability to make independent judgments or decisions. Some of the definitions imply that control electronics have the ability to "determine" or "generate" a signal, although it is not specified whether this ability is a result of independent judgments, as opposed to merely translating the signal into a new format. Additionally, several definitions state that a controller merely acts according to pre-determined instructions, demonstrating that a device does not need to "create" or "change" the information in a signal to qualify as control. *See McGraw-Hill Dictionary of Scientific and Technical Terms*, Def.'s Ex. S (stating control "carries out instructions in proper sequence"); *The IEEE Standard Dictionary of Electrical and Electronics Terms* (6th ed.), Pl.'s Ex. 20 (stating a controller "serves to govern, in some predetermined manner, the electrical power . . ."); *Webster's New International Dictionary*, Def.'s Br. 17 (stating a controller is a "device for governing in some pre-determined way the power delivered to the apparatus"). Accordingly, Samsung's expert reports, which state that control electronics must be able to make independent judgments and "create" the instructions, are not consistent with the dictionary definitions and are not entitled to any persuasive weight. *See Kahrs Int'l*, 791 F. Supp. 2d at 1240–41 (noting the court may consider expert opinions as advisory and to the extent they are consistent with lexicographic and other reliable sources).

Moreover, Samsung's own experts contradict the argument that all control electronics must possess the ability to make independent decisions. In Samsung's Answer to Defendant's First Interrogatories, Samsung defined control electronics as "a system or electronic circuits that uses a feedback function to make decisions by referring to

such Feedback to reflect an output status.” Pl.’s Answers to Def.’s First Interrogs. and Request for Production of Docs. Directed to Pl. (“Pl.’s Answers to Def.’s First Interrogs.”), Pl.’s Ex. 4 at 10, ¶ 12(a). Samsung noted that “Feedback is the determinative factor in distinguishing between Control Electronics and Drive Electronics” *Id.* Samsung abandoned its argument that control electronics must be able to receive feedback once its experts disagreed that feedback was a determinative element of the definition. *See* Deposition of Robert Marcotte (“Marcotte Dep.”), Def.’s Ex. M at 104–05; *see also* Byungcho Choi Report (“Choi Report”), Pl.’s Ex. 10 at 9–11 (describing the difference between control systems with feedback and control systems without feedback).

As indicated, Samsung now argues that the ability to make “independent judgments” is the determining characteristic of control electronics. By independent judgments, Samsung appears to mean that an electronic device, based on the information it receives, can choose to act in various ways, instead of merely acting in the same way every time. *See* Yang Report, Pl.’s Ex. 7 at 26 (defining the decision-making function as taking input commands and reflecting upon the state and circumstances of the output or, in other words, the ability to process information in many ways based on feedback). “Independent decision-making” by an electronic device, therefore, refers to the device’s ability to alter its functions based on the feedback it receives, instead of merely following a command. Thus, because “independent judgment” and “us[ing] a feedback function to make decisions” are different labels for the same activity, and because Samsung’s own experts agree that feedback is not required for all control electronics, it follows that the ability to make independent judgments is not a requirement for all control electronics.

Samsung also argues that, consistent with the *Pioneer Ruling*, control electronics must be able to accept “video signals” from an external device. Pl.’s Br. 24; *see also* Choi Report, Pl.’s Ex. 10 at 9–10 (stating control electronics accept video signals from external devices (i.e. a cable signal) and send out an electronic signal and drive electronics are limited to receiving electrical signals). The dictionary definitions also do not reference the type of signal as a distinguishing element of a control. Instead, the dictionary definitions refer to the ability to accept and process “commands,” “instructions,” “signals,” and “power.” Thus, the court does not find justification for reading into the common meaning of control electronics an ability to create the signal, make independent judgments, or use only video signals.²¹

²¹ Samsung argues that if the court adopts the *Pioneer Ruling*’s definition, it should be interpreted strictly to refer to the electronics that accept video signals. Pl.’s Br. 24–26. The

The court does not find that the Answer to the Nine Questions requires a departure from the common meaning expressed by the dictionary definitions. The document was not published and was prepared by seven plasma television manufacturers in the context of a specific customs dispute. Additionally, the document contradicts itself by stating there is no accepted or uniform definition of drive or control electronics before providing a specific definition for both. Answers to the Nine Questions ¶¶ 2, 3, 4(a)–(b) (noting there are no uniform definitions of drive electronics in the flat panel display industry but defining drive electronics as those that lack the ability to make independent judgments).²²

Consistent with the common meaning as expressed in the dictionary definitions, the court concludes that control electronics are the electronics that perform some type of control function, such as interpreting coded instructions, determining the time and order of a device's actions, managing the flow of data, coordinating and synchronizing operations between two devices, governing the electrical power sent to a device, and accepting commands and carrying out instructions in a proper sequence. Control electronics will perform some, although not necessarily all, of these types of functions. Although some control electronics may use "independent judgment" or feedback, it is not a requirement for all control electronics.

The court's common definition of control electronics is confirmed by the expert reports in this case. *See Kahrs Int'l*, 791 F. Supp. 2d at 1240–41 (noting the court may consider expert opinions to the extent they are consistent with lexicographic and other reliable sources). Here, Defendant's experts state that the display industry defines control electronics as the electronics that process the signal from an input device and use that signal to turn on and off the drivers. Schlam Declaration, Def.'s Ex. B at ¶ 10.

Samsung's experts also describe what is called an "open-loop control system," which refers to a device capable of controlling another

court does not adopt the *Pioneer* definitions, and thus, this argument is moot. Samsung's experts, however, do state that control electronics must accept video signals from an end-user system. As stated above, this is inconsistent with the dictionary terms and is not persuasive.

²² The Answers to the Nine Questions state that:

The television industry agrees that terms, such as 'controller', 'logic' and 'control electronics', 'drive electronics' are not uniformly used in the industry. These terms are used differently and sometimes interchangeably by different Plasma TV Manufacturers. They are not industry-defined technical terms. They do not represent scientific or technical definitions of the product or industry. In most cases these names and/or labels are used for convenience and certainly not necessarily for the purposes of describing or defining actual functions.

Answers to the Nine Questions ¶ 3.

subsystem without relying on feedback.²³ In an open-loop control system, an “input signal” is sent to a “controller,” the controller converts the input signal into an “actuating signal” that is sent to another subsystem, the actuating signal causes the subsystem to function according to a pre-determined process, and that process produces the desired output. *See* Choi Report, Pl.’s Ex. 10 at 12–13. When discussing control theory, the expert report provides a general definition of “controlling function” as “transforming the input signal into the (intermediate) actuating signal that activates the rear-end subsystem to produce the output variable as the final outcome of the entire system.” *Id.* at 9–10. This is consistent with the dictionary definitions in that control electronics accept a signal and process that signal in some way, such as translating the instructions in that signal and using the instructions to cause another subsystem or device to function.

Having determined the common meaning of control and drive electronics, the court now turns to whether Samsung’s PDP Modules contain a display device, drive electronics, and control electronics and thus, can be classified as FPSAs.

II. Classification of Samsung’s PDP Modules

Here, the PDP Modules are *prima facie* classifiable in heading 8529 only.²⁴ The proper subheading at the six-digit level is 8529.90.²⁵

²³ In addition to the expert report, Samsung also provides dictionary definitions that demonstrate the difference between control systems with feedback and those without:

The IEEE Standard Dictionary of Electrical and Electronics Terms

controlling system 1: (automatic control system without feedback) That portion of the control system that manipulates the controlled system

controlling system 2: (control system feedback) The portion that compares functions of a directly controlled variable and a command and adjusts a manipulated variable as a function of the difference.

Pl.’s Ex. 20. This definition contradicts Samsung’s argument that all control systems must have feedback. It is undisputed that the PDP Module does not have feedback, and thus, the second definition is not relevant. The non-feedback definition is consistent with the common definition that control electronics exert control over a device or system.

²⁴ The PDP Modules were used solely with televisions and video monitors and neither party has suggested that there is an alternative principal use. Both parties argue that 8529 is the correct heading for the PDP Modules, which implies that the parties agree the PDP Module is primarily or solely used for articles of heading 8525 to 8528. *See* Def.’s Facts ¶ 4; *see also* Pl.’s Br. 17 (“the heading that most closely describes the PDP Modules imported into Mexico from Korea is HTSUS 8529”). As a part suitable for use solely or principally with articles of heading 8528, the proper heading for the PDP Module is heading 8529.

²⁵ Classification at the six digit level is readily determined. The choice is between “Antennas and antenna reflectors of all kinds; parts suitable for use therewith” 8529.10 and “Other” 8529.90. Because the PDP Module is not an antenna, 8529.90 would be the correct classification.

A. V3 PDP Module

The proper classification at the eight-digit level turns on whether the Logic Board meets the definition of control electronics. Samsung argues that the Logic Board is not control electronics because it has no capability to direct video signals or manage the data, and that its only purpose is to energize and de-energizes the pixels on the display panel. Pl.'s Br. 23, 29. Samsung also argues that because the Logic Board cannot alter, manipulate, decide, or otherwise affect the instructions sent to the display, it is not control electronics. Pl.'s Br. 24, 29–30. Defendant argues the Logic Board is control electronics because it directs video signals and timing instructions to the Drivers and manages the data received from the Main Board (outside the article at issue). Def.'s Br. 23.

As defined above, a FPSA must contain at least a display device, drive electronics, and control electronics. Drive electronics supply a signal or electrical current to another device in order to activate it or run it. Control electronics control a device or system by performing some type of control function, such as such as interpreting coded instructions, determining the time and order of a device's actions, managing the flow of data, coordinating and synchronizing operations between devices, governing the electrical power sent to a device, and accepting commands and carrying out instructions in a proper sequence.

The court finds that the glass panels containing the electrodes and plasma gas constitute a display device because this is the plasma screen that will display the image. The court finds that the X, Y, and Column Drivers are the “drive electronics” because these electronics provide an electrical signal to the electrodes in the panel in order to excite the electrodes.²⁶

The court finds that the Logic Board is a control electronic. The Logic Board executes a control function over the Drivers by receiving a signal from the Main Board, processing that signal, and using the instructions and timing information contained in the signals to know when and where to send the appropriate signals to the Drivers. The Logic Board's inability to create the instructions contained in the signal that it receives from the Main Board and its inability to receive feedback and make adjustments to the signal are not determinative. As explained above, the common meaning of “control” is not limited to electronics that generate original instructions, make independent judgments, or accept feedback. Instead, the distinguishing characteristic is that control electronics control another device by performing a

²⁶ The parties agree that the X, Y, and Column Drivers are drive electronics. Def.'s Facts ¶ 7; Pl.'s Resp. ¶ 7.

control function such as interpreting coded instructions, determining the time and order of a device's actions, managing the flow of data, coordinating and synchronizing operations, governing the electrical power sent to a device, and accepting commands and carrying out instructions in a proper sequence. Here, the Logic Board controls the X, Y, and Column Drivers because it processes the LVDS signal received from the Main Board, performs coordinating and synchronizing operations by interpreting the video information in accordance with the timing information, performs the instructions contained in the signal in the proper sequence, and manages the flow of data by sending the appropriate signal to the appropriate Driver at the appropriate time.²⁷

The Logic Board also performs a drive function in that it takes a signal from the Main Board and passes that signal along to the Drivers in order to energize the electrodes and produce an image. Additionally, the Main Board performs a control function by receiving a signal, translating that signal into another format, and sending that signal to the Logic Board. Thus, it is easy for Samsung to argue that the Main Board constitutes control electronics and that the Logic Board is merely a drive electronic that passes on a signal. Samsung's experts note, however, that electronics often will perform more than one function and that control electronics can also perform a drive function. Choi Report, Pl.'s Ex. 10 at 8 ("almost all components of modern consumer electronics execute multiple functions simultaneously and interchangeably, which may not always exclusively fall within one classification or another."); Yang Report, Pl.'s Ex. 7 at 24 ("Similarly, a 'control electronics' also drives designated objects, just like a 'drive electronics.'"). Thus, the ability of the Logic Board to pass

²⁷ The patents that relate to the V3 PDP Modules provide a schematic of the PDP Module with one block labeled as a "controller". See, e.g., U.S. Patent 7,425,936 B2, Def.'s Ex. V at 722; see also Deposition of Wansoon Kim, Def.'s Reply Ex. Y at 88 (identifying patent as "related with V3"). The controller is described as receiving the image and synchronisation signal from an outside source, dividing frames into sub-fields, and dividing the sub-fields into a reset time, addressing time, and sustain/discharge time in order to drive the plasma display panel. *Id.* at 735. The functions of this controller are substantially similar to that of the Logic Board. The schematic in the patent matches the block diagrams used by Samsung's expert to identify control electronics. See Choi Report, Pl.'s Ex. 10 at 13. The patent shows that an "image signal" is sent to the controller, the controller sends out electric signals to the drivers, and the drivers produce an image on the screen. Just as in the block diagram in the Choi Report, there is a front-end subsystem (Logic Board), a rear-end subsystem (Drivers), an input variable (image signal in LVDS format), an intermediate variable (electrical waveforms), and an output variable (image). Thus, the Logic Board fits the theoretical definition of control electronics provided by Samsung's experts and illustrated in its patent. Although Samsung's experts argue convincingly that the Main Board can be identified as control electronics within an entire PDP television system, Samsung's experts have not explained why the Logic Board cannot also be identified as control electronics within a PDP Module.

a signal along to other devices, which ultimately energizes the screen and displays an image, does not prevent the Logic Board from qualifying as control electronics.

Additionally, the fact that the Main Board executes a control function does not mean that the Logic Board cannot also execute a control function. The Main Board accepts a video signal and processes it into an LVDS format. The Logic Board accepts an LVDS signal and processes it into electrical waveforms. Samsung argues that the process on the Main Board is more complicated than the process on the Logic Board because the Main Board uses a microprocessor and performs “image scaling and processing (enhance) functions.” See Kim Deposition, Pl.’s Ex. 5 at 26. Samsung’s expert, however, describes both a complicated controlled system, run by a microprocessor, and a simple controlled system that is not controlled by a computer chip. See Choi Report, Pl.’s Ex. 10 at 12–13 (quoting B.C. Kuo and F. Golnarachi, *Automatic Control Systems* (8th ed., John Wiley & Sons, Hoboken, N.J. 2003) at 2–8 (“In simple cases, the controller can be an amplifier, a mechanical linkage, a filter, or other control elements, depending on the nature of the system. In more sophisticated cases, the controller can be a computer such as a microprocessor.”)). Samsung’s argument that only the microprocessor on the Main Board could constitute control electronics is inconsistent with this textbook definition of more simple controlled systems. Samsung has not adequately explained why a less complicated process of converting and generating an electrical waveform from an LVDS input and using the instructions in the signal to control another subsystem (the Drivers) is not also a control function. In short, Samsung has emphasized the different functions performed by the Main Board and the Logic Board, but Samsung has not demonstrated that the functions of the Logic Board do not also satisfy the common definition of control electronics.

Samsung’s fundamental error is defining control electronics and drive electronics in the context of a complete television. See Pl.’s Reply 9, 29 (stating that control electronics must “control the color video image” and that the NAFTA definition of control refers to all of the control electronics in a television). The court cannot consider these definitions in the context of a complete television because it is defining a term that, by definition, must be merely a part of a complete television. Samsung’s error is illustrated by its attempt to define control electronics as the electronic that accepts a video signal from the end-user system (i.e. a cable box or DVD player). It is undisputed that in the context of a complete television, the control electronics include the electronics that accept a video signal from an end-user system.

See U.S. Customs, *Classification of Flat Panel Displays: An Informed Compliance Publication* (Jan. 2004), Def.'s Ex. K at 7 (defining control electronics in the context of a complete flat panel display (a complete television) as “[i]ntegrated circuits that decode and interpret the signals sent by the end-user system and transmit the signals to the drive electronics.”). This definition demonstrates that the first electronic device connected to an end-user system is a type of control electronic. It does not follow, however, that the definition of control electronics is limited to the first component of a television that accepts video signals from the end-user systems.²⁸

Moreover, Samsung’s proposed definition of control electronics would require the court to find that a FPSA refers to: the Main Board and all of its integrated circuits, including the analog board, digital board, microprocessor, and, in the case of a television, a tuner, plus all of the integrated circuits on the Logic Board, the Drivers, and the flat panel display containing the electrodes and plasma gas.²⁹ Pl.’s Facts ¶¶ 34–35, 38; see Robert Marcotte Expert Report, Pl.’s Resp. Ex. 5 at 24 (illustration of the control and drive electronics). In short, Samsung argues that a FPSA refers to a display panel plus *all* of the electronics necessary to produce an image on the screen. See Pl.’s Reply 29 (stating that the NAFTA Clarification did not refer to only “some” of the control electronics but instead requires the “full set” of control electronics); *id.* at 5 (“even if [the Logic Board] could be considered part of the control electronics, the full set of control electronics is not present on the PDP Modules . . .”). Such a definition would render the NAFTA Clarification inconsistent with heading 8529, which only applies to “parts.” Samsung has failed to provide a definition for control electronics, as referenced by the NAFTA Clarification, that is plausible given the type of products that may be classified under 8529.90.53. The determinative issue here is whether the PDP Module contains the electronics necessary to “control” the flat panel display, not the entire television. The answer here is yes

²⁸ Even if all control electronics were required to accept video signals, Samsung’s argument would fail because Samsung itself describes the LVDS signal sent from the Main Board to the Logic Board as a “video signal.” See Pl.’s Answers to Def.’s First Interrog., Pl.’s Ex. 4 at 15, ¶ 24(a) (stating that the digital board enables the “Main Board to generate video signals (LVDS signals) delivered to the Logic Board . . .”).

²⁹ The record suggests that this list would include all of the electronics necessary to make a television or video monitor. See Pl.’s Facts ¶¶ 18, 31; Def.’s Resp. ¶¶ 18, 31 (stating that the PDP Modules are combined with the Main Board, front and rear covers, cables, and various connectors, fasteners, and other parts to produce the finished video monitors and televisions); See also Marcotte Dep., Def.’s Ex. M at 93–94 (stating that after the Main Board and Logic Board are combined, the remaining elements necessary to complete a television would be “final assembly-type items” such as remote control interfaces, outer bezels, and front EMI filters).

because the Logic Board performs a control function by translating the video and timing information, synchronizes the information, and uses the instructions from those signals to know when to send a signal to a particular Driver. Thus, the court finds that the V3 PDP Module is classified under 8529.90.53 as a FPSA because it contains a display panel, drive electronics, and control electronics. Pursuant to the NAFTA ROO, the video and television monitors incorporating the V3 PDP Module are therefore not NAFTA-originating goods and are not entitled to NAFTA preferential treatment.

B. V4 PDP Module

Samsung argues that because the V4 PDP Module was not imported with a Logic Board attached, the Module cannot have control electronics and therefore is not a FPSA. Pl.'s Br. 29. Defendant argues the V4 Modules were imported together with the Logic Boards, and thus, are unassembled FPSAs pursuant to GRI 2(a). Def.'s Br. 26. Samsung replies that the products cannot be classified as FPSAs under GRI 2(a) because (1) complex manufacturing processes are required to manufacture and assemble the V4 Logic Board to the V4 PDP Module; (2) the Logic Board is not control electronics, and (3) even with the Logic Board assembled on the V4 at the time of importation, the V4 has yet to be designated for use in a television versus computer monitor and thus, cannot be classified as a FPSA.³⁰ Pl.'s Reply 25.

GRI 2(a) states that “Any reference in a heading to an article shall be taken to include a reference . . . to that article complete or finished . . . entered unassembled or disassembled.” GRI 2(a); *see also* Explanatory Note V to GRI 2(a) (“[C]omplete or finished articles presented unassembled or disassembled are to be classified in the same heading as the assembled article.”). The Explanatory Notes explain that “articles presented unassembled or disassembled’ means articles the components of which are to be assembled either by means of fixing devices (screws, nuts, bolts, etc.) or by riveting or welding, for example, provided only assembly operations are involved. No account is to be taken in that regard of the complexity of the assembly method.” Explanatory Note VII to GRI 2(a). “However, the components shall not be subjected to any further working operation for completion into the finished state.” *Id.*

The Explanatory Notes and case law from the court do not elaborate on the distinction between “assembly operations” and “further working operation.” Customs, when resolving this issue, first considers

³⁰ Flat plasma screens used for computer systems are prima facie classifiable in heading 8471(for use in ADP systems) and not in 8529.

whether the items were imported together in the same shipment in equal amounts or whether the items were imported in bulk for an assembly operation. *See Re: Classification of Plastic Pet Carrier Parts; Not incomplete articles with essential character of complete or finished container: GRI 2(a)*, HQ Ruling 966894 (Mar. 2004). The former will be considered finished items entered unassembled, and the latter are classified as discrete products. *See RE: Protest No. 4909-91-100143; Footwear; Leather Upper; Sock Liner; Constructively Assembled; Goods Shipped in Bulk*, HQ 951508 (July 1992).

Here, it is undisputed that the Logic Board and V4 PDP Modules applicable to the entries at issue were included in the same shipment and were listed together in equal numbers on the entry documentation. Def.'s Facts ¶ 34; Pl.'s Resp. ¶ 34; *see also* Pl.'s Third Supplemental Answer to Def.'s First Interrog. and Req. for Produc. of Docs. Directed to Pl., Def.'s Ex. 1, (entry documentation listing V4 PDP Modules and Logic Boards in equal numbers).³¹ Additionally, there is no dispute that the Logic Board is a part that is to be fitted together with the V4 PDP Module. *See* Pl.'s Facts ¶¶ 18-19. Thus, classification turns on whether the Logic Board is attached to the PDP Module with only assembly operations.

Samsung repeatedly describes the process of connecting the V4 Logic Board to the PDP Module as mounting and assembly.³² *See* Pl.'s Facts ¶ 18 (quoting Pl.'s Answer to Def.'s First Interrog., Pl.'s Ex. 4 at 13, ¶ 18) ("In the case of the V4 modules, the V4 Logic Board, which is not included on the PDP Logic Board when shipped from Korea, is assembled and mounted onto the V4 PDP Module in Mexico during this time."); *see also* Pl.'s Answer to Def.'s First Interrog., Pl.'s Ex. 4 at 13, ¶ 19 ("in the case of the V4 PDP Module, the Logic Board is assembled onto the PDP Module after its importation into Mexico").

Samsung relies on a declaration of one of its executives, Wansoo Kim, to demonstrate that further manufacturing is required to attach the Logic Board to the V4 PDP Module. *Declaration of Wansoo Kim*, Pl.'s Resp. Confidential Ex. 1, ¶¶ 3, 6, 9. Contrary to Samsung's arguments, the statements in Kim's Declaration further demonstrate that the Logic Board is merely mounted and attached to the Main

³¹ [[

]] The entry documentation provided by Samsung was in response for a request for all entry documentation related to the entries at issue. *See* Def.'s Ex. 1 at 7. If there were other shipments of the V4 PDP Module that did not include the V4 Logic Board, Samsung had the opportunity to provide them but did not. Thus, Samsung offers no evidence to suggest other shipments did not include the V4 Logic Boards and PDP Modules together.

³² In general, logic boards are attached with special wire-harnesses used as connectors. *See* Answers to the Nine Questions at 20, ¶ 6.

Board. *Id.* ¶ 9.³³ Although additional manufacturing occurs in Mexico to transform the PDP Module into a finished product, the Kim Declaration does not state that the further manufacturing is related to the connection of the Logic Board to the PDP Module. *See id.* ¶ 6.³⁴ Thus, Samsung has offered no evidence of the alleged manufacturing and its own Statement of Undisputed Facts describes the process as one of mounting and assembly.

Samsung's remaining arguments are also unavailing. Samsung supplied only limited evidence relating to the structure and function of the V4 Logic Board. It, therefore, has failed to present evidence that the V4 Logic Board lacks control electronics. Regardless, by Samsung's own admission, the Logic Board for the V4 Module contains control electronics. Pl.'s Answers to Def.'s First Interrogs., Pl.'s Ex. 4 at ¶ 40 (stating that the MICOM on the V4 Logic Board provides the "control" function).³⁵

Finally, even though the PDP Modules may lack the electronics that eventually designate it for use in a television versus an ADP system, Samsung has not argued that there is an alternative principal use for its PDP Modules. Because headings 8529 (parts used for television and video monitors) and 8471 (ADP systems) are "use" provisions, the principal use of the PDP Modules controls, regardless of whether the products could potentially be used in other systems.

The court concludes that Samsung's V4 PDP Module and Logic Board are classified as an unassembled FPSA under subheading 8539.90.53 and are, therefore, not entitled to preferential NAFTA treatment.

CONCLUSION

For the foregoing reasons, the court concludes that the V3 and V4 PDP Modules are flat-panel screen assemblies classified under 8529.90.53, HTSUS. Because the imported goods include a FPSA manufactured outside of a NAFTA territory, the NAFTA Rules of Origin have not been satisfied and the imported goods are not entitled to NAFTA preferential treatment. The court sustains Commerce's

³³ The relevant portion of paragraph 9 (II)(3) states: [[]]

³⁴ Paragraph 6 states in part: [[]]

]]

³⁵ Unlike the V3 Logic Board, the V4 Logic Board incorporated a MICOM as an additional integrated circuit. Yang Report, Pl.'s Ex. 7 at 6, Table 1. "The MICOM, an IC, is a small computer containing a software program through which it can make decisions. It has input ports for various purposes including receiving feedback." Pl.'s Answers to Def.'s First Interrogs., Pl.'s Ex. 4 at ¶ 41(a). Thus, according to Samsung, the V4 Logic Board constitutes control electronics.

denial of Samsung's request and application for NAFTA preferential treatment and the denial of the subsequent protests on all entries covered by this case. Plaintiff's motion for summary judgment is denied. Defendant's motion for summary judgment is granted. Judgment will be entered accordingly.

Dated: November 21, 2012\
New York, New York

/s/ Jane A. Restani
JANE A. RESTANI JUDGE

ERRATA

Please make the following change to *Samsung Int'l, Inc. v. United States*, No. 10-00015, Slip Op. 12-144:

- page 35, line 8: change “subheading 8539.90.53” to “subheading 8529.90.53”.

November 26, 2012.

