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MEMORANDUM TO: Stephen J. Claeys
Acting Assistant Secretary
for Import Administration

FROM: Edward Yang
Senior Enforcement Coordinator / NME Unit
Import Administration

SUBJECT: Issues and Decision Memorandum for the Final Results in the 2003/2004 Administrative Review of Brake Rotors from the People's Republic of China

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SUMMARY

We have analyzed the case briefs and rebuttal briefs of interested parties in the 2003/2004 administrative review of brake rotors from the People's Republic of China ("PRC"). As a result of our analysis, we have made certain changes since the preliminary results. See Brake Rotors from the People's Republic of China: Preliminary Results of Second Antidumping Duty Administrative Review, 70 FR 24382 (May 9, 2005) (Preliminary Results). We recommend that you approve the positions we have developed in the "Discussion of the Issues" section of this Issues and Decision Memorandum. Below are the issues in this review:

General Issues
Comment 1: Labor Rate
Comment 2: Surrogate Value Calculations for Cartons
Comment 3: Coal Transport and Loading Fees
Comment 4: Scrap Offset in Surrogate Financial Ratios
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Comment 7: Huanri-Separate Rate
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Comment 13: ZLAP-Surrogate Value for Lug Nuts

Background

We published the preliminary results in the 2003/2004 administrative review in the Federal Register on May 9, 2005. See Preliminary Results. The period of review ("POR") is April 1, 2003, through March 31, 2004.

On June 6, 2005, we invited the interested parties to comment on our preliminary determination that a particular village committee was an arm of the PRC government and that as such, it affected export-related decisions at Huanri leading us to preliminarily deny Huanri a separate rate. On June 14, 2005, we received comments from petitioners and Huanri in response to our June 6, 2005, letter, and on June 21, 2005, we received comments from petitioners in rebuttal to Huanri's June 14, 2005, letter.

On June 30, 2005, we received case briefs from the petitioners, the Coalition for the Preservation of American Brake Drum and Rotor After Market Manufacturers, and from the following respondents: China National Industrial Machinery Import & Export Corporation ("CNIM"), Qingdao Gren (Group) Co. ("GREN"), Shanxi Fengkun Shanxi Fengkun Metallurgical Ltd. Co., ("Fengkun"), Zibo Luzhou Automobile Parts Co., Ltd. ("ZLAP"), Laizhou Auto Brake Equipment Company ("LABEC"), Yantai Winhere Auto-Part Manufacturing Co., Ltd. ("Winhere"), Longkou Haimeng Machinery Co., Ltd. ("Haimeng"), Laizhou Hongda Auto Replacement Parts Co. ("Hongda"), Hongfa Machinery (Dalian) Group Co., Ltd. ("Hongfa"), Qingdao Meita Automotive Industry Co., Ltd. ("Meita"), and Shandong Huanri (Group) General Company together with Laizhou Huanri Automobile Parts Co.,Co., Ltd. (collectively, "Huanri"). On July 11, 2005, we received rebuttal briefs from the petitioners, and from LABEC, Winhere, Haimeng, Hongda, Hongfa, Meita, and Huanri.

Based on the comments summarized below, we have made revisions to the data used for the final results. For further details, please see the final analysis memoranda for the particular companies. These memoranda are dated November 7, 2005, and are on file in Import Administration's Central Records Unit, room B-099 of the Department of Commerce building.

General Issues

Comment 1: Labor Rate

Respondents LABEC, Winhere, Haimeng, Hongda, Hongfa, Meita and Huanri (hereinafter "LABEC et al.") argue that the Department should use labor rates from India pursuant to the statutory requirement to use "prices or costs of factors of production in one or more market economy countries that are (A) at a level of economic development comparable to that of the nonmarket economy country and (B) significant producers of comparable merchandise." LABEC et al., argue that using countries which are not at a level of economic development comparable to China or which are not significant exporters of comparable merchandise contradicts 19 U.S.C. §1677b(c)(4).

These respondents further argue that, if the Department continues to use the regression analysis it used in the Preliminary Results to calculate the 2002 labor rate in China, then it should use all available country data, and not exclude, without explanation, 29 market economy countries, since to do so conflicts with the "more data is better than less data" principle cited by the

Department as a guide to determining labor surrogate value in non-market economy (NME) cases. Finally, LABEC et al. argue that the foregoing comments could as well be applied to the use of the more current 2003 data, should the Department use them.

Respondents CNIM, Gren, Fengkun and ZLAP (CNIM et al.) argue that the Department's surrogate labor rate fails to reflect values from comparable countries as directed by section 19 U.S.C. §1677b(c)(4)(A). CNIM et al. further argue the wage rate used by the Department is unreasonably high because it includes data from non-comparable countries such as Switzerland, the United Kingdom, Norway, and Germany. By way of an example of the inappropriateness of these data, CNIM et al. argue that Norway's annual per-capita gross national income (GNI) in 2002 was $35,630 versus $960 in China.

CNIM et al. also argue that the Department's labor rate is flawed because it incorporates information on the Chinese GNI per-capita in its formula, thereby improperly relying on NME price data in the surrogate value.[1] These respondents argue that although recent Department determinations have acknowledged the need to revise the labor rate calculations,[2] the Department is still using the unrevised calculations.

CNIM et al. also argue that the labor rate calculation fails to include data from countries comparable to China, for which published data are available, and even excludes data from countries cited by the Department as specifically comparable for purposes of surrogate value in this review, i.e., Morocco and Indonesia.

Finally, CNIM et al. argue that the goal of predictability cannot be served if the Department arbitrarily includes or excludes data from countries with published wage rates in its calculations. At a minimum, respondents argue, the Department should indicate what steps, if any, have been taken to revise the surrogate labor calculations.

Department's Position:
In Antidumping Duties; Countervailing Duties: Final Rule, 62 FR 27296, 27367 (May 19, 1997) (Final Rule), the Department explained the rationale for its calculation of expected NME wages:

[1] Respondents refer to the Department's wage rate calculations which can be found at: http://ia.ita.doc.gov/wages/.

[2] Respondents cite Final Determination of Sales at Less Than Fair Value: Wooden Bedroom Furniture From the People's Republic of China, 69 FR 67313 (November 17, 2004), and the accompanying Issues and Decisions Memorandum at Comment 23; Persulfates from the People's Republic of China; Final Results of Antidumping Duty Administrative Review, 70 FR 6836 (February 9, 2005), and accompanying Issues and Decisions Memorandum at Comment 9.

> In general, we believe that more data is better than less data, and that averaging of multiple data points (or regression analysis) should lead to more accurate results in valuing any factor of production.

The Department does not agree with the respondents that the Department should use India's average wage rate as a surrogate value for PRC labor because the use of such data as a surrogate for PRC labor would be contrary to the Department's regulations.

Section 351.408(c)(3) of the Department's regulations directs the Department to value labor in cases involving NME countries as follows:

> For labor, the Secretary will use regression-based wage rates reflective of the observed relationship between wages and national income in market economy countries. The Secretary will calculate the wage rate to be applied in nonmarket economy proceedings each year. The calculation will be based on current data, and will be made available to the public.

Accordingly, recalculating the regression analysis, using a different basket of countries, would amount to a significant change in the Department's current methodology. The Department declines to do so in the context of the current review. We note that the Department has invited and received comments from the general public on this matter in a proceeding separate from the current review of this order.[3]

Since the Preliminary Results, the Department has revised its 2004 calculation of expected NME wages in accordance with the voluntary remand requested in another case. See Wooden Bedroom Furniture from the People's Republic of China: Final Results of Redetermination Pursuant to Court Remand Orders, Court Nos. 05-00003 (June 1, 2005); 05-00083 (June 20, 2005) ("Wooden Bedroom Furniture from the PRC"). This revision to the Department's 2004 calculation of expected NME wages corrects errors in the 2004 calculation, which itself was not consistent with the Department's normal methodology.

Specifically, as discussed in the Wooden Bedroom Furniture from the PRC remand redetermination, in October 2004, the Department posted an updated wage rate data set but did not rely upon this data set when calculating expected NME wage rates for 2004. Instead, the Department erred in October 2004 by relying on the regression analysis from the prior year's (2003) calculation of expected NME wage rates. The October 2004 wage rate data set and expected NME wage rates posted in November 2004 represented an attempt to correct the Department's error. However, the Department has acknowledged that the November 2004 wage rate calculation was also in error because the Department did not rely on the most recent data available.

[3] See Expected Non-Market Economy Wages: Request for Comment on Calculation Methodology,70 FR 37761 (June 30, 2005).

Accordingly, the Department's revised 2004 calculation of expected NME wage rates is consistent with its normal methodology, based on the data available as of December 2004. See http://ia.ita.doc.gov. On June 30, 2005, the Department published a notice in the Federal Register requesting comment on the sample wage rate methodology published on the Department's website.[4] We explicitly stated in that notice that this methodology will not be used for antidumping purposes, and therefore, we believe it is inappropriate to apply the wage rate for the People's Republic of China proposed by petitioners (U.S. $0.98/hour) to our final results.

The Department believes that its current calculation (which is the revised 2004 calculation) of expected NME wages is reasonable and correct, and we will continue to rely on it unless it is changed as a result of a thorough review subject to comment from all interested parties. Accordingly, for the final results of this review, the Department has valued labor with its expected NME wage rate for China at USD $0.85 per hour.

Comment 2: Surrogate Value Calculations for Cartons

Petitioners argue that the Department inadvertently included surrogate value data from one of the countries it intended to exclude from the calculation of the surrogate value for cartons (i.e., Indonesia). Petitioners argue that based on the Memorandum to the File, from Edward Jacobson, "Seventh Antidumping Duty Administrative Review and Eleventh New Shipper Review of Brake Rotors from the People's Republic of China Preliminary Factor Memorandum," dated May 2, 2005 (Preliminary Factor Memorandum), it is clear that the Department intended to exclude Indonesia, as well as South Korea and Thailand from the import statistics used to calculate average unit values. Petitioners contend that in the Preliminary Results, the Department erroneously incorporated values from those countries in the average value for cartons. Therefore, petitioners suggest that the Department recalculate the surrogate value for cartons excluding the values from those countries.

Respondents did not comment on this issue.

Department's Position:

We agree with petitioners to the extent that one calculation erroneously included Indonesian data. Specifically, in the Preliminary Factor Memorandum at page 2, footnote 1, the Department stated:

> {W}e excluded Indian import price data from non-market economies, as well as imports from Indonesia, South Korea and Thailand because we had reason to believe or suspect that they were distorted by subsidies (see Notice of Final Determination of Sales at Less Thank Fair Value: Certain Automotive Replacement Glass Windshields from the People's Republic of China, 67 FR 6482 (February 12, 2002)).

In calculating the value for cartons, to capture the relevant values available, we used two worksheets: "Cartons1" and "Cartons2." In "Cartons2," we inadvertently failed to exclude

[4] Id.

Indonesian values from the weighted-average market values. Accordingly, for the final results, we have re-calculated the weighted-average carton value excluding the Indonesian values. See the "Cartons2" worksheet in Memorandum to the File, from Tom Killiam, "Final Results Factor Valuation," dated November 7, 2005 (Final Factors Memorandum).

Comment 3: Coal Transport and Loading Fees

Petitioners argue that the Department intended to add coal loading and transportation fees to normal value in the preliminary results, but inadvertently omitted them. Petitioners also assert that the Department incorrectly calculated the values for these two items, and improperly inflated these values. Therefore, petitioners propose revised values for use in the Department's final results.

CNIM et al., did not comment on these points. However, respondents Labec et al., argue that since they did not use coal in the production of subject merchandise, the Department should not add these surcharges to their normal values. Furthermore, Labec et al., argue that these fees are only levied when coal is loaded either into the Indian Railway system or the purchaser's own transportation system.

Department's Position:

We disagree with petitioners that it is appropriate to apply the values listed in the Preliminary Factors Memorandum, as cited in Comment 2, above. We are not adding these expenses to the normal value of the responding companies because no party reported incurring this expense in the production of the subject merchandise. The Department was mistaken in indicating these expenses should be added to normal value in its Preliminary Results.

Comment 4: Scrap Offset in Surrogate Financial Ratios

CNIM et al. argue that in the Preliminary Results, the Department incorrectly applied a scrap offset to the costs of manufacture (COM) of two of the surrogate financial ratio companies, Kalyani Brakes Limited (Kalyani) and Mando Brake Systems India Limited (Mando). CNIM et al. contend the Department typically accounts for revenue from by-products only after surrogate ratios and packing have been added to the total COM. Furthermore, CNIM et al. argue, since they reported no such offsets in their data, the surrogate financial ratios should not be subject to an offset for scrap revenue.

The petitioners did not comment on this issue.

Department's Position:

We agree with CNIM et al. that it was incorrect to deduct scrap sales from the COM at the surrogate companies, Kalyani and Mando, and that this step erroneously increased the ratios for overhead, selling general and administrative expense (SG&A), and profit. Accordingly, for the final results, we have revised our calculation of COM for Kalyani and Mando by not deducting scrap sales from the cost of raw materials.

Comment 5: Financial Ratios Applied to Inputs Supplied by Customers

CNIM and ZLAP argue that the Department erred in the preliminary results by applying certain adjustments to normal value and U.S. price in an inconsistent manner. In particular, they contend that the Department should not have applied the surrogate financial ratios (overhead, SG&A, and profit) to the value of the ball bearing cup and lug nut components which were supplied for free by the U.S. customers, and which CNIM and ZLAP incorporated into brake rotors. CNIM and ZLAP argue that this adjustment to normal value was inconsistent with the Department's treatment of U.S. price, in which no such financial ratio adjustment was added to the value of the components supplied by the customers. Therefore, CNIM and ZLAP assert that for the final results, the Department should add the value of the components supplied by customers to normal value after the financial ratios have been applied to normal value.

Petitioners did not comment on this issue.

Department's Position:

We disagree with CNIM and ZLAP. Pursuant to section 773(c)(3)(B) of the Tariff Act of 1930, as amended (the Act), the Department determines normal value on the basis of factors of production (FOPs) utilized in producing the merchandise, including components supplied at no charge by U.S. customers, since they have not been specifically excluded. The Department considers these customer-supplied factors to be raw materials and therefore includes the cost of these materials in the COM. The respondents incurred overhead, SG&A, and profit, in handling, storing, assembling and delivering the final products. The customer-supplied items were unarguably components of the final products. Therefore, by statute, as cited above, the value of the components as supplied to the respondents must be adjusted to reflect the surrogate company's financial ratios. On the other hand, there is no authority or rationale for adding the financial ratios to the value of the components supplied by the U.S. customer to U.S. price. See, e.g., Notice of Final Determination of Sales at Less Than Fair Value: Chlorinated Isocyanurates From the People's Republic of China, 70 FR 24502 (May 10, 2005) and the accompanying Issues and Decisions Memorandum at Comment 10. See also Certain Preserved Mushrooms From the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review, 70 FR 54361 (September 14, 2005) and accompanying Issues and Decisions Memorandum at Comment 13. Accordingly, for the final results, we are not changing our approach from the Preliminary Results in regards to the application of the financial ratios to the components supplied for free by customers.

Comment 6: Surrogate Value for Lug Nuts

LABEC et al. argue that the Department erred in applying data based on the subheading 7318.16.00 ("lug nuts") from the Harmonized Tariff Schedule of the United States (HTSUS) to the value of lug bolts. The respondents argue that it is more appropriate to value this component using data from subheading 7318.15.00, HTSUS ("lug bolts"), because it corresponds more precisely to the components used in manufacturing the subject merchandise.

Petitioners did not comment on this issue.

Department's Position:
We agree with LABEC et al. that the product classification which they suggest corresponds more appropriately to the component in question. However, we note that the respondents' suggested remedy neglects to exclude certain countries designated by the Department as NMEs or as affected by export subsidies. For the Final Results, we have used the subheading 7318.15.00, HTSUS, to value this input for all responding companies, but have removed Indian imports from NMEs or countries affected by export subsidies from the average unit value. See Comment 2, above.

Company-Specific Issues

Comment 7: Huanri-Separate Rate
In the Preliminary Results, the Department determined that Huanri was not entitled to a separate antidumping duty rate for two reasons; as stated in the Preliminary Results:

> (1) the Department has analyzed the February 25, 1999, Organic Law on the Village Committee of the PRC ("Village Committee Law") and has determined that the Panjacun Village Committee is a form of local government in the PRC, and (2) new information obtained at verification demonstrates that the Panjacun Village Committee, as a local PRC government entity, controls the export activities of Huanri General.

See Preliminary Results, 70 FR at 24386-24387.

Additionally, we provided the following explanatory notes in the same notice:

> Government control of companies in non-market economies, such as the PRC, is not limited strictly to central government control, but can also include levels of sub-national government, including provincial, township or village government. If a company's export activities are subject to government control at any level, there is the possibility that export prices and export-related activities are subject to manipulation by the relevant NME government entity. Therefore, the relevant question in the Department's separate rates analysis is whether, as a matter of fact, the company operates autonomously from a government entity at any level with respect to export-related activities.[5]

We also requested comments on our interpretation of the Village Committee Law, stating that:

> {T}he Department recognizes that the articles of the Village Committee Law may be interpreted in different manners. As a result, the Department invites both especial comment as well as additional supporting information on these two considerations.[6]

[5] See Preliminary Results, 70 FR at 24388.

[6] Id. at 24389

Subsequent to the notice of Preliminary Results, at the request of Huanri,[7] we issued a letter to the interested parties clarifying the above request for comments, as follows:

> {Y}ou may wish to submit information and argument challenging the conclusion reached by the Department in the Preliminary Results that village committees are a form of government, or whether it is appropriate for the Department's separate rates analysis to include village-level government entities.[8]

The arguments summarized below reflect, in addition to the briefs and rebuttal briefs addressing the Preliminary Results, Huanri's and the petitioners' June 14, 2005, submissions in response to our invitation for comments, and the petitioners' June 21, 2005, rebuttal comments. Huanri made no rebuttal to petitioners' June 14, 2005, comments, but did submit case and rebuttal briefs.

Respondents' Arguments

Huanri's arguments, further elaborated below, are: 1) that the denial of separate rates in the Preliminary Results is a change in practice requiring discussion and analysis, 2) that village committees in the PRC are not government entities, and 3) alternatively, if the Department does determine that village committees are government entities, then at a minimum they should be eligible for antidumping rates calculated only for companies controlled by that particular level of government entity, and not assigned the China-wide rate which companies that are controlled by the central government, and non-responsive companies, would be assigned.

Huanri argues that the approach the Department took in the Preliminary Results is a change from prior practice that should only be undertaken after greater involvement and input from parties outside the current proceeding. Huanri notes that although the Department's letter inviting comments stated that interested parties, as defined by section 771(9) of the Act, could submit information and comments per section 351.309(c) of the Department's regulations, only the interested parties in this particular proceeding were notified of the invitation and were thus able to comment on it. Huanri contends that parties other than those involved in this proceeding were not given an opportunity to comment. Huanri argues that in the Preliminary Results, the Department acknowledged that it was "further cognizant that finding control at the village governmental level is novel." See Huanri's June 14, 2005 comments at page 3.

Huanri states that the Department's test for government control of NME respondents has been in place for 15 years, since it was put forth in the Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China, 56 FR 20588 (May 6, 1991) ("Sparklers from China"), and amplified in the Final Determination of Sales at Less Than Fair Value:

[7] See Letter from Trade Pacific PLLC, on behalf of Huanri, to the Department (May 10, 2005).

[8] See Letter from James C. Doyle, Director, AD/CVD Operations, Office 9, to Huanri (June 6, 2005).

Silicon Carbide from the People's Republic of China, 59 FR 22585 (May 2, 1994) ("Silicon Carbide from China"). Huanri argues that the Department should ask for comments from the public at large because the pool of parties that should be able to submit information and comment is larger than only those parties involved in this segment of this proceeding.

Next, Huanri argues that the Department's determination that government control, as determined by the separate rates test, can be identified at the municipal or local level as well as at the central government level, is not a clarification of the level of control, as the Department stated in the Preliminary Results, but a departure from established practice. Huanri argues that the last revision to the Department's regulations, in 1997, emphasized only central government control. In particular, Huanri argues that the Department stated, in connection with that revision, that it was refraining from adopting any extension of the presumption of government control "beyond the central NME government to provincial and municipal governments."[9] Huanri argues that the Department should not now change that which it previously declined to change inside the public rule-making process, without due process for the parties affected by this policy.

Huanri further argues that although the Department has recently adopted a new formal application procedure for NME companies requesting separate rates, the standard for determining eligibility has not changed. Huanri notes with respect to other changes in practice and policy in NME cases, such as the use of certain market-economy input prices in NME proceedings, the Department has invited public comment prior to effecting policy changes. Huanri suggests that the change in practice represented by the denial of separate rates to Huanri in the Preliminary Results merits similar treatment. Further, Huanri argues that the Department should only implement such a policy in reviews initiated after the Department has heard public comment and announced the change.

On whether Chinese village committees are government entities, Huanri argues that the U.S. State Department, in a 2002 report on human rights practices, stated that local village committees are not government bodies.[10] Huanri further argues that the Constitution of the People's Republic of China, Article 111, does not mention village committees among the local government entities listed in the Organic Law, in contradistinction with prefectures, counties, autonomous counties, municipal districts, townships and towns.[11] Finally, Huanri argues that if the Department does proceed to include village-level government entities in the test of government control, then the Department should at a minimum devise a separate rate applicable to that level of government entity, and not apply the same rate as it applies to entities presumed to be controlled by the central government.

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[9] See Huanri's letter of June 14, 2005, to the Department, citing the 1997 revisions to the Department's regulations, 62 FR 27296, 27304 (May 19, 1997).

[10] See Huanri June 14, 2005, letter to the Department, page 6, quoting U.S. State Department, "Country Reports on Human Rights Practices - 2002," March 31, 2003.

[11] See Huanri's letter of June 14, 2005, to the Department, page 6.

In their June 30, 2005 case brief, co-respondents LABEC et al. make the above arguments anew, while issuing the following two additional arguments on this issue. Labec et al. argue that the facts of Huanri's situation regarding government control did not change between prior reviews and the current review, and therefore, according to the principle stated in Certain Helical Spring Lock Washers from the People's Republic of China, 68 FR 63060 (November 7, 2003) (Lock Washers), in the absence of new facts, the Department should not change its approach. Secondly, LABEC et al. contend that the Court of International Trade (CIT), in Shikoku Chems. Corp. v. United States, (795 F. Supp. 417, 421-22 (CIT 1992)) (Shikoku), held that the Department may not unilaterally alter its methodology when a respondent has detrimentally relied on an old methodology used in previous reviews stating that "principals of fairness prevent Commerce from changing its methodology at {a} late stage." Huanri asserts that it relied on the Department's approach in prior reviews, and had no indication of an impending change prior to exporting the merchandise covered by this review. Therefore, Labec et al. argue, that the Department's alteration of its established practice would result in an unfair retroactive application of a new methodology.

Petitioners' Arguments

In their June 14, 2005, letter, June 21, 2005, rebuttal comments, case brief and rebuttal brief, petitioners argue that: 1) the Village Committee Law grants significant governmental powers to village committees; 2) village committees are controlled by the central and township levels of government; 3) government control at the village level can affect export operations and is therefore relevant to the separate rate test; and 4) evidence on the record indicates that Huanri was under both de jure and de facto government control, during the POR.

Petitioners argue that the Village Committee Law grants entities such as the Panjacun Village Committee the powers of a government entity, and invests them with certain executive, legislative and judicial powers. In particular, petitioners cite Articles 2, 5, 6, 25 and 26 of the Village Committee Law as bestowing fundamental executive governmental powers. Petitioners assert that these articles grant the Committee the power to command public services, provide or ensure education, manage public affairs, maintain social stability, act in a judiciary capacity, provide certain police powers to protect legal rights of citizens "and promote the development of rural socialist production and a socialist market economy..."[12] Petitioners note that no private parties in China are entrusted with such powers.

Petitioners further argue that Article 9 of the Village Committee Law provides that committee members "... can be compensated for their governance work if necessary." Petitioners argue this payment relationship is unequivocal evidence that the committees perform government functions and are beholden to central government authorities. Moreover, petitioners contend that it is normal practice in the PRC for village committee members to receive salaries (in part) from the central government, and therefore, the village committee members are dependent on the central

[12] Village Committee Law of February 25, 1999, Article 5.

government.[13]

Petitioners also argue that Article 25, on the formation of sub-committees "for mediation, public security or public hygiene," sets out the village committees' judicial power to interpret the law and apply it to particular disputes involving public services through mediation, thus further coloring the village-level government as an arm of the central authority. Petitioners further contend that village committees are in fact controlled by, or subject to the control of, the central and township government. Citing the Village Committee Law, petitioners assert that Articles 1, 2, and 23 demonstrate the control exercised by the central government and the Chinese Communist Party (CCP) over village committees. In particular, petitioners argue that Articles 1 and 23 show that the Village Committee Law, and the committees themselves, are subject to the Constitution of the PRC and national laws, regulations and policies. Petitioners argue that Article 2 explicitly calls for the committees to work under the "core leadership" of the CCP.

In addition, petitioners argue that Articles 8, 14, 15, 20, 22, 28 and 29 of the Village Committee Law specifically call for governmental entities at the township, county, province, autonomous region, centrally administered municipality, and People's Congress levels to control the election, establishment, policing and dissolution of village committees. Therefore, petitioners argue that village committees are closely controlled by all levels of the government of China.

Citing Silicon Carbide from China, petitioners also state that Department policy recognizes that certain enactments of the Chinese central government have not been implemented uniformly. Therefore, petitioners reason, it is also important to investigate how the Village Committee Law is implemented in practice. Petitioners argue that the CCP maintains control of village committees: 1) through the distribution of public resources (since the local Party Secretary controls funds), 2) through the greater hierarchical power of the Party Secretary, and 3) by disregarding the nominal provisions of self-governance put forth in the Village Committee Law.[14] As examples of how the CCP disregards provisions of this law, petitioners note that the record of this review shows that the Panjacun Village Committee does not in fact convene village assembly meetings to decide on the use of funds, except for significant sums, notwithstanding the provisions of Article 19 which require such meetings for all disbursements. Additionally, petitioners note, the Panjacun Village Committee does not hold annual meetings or issue reports to the village assembly, in contravention of the Village Committee Law.[15]

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[13] Petitoners cite "Holding up the Chinese Model of Governance," by Dhiman Chattopadhyay, in Times of India, January 7, 2003, quoting Yang Chengmin, Senior Professor and Dean of the School for Ethnology and Sociology, Central University for Nationalities in Beijing.

[14] See Petitioners' June 14, 2005, comments at page 7, citing: Village Elections, Village Power Structure and Rural Governance in Zhejiang, by He Baogang, October 1, 2002, ("Village Elections"), page 13 and Government Regulations, Legal-Soft-Constraint and Rural Grass-roots Democracy in China, by Qi Zhang, October, 2004, pages 6-7.

[15] See Petitioners' June 14, 2005, letter at page 9, citing the Haunri General Verification Report of April 6, 2005, page 9.

Petitioners assert that the predominant role of the CCP, and thus, of the central government, in village committee business is provided for by Article 3 of the Village Committee Law. Citing to a scholar of Chinese law and government, petitioners argue that Article 3 serves to "strengthen the party leadership in economic affairs, to ensure that the party is in the leading position, and to control social and economic development programs."[16]

Concerning the management of village-owned companies, petitioners argue that the Village Committee Law authorizes village committees to exert power and control, since it authorizes them to (among other things), "...use income collected from village collective economies," and "begin development of any new village collective economies...."[17] In addition to these powers, which petitioners stress are very broad, village committees are charged with publishing the financial related decisions of such companies. Thus, petitioners argue that the law entitles village committees to be the financial managers of companies they own or control. Petitioners conclude that, with respect to the de jure aspect of the separate rates test, there is "ample evidence" of government control.

Petitioners note that the issue of treating the Village Committee as an arm of the government arose before the CIT, when petitioners sued the Department precisely for having granted a separate rate to Huanri in an earlier review. In its April 1, 2004 remand instructions to the Department, the Court concurred with petitioners that the Department's "separate-rate test should not be limited to proving absence of national government ownership but should be applied to whatever level of government control that is implicated."[18] Though the case was later mooted because the antidumping duties at issue were liquidated prior to the completion of the remand proceedings, petitioners argue that the Court's interpretation of the governmental character of the committees has not subsequently been reversed or challenged since. See The Coalition for the Preservation of the American Brake Drum and Rotor Aftermarket Manufacturers v. United States, No. 05-74, 2005 Ct. Intl. Trade LEXIS 70 (CIT June 21, 2005) Slip Op. 05-74 (June 21, 2005).

Petitioners note in their brief that the Panjacun Village Committee decided to sell its ownership interest in Huanri to ten individual shareholders on the day after the aforementioned CIT remand, just after the close of the POR. However, petitioners argue, the Committee and Huanri's directors and managers are "so entangled" that there cannot be independence between the export operations of Huanri General and the Panjacun Village Committee.

Regarding the Department's test for de facto government control, as presented in Sparklers from China and Silicon Carbide from China, petitioners argue, the four factors for determining control are: 1) whether the export prices are set by, or subject to the approval of, a governmental

[16] See Petitioners's June 14, 2005, letter at page 9, citing Village Elections, page 14.

[17] Petitioners cite Articles 5, 19 and 22 of the Village Committee Law in this regard.

[18] Petitioners cite Coalition for the Preservation of American Brake Drum and Rotor Aftermarket Manufacturers v. United States, 318 F. Supp. 2d 1305, 1313 (CIT 2004) (hereinafter, Coalition v. United States).

authority; 2) whether the respondent has authority to negotiate and sign contracts and other agreements; 3) whether the respondent has autonomy from the government in making decisions regarding the selection of management; and 4) whether the respondent retains the proceeds of its export sales and makes independent decisions regarding the disposition of profits or financing of losses.

Petitioners argue that in light of the detailed nature of the types of intervention addressed by the separate rates test, it is appropriate to consider that the arm of government which likely would be involved in a company's decision-making would in fact be the local government. In this regard petitioners argue that government control at the village level can affect all aspects of export operations of an enterprise, and thus is relevant to the separate rates analysis. In the case of Huanri, petitioners contend that there is evidence that this power to control is indeed exercised. To support this assertion, petitioners note that the Preliminary Results stated that "new information obtained at verification demonstrates that the Panjacun Village Committee, as a local PRC government entity, controls the export activity of Huanri General." See Preliminary Results, 70 FR at 24387; see also Memorandum to the File, Verification of the Response of Shandong Huanri Group General Company and Laizhou Huanri Automobile Parts Co., Ltd. in the Seventh Administrative Review of Brake Rotors from the People's Republic of China, (April 6, 2005) (Huanri Verification Report). Petitioners argue that the extensive involvement of the Panjacun Village Committee in decisions bearing on export-related activities at Huanri, which was noted in the Huanri Verification Report and in the Preliminary Results, shows precisely that the de jure control called for in the Village Committee Law is in fact exercised.

Additionally, petitioners argue that the record of this review shows de facto government control over selection of management, contract authority, and disposition of profits or finances. Petitioners note that notwithstanding the April 1, 2004, stock sale transaction between the Committee members and ten individuals, the Panjacun Village Committee chairman is also Huanri's Chairman of the Board. Petitioners likewise cite the finding of the Department at verification and in the Preliminary Results that these two entities were closely intertwined.

Regarding contract authority, petitioners also cite the Huanri Verification Report and the Preliminary Results, in connection with Huanri's financing of a new plant, through the Village Committee. In particular, petitioners cite the Department's position that "Huanri General does not have the ability to obtain its own loans. Rather, the evidence on the record of this review indicates that the local government's assistance was required for this purpose."[19]

Regarding the disposition of profits, petitioners argue that the Village Committee demonstrated its authority over Huanri's profits by deciding not to distribute them in the year 2000, as discussed in the Huanri Verification Report. Petitioners further note that the 41 village representatives on the Committee have subsequently continued to be directly involved in profit distribution and strategic financing decisions and transactions at Huanri. As an example, petitioners point to the Village Committee's having made investments in Huanri, in two

[19] Preliminary Results, 70 FR at 24389

installments, which were financed from the village's lease payments, its own cash reserves, and a loan the village took in order to finance Huanri. Petitioners note that Huanri paid back part, but not all, of this loan, and that the village treated the balance as an investment loss. See Memorandum to Jim Doyle, Office Director, From Stephen Berlinguette, Re: Verification of the Response of Shandong Huanri Group Co., Ltd. in the Changed Circumstances Review of Brake Rotors from the People's Republic of China , (June 17, 2005) (Huanri CCR Verification Report). Petitioners further note that the Village Committee gave preferential treatment to Huanri during the POR, for example, not charging Huanri for land-use rights, in exchange for the company's hiring of local workers.

With respect to the Department's recently introduced separate rates application, petitioners note that the questions therein pertain to de jure and de facto control at any level of government, and specifically ask if any managers have "worked for the government at any level (national, provincial, local), or any government entities, in the past three years." Petitioners conclude from this text that the Department's current position is that the absence of de facto local control is a factor considered in determining the eligibility for a separate rate.[20]

Petitioners address Huanri's arguments for the need to offer all potentially interested parties an opportunity to comment on what Huanri argues is a new practice, that is, identifying village-level units of government in China as parts of the central government for purposes of the separate rates test. In particular, petitioners argue that no public rule making procedure is required because the Department is merely applying existing laws and regulations, and is explaining its approach, to the interested parties, particularly the village committee. Petitioners cite multiple prior cases in which the Department made determinations of whether local, municipal or village entities controlled the export-related decisions of particular respondent companies. Petitioners also cite the Department's April 5, 2005, bulletin on separate rates practice, and note that it does not exclude village or local entities from consideration in the separate rates test. See Import Administration Policy Bulletin No. 05.1 on Separate Rates Practice and Application of Combination Rates in Antidumping Investigations Involving Non-Market Economy Countries, (April 5, 2005) (Separate Rates Policy Bulletin), available at http://ia.ita.doc.gov.

Petitioners also argue that the Department is free to change its decision on separate rates if the facts warrant it, since the Department applies a de novo analysis. For this reason, petitioners argue, Huanri's reliance on past determinations by the Department was misplaced. Petitioners contend Huanri was not granted a perennial exemption from the separate rates test after having passed it successfully in prior reviews. Moreover, petitioners contend that Huanri's argument that a denial of a separate rate should only be instituted prospectively, runs counter to U.S. dumping laws, which require the administrator to examine respondents' actions at the conclusion of each review period, and issue liquidation and cash deposit instructions accordingly.

[20] See Petitioners' June 14, 2005 comments at page 14, citing Office of AD Enforcement, "Separate-Rate Application and Request for Supporting Documentation," pp. 8-12, available at http://ia.ita.doc.gov.

In rebuttal, Huanri argues that the petitioners have erred in their analysis and that there is no de facto government control over Huanri's export operations. See Huanri's July 11, 2005 rebuttal comments, pp. 3-7 (Huanri Rebuttal). Huanri notes that in granting Huanri a separate rate in its new shipper review, the Department stated that:

> Companies which are either owned by local or provincial government entities or the managers of which are appointed by the provincial, not the central, government can also receive a separate rate if they sufficiently demonstrate that they are entitled to one based on the criteria.... Huanri... in this case has demonstrated that it is responsible for all decisions such as determining export prices, allocation and retention of profits on export sales, and negotiating export sales contracts.[21]

Huanri argues that petitioners' assertion that the Panjacun Village Committee controls Huanri because the latter appoints key decision-makers at Huanri, is false, and that the facts could just as well be seen to show that Huanri controls the Village Committee. Huanri states that there is no record evidence to support petitioners' "presumption" that the committee makes Huanri's personnel decisions, and that there is ample evidence on the record that Huanri's shareholder representatives and directors make certain management and personnel decisions independent of the village committee. Huanri notes that only two of its 41 shareholder representatives are village committee members. Huanri further states that most of the personnel and management decisions for Huanri are made by the General Manager Pan Zhiqiang, not the shareholders or the directors, much less a local government. See Huanri Rebuttal, p. 5.

Respecting profits, Huanri argues that, contrary to petitioners' claim, Huanri's shareholder representatives, not any other entity, decide on profit distributions. Huanri states that subsequent to its new shipper review, the village committee no longer makes these decisions. Citing the Company Laws and Foreign Trade Laws of the PRC, which Huanri submitted in the course of the present review, and the shareholder meeting records contained in the Huanri Verification Report for the present review, Huanri argues that since January 2002, only the shareholder representatives have been responsible for profit distribution decisions.

With respect to the signing of contracts and other agreements, and petitioners' concerns on the village's financing of Huanri new plants, Huanri argues that a company's loan arrangements are irrelevant to its legal right to enter into agreements. As evidence of Huanri's ability and legal authority to sign agreements and enter into contracts, Huanri cites a rental agreement, an asset purchase agreement, a facility construction agreement, and a project cost agreement, which are all included or excerpted in the Huanri Verification Report . Huanri also cites to evidence on export price-setting practices, in particular, multiple instances on the record of sales contracts for export prices, signed by Huanri officers. Concerning the Village Committee Law, Huanri argues that petitioners have omitted discussion of Article 5, which according to Huanri states that, while the village committee shall support villagers in developing a collective economy, in doing so, the

[21] See Huanri Rebuttal, p. 3, quoting Brake Rotors from the People's Republic of China, 66 FR 44331 (August 23, 2001), and accompanying Issues and Decisions Memorandum at Comment 2, page 4.

committee "should respect the autonomy of collective economic units in conducting economic activities."[22]

Department's Position:
To establish whether a firm is sufficiently independent in its export activities from government control to be entitled to a separate rate, the Department applies a test arising from Sparklers from China and amplified in Silicon Carbide from China, cited above. Specifically, under the test, as defined in Silicon Carbide from China, the Department looks for whether there is an absence of de jure government control of the export activities of the respondent enterprise, and an absence of de facto government control of its export activities.[23] Under the separate-rates criteria, unless and until the case facts show otherwise, the Department presumes that all companies within a non-market economy are subject to government control and thus should be assessed a single antidumping duty deposit rate, the PRC-wide rate, which in this case is 43.32 percent. We assign a separate rate in NME cases only if the respondent can demonstrate the absence of both de jure and de facto governmental control over its export activities. See Preliminary Results, 70 FR at 24386.

With respect to the first part of the test, an absence of de jure governmental control, in analyzing both the case facts and the Village Committee Law, we have determined that Huanri's local village committee, the Panjacun Village Committee, is in fact, a form of government in the PRC. Although Huanri has presented a portion of a report from the U.S. State Department which purports to indicate that local Chinese village committees are not government bodies, it is unclear whether the term "government bod{y}" was the result of a specific determination by the U.S. State Department, Chinese Government or another entity.[24] In contrast, other record evidence includes various provisions of the Village Committee Law, the petitioners' analysis thereof, and references to academic publications which indicate to the contrary, that these Village Committees are, in fact, government entities.

For example, Article 2 of the Village Committee Law indicates that a Village Committee is not an independent entity but operates under the leadership of the Chinese Communist Party. The party branch is in effect the core of the village power structure. Additionally, Article 29 indicates that the Standing Committee of the People's Congress of provinces, autonomous regions, and centrally-administered municipalities exerts control by implementing this law in accordance with regional conditions. In addition to these Articles, the Department is mindful of the CIT's statement that there is a "...longstanding emphasis of the Communist Party on the 'grass roots' of China." See Coalition v. United States 318 F.Supp. at 1312.

[22] Huanri Rebuttal, p. 7, quoting Village Committee Law, Article 5.

[23] See Silicon Carbide, 59 FR at 55108, "Separate Rates" section.

[24] This report is entitled "Country Reports on Human Rights Practices - 2002," and the portion of the report selectively placed on the record by the respondent does not purport to be an exhaustive analysis of PRC Government functions by the United States State Department.

Additionally, although Huanri indicates that Article 111 of the PRC constitution does not mention village committees among the local government entities listed in the document, the Department finds that this omission is not dispositive or instructive when viewed in light of the actual provisions of the Village Committee Law itself. For instance, the guidelines for village committees do not rule out, but rather allow for, the possibility of control from party leaders and higher levels of government. Indeed, Article 5 calls for the party cadres to play "a key leadership role." In addition, Article 5 of the Village Committee Law provides for certain economic responsibilities to be undertaken by the Village Committee, including the development of a collective economy. Therefore, it seems clear that this Committee serves as some form of government, and that form of government is dedicated, in its economic activity, to promoting the principles of "rural socialist production and a socialist market economy." See Article 5 of the Village Committee Law. Although petitioners acknowledge that laws are not necessarily uniformly applied in China, it is ultimately unnecessary to resolve this matter given the Department's position above that the Village Committee is, in fact, a form of PRC Government, and the Department's de facto considerations.

The Department determined in the Preliminary Results that Huanri had not demonstrated a de facto absence of government control with respect to making its own decisions in key personnel selections, the use of its profits from the proceeds of export sales, and the authority to negotiate and sign contracts and other agreements.

In respect to personnel decisions, we stated that:

> The Panjacun Village Committee is so intertwined in personnel, and involved in key financing operations with Huanri General with respect to export activities, that there can be no meaningful consideration of separateness between the local PRC government and Huanri General.[25]

In respect to profit decisions and the use of profits from the proceeds of export sales, we stated that:

> Our verification findings further note that the 41 village representatives (serving in the capacity of Huanri General's shareholder representatives) have also been directly involved in profit distribution decisions made at Huanri General as evidenced by shareholder meeting minutes examined at verification (see Huanri General verification report at page 12). Therefore, based on the facts mentioned above, we cannot conclude that Huanri General makes its own profit decisions. Rather, the evidence on the record of this review indicates that the same individuals who appointed the village committee members also decided how Huanri General's profits are distributed, consistent with Article 19 of the Village Committee Law.[26]

[25] See Prelminary Results, 70 FR at 24388

[26] Id.

Finally, with respect to the authority to negotiate and sign contracts independently, we noted that:

> The village representatives (serving in the capacity of Huanri General's shareholder representatives) decided during 2003 to acquire the funds necessary for establishing a tire production plant as part of Huanri General's operations, consistent with Article 19 of the Village Committee Law. However, to pursue this objective (which required a significant amount of capital), the village representatives had to obtain the entire capital investment amount from the Panjacun Village Committee which subsequently furnished it to Huanri General by obtaining a bank loan (using the villagers' households as collateral) and by providing a portion of its rental income received from land lease agreements (see pages 5-6 and 10-12 of the Verification Report). Therefore, we conclude that Huanri General does not have the ability to obtain its own loans. Rather, the evidence on the record of this review indicates that the local government's assistance was required for this purpose.[27]

We continue to find, in this review, that the Village Committee is a level of the PRC government and that the Committee was inextricably involved in export-related decisions at Huanri. Huanri's arguments that it was not under the control of the local village committee are not supported by the facts on the record. See Verification Report and Preliminary Results. With respect to Huanri's argument that the Department is treating case facts identical to those in prior reviews differently, we disagree that the case facts are the same. As we stated in the Preliminary Results, there are "even more indicia" of government control, specifically the Huanri Verficiation Report and Village Committee Law, on the record of this review than in the prior Huanri review, which was the fifth administrative review under this order.[28] Additionally, the case facts in this review, as discussed above, demonstrate the close involvement of the Village Committee in Huanri's decisions. Thus, the Department has reached a different conclusion in this review than in prior reviews after learning of the extent of the decision-making role of the Village Committee and after analyzing the Village Committee Law, which was not analyzed in prior segments.[29]

In the Preliminary Results, we also noted that in denying Huanri a separate rate, the Department was clarifying its policy regarding the level of government control that is relevant to the separate rates analysis. We further stated that the relevant question in the Department's separate rates analysis was whether, in practice, the company operates autonomously from a government entity

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[27] Id., p. 24389

[28] Id.

[29] Coalition v. U.S., 318 F. Supp. 2d at 1313. In that case, the Court remanded the fifth new shipper review determination to ITA, "for reconsideration of its determination to grant {Huanri}... a separate antidumping rate." In so doing the Court stated that the "linchpin" of the question of whether there is government control of the Panjacun Village Committee, and therefore of Huanri, was the Village Committee Law. The Court therefore instructed the Department to reconsider granting a separate rate to Huanri in light of an analysis of the Village Committee Law.

at any level with respect to export-related activities. The Department did not state that this approach was a change of practice, but simply invited comments on two issues, namely 1) whether the Village Committee Law shows that the Panjacun Village Committee is a level of government in the PRC and 2) whether it "is appropriate to consider that government control at the village level can affect the export operations of an enterprise in general." See the Department's June 6, 2005 letter to Huanri.

The Separate Rates Policy Bulletin specifically states that:

> The separate rates application "does not change the long-established standard for eligibility for receiving a separate rate... which remains whether a firm can demonstrate an absence of both de jure and de facto government control over its export activities.

We agree with petitioners that the separate rates test has always been open to application at all levels of government control. Neither the Department's stance in regards to Huanri's control by the Panjacun Village Committee in this POR, nor the Separate Rates Policy Bulletin portend a change in policy in this regard. In particular, the Separate Rates Policy Bulletin recapitulates the criteria for determination of the absence of de jure and de facto control in terms consistent with the Sparklers from China and Silicon Carbide from China determinations. The Separate Rates Policy Bulletin also specifically states that the new application process "does not change the long-established standard for eligibility for receiving a separate rate."

Our determination in these final results is not a change in policy, as Huanri argues, but rather, properly reflects the case facts and the new information concerning the level of government control, specifically, the text of the Village Committee Law, which provides for higher-level government control, and the fact pattern which emerged in the 2003-2004 POR, where the Panjacun Village Committee frequently and significantly exerted control in export-related activities and decisions, including personnel decisions and contract negotiations. See Huanri Verification Report, pp. 10-12; see also Preliminary Results, 70 FR at 24387, 24388. These facts must be taken into account in the separate rates analysis specific to this proceeding.

With respect to Huanri's argument that the Department first offer the possibility of general public comment on whether to attribute governmental authority to village committees as a prospective policy initiative, this procedure is not called for since, again, we are not changing our policy but are acting on the facts, as summarized above, in light of existing law. Although we took the unusual step of inviting comments on this issue in our Preliminary Results, our determination that the Village Committee is a form of local government is based on the facts in this proceeding and does not represent a change in policy or methodology.

Huanri's argument that we are departing from guidelines set forth in the May 19, 1997, revisions to the Department's regulations is based on a selective reading of the relevant portion thereof.

Contrary to Huanri's argument, the Department explicitly left open the interpretation of the significance of local and village units of government with regards to the separate rates test:

> because of the changing conditions in those NME countries most frequently subject to AD proceedings, we do not believe it is appropriate to promulgate the presumption {of a single rate} or the separate rates test in these regulations. Instead, we intend to continue developing our policy in this area, and the comments that were submitted will help us in that process. We would like to clarify, however, that we do intend to grant separate rates in appropriate circumstances, and that our decision not to codify the presumption or the separate rates test should not be seen, as one commenter suggested, as a decision not to grant separate rates.[30]

The Department's decision to address the separate rates test flexibly, in light of changing conditions, has proven well-adapted to the facts in the present review, and in proceedings involving China generally. In particular, the authority and autonomy of village units of government in China has continued to evolve and is not uniform from village to village. The level of involvement of village committees in village-owned enterprises like Huanri is one reason for the separate rates test to be applied and analyzed under the particular facts of each segment of an antidumping proceeding for China. Moreover, we note the Village Committee Law was not formalized until after the Department's regulations were revised; thus, the Department could not have contemplated such law at that time. Certainly, the Huanri case is one of extensive involvement of the village in the company's affairs. See Preliminary Results, 70 FR at 24389.

The Department's methodology for separate rates have not changed, even when the application procedure for them has recently been formalized. The criteria remain the same, as the Separate Rates Policy Bulletin makes clear, but the facts presented here in this review support a different conclusion from that reached in prior reviews. In this case, LABEC et al. argues that, because of Shikoku, the Department cannot change its methodology. In Shikoku, the CIT found that the Department's adoption of a new approach which adversely affected the plaintiff's reliance on an "{old} methodology {that has been} consistently applied by Commerce in an attempt to comply with United States antidumping law," was unjustified, specifically with an unchanged fact pattern. See Shikoku at 795 F. Supp. at 420. However, Shikoku is distinguishable from the present review, where the Department has not adopted a new methodology. The facts in this review and our examination of the Village Committee Law have occasioned different results than reached in prior reviews, in which the fact patterns presented were not the same and information on these records was more limited.

With regard to Huanri's argument that the Department should devise a separate rate just for villages, this would not be in conformity with the established practice of applying the PRC-wide rate to those companies which do not qualify for a separate rate. As noted in the Separate Rates Policy Bulletin, "the Department assigns separate rate status in NME cases only

[30] See Final Rule.

if an exporter can demonstrate the absence of both de jure and de facto governmental control over its export activities." See Separate Rates Policy Bulletin; see also, e.g, Certain Preserved Mushrooms from the People's Republic of China: Final Results and Final Rescission, in Part, of Antidumping Duty Administrative Review, 70 FR 54361 (September 14, 2005). Huanri's proposed village rate would be a separate rate, and we determine that Huanri is not eligible for a separate rate as the Village Committee exists as a government entity.

Huanri has not once argued that there is not a relationship between the Village Committee and the company. Rather, Huanri's arguments focus on changes in practice, which the Department has addressed above, and on the assertion that village committees are not government entities. However, the Village Committee Law and the information on the record indicate otherwise. Therefore, for the above reasons, we agree with petitioners that the denial of a separate rate for Huanri in the final results properly reflects Chinese Law and the facts of this case with regard to Huanri's practices during the POR.

Comment 8: Xianjiang-Non-Responsive

Petitioners argue that in the final results the Department should resort to facts available in calculating the margin for China National Machinery and Equipment Import & Export (Xianjiang) Corporation ("Xianjiang") because it did not respond to the Department's questionnaires and inquiries. Petitioners assert that the Department correctly took this approach in regards to another unresponsive company, Qingdao Rotec Auto Parts Co., Ltd.[31] Petitioners further argue that the Department should not rely on data from U.S. Customs and Border Protection (CBP), because to rely on such data for antidumping analysis would set a "dangerous precedent" by effectively waiving the requirement to comply with Department questionnaires.

Xianjiang did not comment on this issue.

Department Position:

Pursuant to 19 USC 1677e(a), the Department will make a determination using facts available if (1) necessary information is not available on the record, or (2) an interested party…(A) withholds information that has been requested…, (B) fails to provide such information by the deadlines for submission of the information or in the form and manner requested…, (C) significantly impedes a proceeding…, or (D) provides such information but the information cannot be verified. Further, 19 USC 1677e(b) allows the Department to use adverse facts available if it "finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information."

The Department has the "discretion to determine whether a respondent has complied with an information request." See Daido Corp. v. United States, 893 F. Supp. 43, 49-50 (CIT 1995); Allegheny Ludlum Corp. v. United States, 215 F. Supp. 2d 1322, 1338 (CIT 2000); Maui Pineapple Co. v. United States, 264 F. Supp. 2d 1244, 1257 (CIT 2003). Moreover, facts

[31] See Preliminary Results, 70 FR at 24383.

available will be used if "necessary information is not available on the record." See 19 USCD 1677e(a)(1).

In this instance, there is insufficient and inconclusive information on the record to establish whether China National Machinery and Equipment Import & Export (Xianjiang) Corporation ("Xinjiang"), had any U.S. exports or sales of subject merchandise to the United States during the POR, which were manufactured by any company other than Zibo Botai Manufacturing Co., Ltd. ("Zibo Botai"), the producer/exporter combination initiated upon by the Department.[32] The burden of producing a record lies with the party possessing the information necessary to complete an administrative review. See NTN Bearing Corp of Am. v. United States, 997 F.2d at 1453, 1458 (Fed. Cir. 1993); Zenith Elecs. Corp. v. United States, 988 F.2d 1573, 1583 (Fed. Cir. 1993). In this case, Xianjian is the only party with knowledge of whether it made U.S. shipments of subject merchandise, manufactured by parties other than Zibo Botai, during the POR. Therefore, Xianjian has failed to meet the burden to make necessary information available on the record because it did not respond to any of the Department's requests for information and it did not inform the Department about concerns whether it had shipments (exports) to the United States during the POR.

The Department notes that respondents' certified questionnaire responses and statements are its primary sources of information in antidumping proceedings while data from CBP may either corroborate or contradict a respondents' reported data. However, the Department is cautious of relying solely on CBP data as a dispositive source of data on company-specific exports. Accordingly, it is the responsibility of the respondent to report to the Department that it has not made any U.S. shipments that are subject to review. Based on the respondent's certified statement, the Department may use CBP data to corroborate the respondent's certification. See Allegheny Ludlum Corp. v. United States, 276 F. Supp. 2d, 1344, 1354-56 (CIT 2003).

In this case, Xianjian has withheld information requested by the Department by failing to inform the Department about its entries of merchandise subject to this review. As a result, the Department finds that Xianjian has not complied with the Department's request for information to the best of its ability and determines that application of adverse facts available to Xianjian, with regard to subject merchandise manufactured by any company other than Zibo Botai, is warranted.

Comment 9: CNIM-Margin Calculation

Petitioners argue that in the preliminary results the Department used a flawed data set for CNIM's U.S. sales, because the dataset contained multiple occurrences of the same observation.

CNIM did not comment on this issue.

Department's Position:

[32] See Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 69 FR 30282 (May 27, 2004).

We have examined the data set in question, containing CNIM's U.S. sales data, and we agree with petitioners that it contains multiple instances of the same sale. Accordingly, for the final results, we have removed the duplicate entries.

Comment 10: Winhere-Plywood Valuation

Winhere argues that the Department used the wrong commodity designation in valuing Winhere's plywood consumption for the preliminary results. Specifically, Winhere argues that the Department used a surrogate value for "wood" instead of the value for "plywood." Winhere suggests that the Department use the value for "plywood" for the final results.

The petitioners did not comment.

Department's Position:

We agree with Winhere that the "plywood" designation is more accurate. Accordingly, for the final results, we have used the value for "plywood" instead of the value for "wood."

Comment 11: GREN-Returned Brake Rotors

GREN argues that the Department inadvertently failed to account for returned sales which it duly reported in its questionnaire responses. GREN asserts that the Department's standard section C reporting requirements ask for sales quantities net of returns where possible. GREN requests that the Department adjust the net sales quantity in the final results by deducting sales it reported as returned.

Petitioners did not comment on this issue.

Department's Position:

It is the Department's established practice to disregard returned sales in its margin analysis. See, e.g., Final Results of Antidumping Administrative Review of Stainless Steel Sheet and Strip in Coils from Taiwan, 69 FR 5960 (February 2, 2004) and accompanying Issues and Decision Memorandum, at Comment 6. We also note that the questionnaire issued to GREN, at field 13.1, requests sales quantities "net of returns where possible." See Department's May 26, 2005, letter to GREN, with questionnaire attached, at page C-13. Therefore, we agree with GREN that returned sales should not be included in the total sales quantity and accordingly, for the final results, we have removed GREN's reported returns from the total sales quantity.

Comment 12: Fengkun-Changed Circumstances Review and Customs Instructions

Petitioners argue that the CBP instructions issued with the preliminary results of the changed circumstances review for Fengkun and the results of the preliminary results of this review are contradictory. Petitioners note that the instructions included with the preliminary changed circumstances determination stated that Fengkun would be assigned the China-wide rate of 43.32 percent, whereas the administrative review indicated that Fengkun's rate would be 0 percent. See Brake Rotors From the People's Republic of China: Preliminary Results of Changed Circumstances Antidumping Duty Administrative Review 70 FR 25545, 25546 (May 13, 2005); see also Preliminary Results, 70 FR at 24392. Petitioners also note that, effective November 28,

2003, Fengkun no longer used the name Shanxi Fengkun Metallurgical Ltd., but instead began using the name Shanxi Fengkun Foundry Ltd., Co. Accordingly, petitioners argue, the Department should instruct CBP to apply the China-wide rate to the entries of any company that purports to use the previous company name, Shanxi Fengkun Metallurgical Ltd., after November 28, 2003.

Department's Position:
We disagree with petitioners. In the final results of Fengkun's changed circumstances review, the Department accepted the name change and recognized Shanxi Fengkun Foundry Ltd., Co. as the successor-in-interest to Shanxi Fengkun Metallurgical Ltd. See Brake Rotors From the People's Republic of China: Final Results of Changed Circumstances Antidumping Duty Administrative Review, 70 FR 41204 (July 18, 2005).

Regarding petitioners' argument that entries imported under Fengkun's previous name be assigned the all-others or China-wide rate, we note that the name change occurred in the midst of the POR, and therefore it is possible that POR entries under both names will be subject to liquidation following these final results. Accordingly, we will instruct CBP to liquidate POR entries imported under either name at Fengkun's 0 percent rate. For cash deposit purposes following these final results, the new company name will be used and any entries under the old name will automatically be assigned the China-wide rate.

Comment 13: ZLAP-Surrogate Value for Lug Nuts
ZLAP argues that the Department inadvertently assigned the wrong surrogate value for lug nuts, and instead applied the value for ball bearing cups in the Preliminary Results.

Petitioners did not comment on this issue.

Department's Position:
We agree with ZLAP and for the final results we have assigned the appropriate surrogate value for its lug nuts.

RECOMMENDATION:

Based on our analysis of the comments received, we recommend adopting all of the above changes and positions, and adjusting the margin calculation programs accordingly. If accepted, we will publish the final results of the review and the final weighted-average dumping margins in the Federal Register.

AGREE_____ DISAGREE_____

_____

Stephen J. Claeys
Acting Assistant Secretary
for Import Administration

_____

Date