Slip Op. 04–30

HYNIX SEMICONDUCTOR, INC., HYNIX SEMICONDUCTOR AMERICA, INC., PLAINTIFFS, v. UNITED STATES, DEFENDANT, AND MICRON TECHNOLOGY, INC., DEFENDANT-INTERVENOR.

Court No. 01–00988

[The Department of Commerce's *Final Results of Redetermination Pursuant to Court Remand* is affirmed in its entirety and this case is dismissed.]

Dated: April 1, 2004

Willkie, Farr & Gallagher LLP (*James P. Durling, Daniel L. Porter, Carrie L. Owens*), Washington, D.C., for Plaintiffs.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice; *Jeanne E. Davidson*, Deputy Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, *Ada E. Bosque*, Trial Attorney, Commercial Litigations Branch, Civil Division, U.S. Department of Justice; *Patrick V. Gallagher, Jr.*, Senior Attorney, Office of Chief Counsel for Import Administration, U.S. Department of Commerce, of Counsel, for Defendant.

Hale & Dorr LLP (*Gilbert B. Kaplan, Michael D. Esch, Cris R. Revaz*), Washington, D.C., for Defendant-Intervenor.

OPINION

CARMAN, JUDGE: Pursuant to 28 U.S.C. § 1581(c) (2000), this Court has jurisdiction to review the United States Department of Commerce's ("Commerce") Final Results of Redetermination Pursuant to Court Remand (Dec. 17, 2003) ("*Remand Results II*"), filed with the Court in response to its opinion and order in *Hynix Semiconductor, Inc. v. United States*, 295 F. Supp. 2d 1365 (Ct. Int'l Trade 2003) ("*Hynix II*"). This Court will sustain *Remand Results II* unless it is "unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i).

BACKGROUND

In *Hynix II*, this Court directed Commerce to reconsider and further explain its decisions in *Final Results of Redetermination Pursuant to Court Remand* (June 6, 2003) ("*Remand Results I*"): (1) to reject Hynix's reported and verified amortized research and development ("R&D") costs; (2) to recalculate Hynix's product-specific R&D costs by applying a theory of cross-fertilization; and (3) to reject Hynix's accounting adjustments for the average useful lives ("AULs") of its semiconductor equipment. In particular, this Court ordered Commerce to:

1. [P]rovide a reasoned explanation, supported by substantial evidence, if it is able, [in support of its assertion] that distortions in the cost of production calculations for this period of review necessarily arise, where Plaintiffs' R&D costs[,] which were previously accounted for through expensing, are now accounted for through amortization[; . . .] to consider and explain whether Plaintiffs' R&D costs prior to the Fifth Administrative Review were accounted for through the expensing of these costs, and if this expensing of R&D costs would leave nothing to carry forward to subsequent review periods. *Hynix II*, 295 F. Supp. 2d at 1371.

2. [E]stablish, if it can, through substantial evidence on the record[, not just through the mere recitation of the titles of Plaintiffs' R&D projects,] that the six non-subject merchandise projects [on a list of projects occurring in Plaintiffs' non-memory lab] or other non-subject merchandise projects provide benefits to the R&D activities of the subject merchandise [or] to recalculate Plaintiffs' R&D costs, excluding R&D costs for no-subject merchandise. *Id*. at 1372.

3. [P]rovide a reasoned explanation for rejecting Plaintiffs' revised AULs, [which included:] (1) a discussion of why Commerce accepted Plaintiffs' 1996 AUL revision, and whether Commerce characterized the 1996 AUL revision and this period of review's AUL revisions differently; (2) a clarification of what information Commerce evaluated in reaching its determination to reject Plaintiffs' revised AULs; (3) a clarification of whether Commerce did, in fact, consider Plaintiffs' information demonstrating industry-wide AUL ranges, and if not, to do so now; (4) an explanation addressing why Commerce accepted Plaintiffs' appraisers' report for asset revaluation, while rejecting the same report for AUL revision; this explanation should compare the quality of the two sections of the report, including whether all pages of the asset revaluation section were translated and

> why the qualifications of the appraisers were acceptable for the asset revaluation and not for the AUL section. *Id.* at 1375.

In *Remand Results II*, Commerce "recalculated Hynix's R&D costs and the AULs used for depreciation costs in this review period," although it expressed disagreement with the Court's finding in *Hynix II* that its decisions in *Remand Results I* were unsupported by substantial evidence and otherwise not in accordance with law. *Remand Results II* at 1. Commerce arrived at a dumping margin of 2.07% for Hynix as a result of the recalculations. *Id.*

First, on the issue of amortization of R&D costs, Commerce stated, as it did in *Remand Results I*, that it is of the view that changing accounting methods from expensing to amortization creates distortions in cost of production calculations. *Id.* at 3–4. Commerce noted that Hynix's change in accounting methodologies produces different R&D ratios and "the difference in the R&D amounts that result from these different methodological approaches can never be picked up as a production cost in antidumping calculations." *Id.* at 4 (citing Mar. 5, 2001, supplemental resp. at Ex. 24). Nevertheless, Commerce noted that in *Hynix II*, this Court found that Commerce's explanation was not supported by substantial evidence on the record, and, as a result, Commerce "recalculated Hynix's R&D costs to allow for amortization." *Id.*

Second, Commerce asserted that its finding of cross-fertilization of R&D in *Remand Results I* was reasonable given "the fact that Hynix has memory projects listed in its non-memory lab, coupled with expert advice [in the form of the memorandum of Dr. Murzy Jhabvala in support of the theory of cross-fertilization]." *Id.* Commerce noted that in *Hynix II*, the Court ordered it "to establish through record evidence that the projects cited in [*Remand Results I*], or other non-subject merchandise projects, provided benefits to [the] subject merchandise" or, if it was unable to do so, Commerce was to recalculate the costs "excluding R&D costs for non-subject merchandise." *Id.* at 4–5. Commerce stated that it was "unable to make the connection the Court requested in *Hynix II* based on existing record evidence [because] R&D, by its nature, does not always produce new knowledge or products and the results of Hynix's ongoing R&D efforts were not known during the review period." *Id.* at 5. As a result, Commerce recalculated Hynix's R&D costs, excluding R&D costs incurred for non-subject merchandise. *Id.*

Third, in addressing the Court's remand of its decision to reject Hynix's revised AULs, Commerce referred to Hynix's "continual change [of] the treatment of its depreciation methodology" as providing reasonable justification for its decision to use Hynix's pre-1998 AULs to calculate the cost of production for this period of review. *Id.* Citing the Court's determination in *Hynix II* that Commerce's explanation was not supported by substantial evidence on the record,

Commerce "recalculated Hynix's AULs to allow for its reported accounting adjustment" in *Remand Results II*. *Id.*

Plaintiffs submitted comments to *Remand Results II*, asking that Commerce's redetermination be sustained and reaffirming its position that Commerce's prior determinations on the issues above were not supported by substantial evidence. (Pls.' Cmts. on the Dep't. of Commerce's Second Re-Determination ("Pls.' Cmts.") at 2, 4.)

Defendant has filed nothing in regard to *Remand Results II*. Defendant-Intervenor, Micron Technology, Inc. ("Micron") submitted a reply to Plaintiffs' comments, urging the Court to remand *Remand Results II* because Commerce did not follow the Court's instructions and asking the Court to order Commerce "to reinstate its initial redetermination on remand with respect to each of the three issues." (Reply of Def.-Int. Micron Tech., Inc. to Pls.' Cmts. on the Dep't. of Commerce's Second Redetermination on Remand ("Def.-Int.'s Reply") at 1.) Micron's Reply repeats the arguments that were offered in support of Commerce's determination in *Remand Results I* for the three issues again before the Court. *Compare id.* at 4–18, with *Remand Results I* at 3–15, *and Hynix II*, 295 F. Supp. 2d. at 1368–71, 1372–75. Micron argues that *Remand Results II* should be remanded because it contains a clerical error in the calculation of the importer-specific assessment rate, "which determines the actual amount of antidumping duties assessed and collected by the government on entries subject to the antidumping duty order." (Def-Int.'s Reply at 18.) Micron states Commerce corrected this clerical error in the program language used to calculate the margin in *Dynamic Random Access Memory Semiconductors of One Megabit or Above From the Republic of Korea: Final Results of Antidumping Administrative Review*, 66 Fed. Reg. 52,097 (Oct. 12, 2001) ("*Final Results*"), but the correction was not carried forward to the margin calculations in *Remand Results II*. (*Id.* at 19–20 (citing Mem. from Thomas F. Futtner, Program Manager, Office of AD/CVD Enforcement to Holly A. Kuga, Office Director, Group II, Office IV of 11/21/01, Ex. 3).) Micron argues that this error results a significantly understated assessment rate. (*Id.*)

DISCUSSION

I. Commerce's Decision to Recalculate Hynix's R&D Costs is Affirmed.

Upon consideration of *Remand Results II*, the Court holds that *Remand Results II* is supported by substantial evidence on the record and is otherwise in accordance with law. Accordingly, *Remand Results II* is affirmed in its entirety.

The Court holds that Commerce's decision to recalculate Hynix's R&D costs using Hynix's reported amortized R&D costs is supported by substantial evidence and otherwise in accordance with law. Title

19 U.S.C. § 1677b(f)(1)(A) provides that Commerce will calculate cost of production

> based on the records of the exporter or producer of the merchandise, if such records are kept in accordance with the generally accepted accounting principles of the exporting country . . . and reasonably reflect the costs associated with the production and sale of the merchandise, . . . consider[ing] all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer on a timely basis, if such allocations have been historically used by the exporter or producer, in particular for establishing appropriate amortization and depreciation periods, and allowances for capital expenditures and other development costs.

19 U.S.C. § 1677b(f)(1)(A).

The Court has twice remanded this issue to Commerce, asking Commerce to provide a reasoned explanation supported by substantial evidence on the record to support its decision to reject Hynix's reported amortized R&D costs. *See Hynix Semiconductor, Inc. v. United States*, 248 F. Supp.2d 1297, 1312 (Ct. Int'l Trade 2003) ("*Hynix I*"); *Hynix II*, 295 F. Supp. 2d at 1370–71. In *Hynix I*, this Court found that the record demonstrated that Hynix had applied Korean GAAP-consistent accounting practices in reporting its amortized R&D costs and that Hynix's reported costs had been verified by Commerce. *See Hynix I*, 248 F. Supp. 2d at 1311. Commerce, however, rejected Hynix's reported costs in the administrative review, and again on the first remand. *See Hynix I*, 248 F. Supp. 2d at 1310–12; *Hynix II*, 295 F. Supp. 2d at 1369. This Court has observed that "[t]he object of the cost of production exercise is not to capture all past expenses, but rather those expenses that reasonably and accurately reflect a respondent's actual production costs for a period of review." *Micron Tech., Inc. v. United States*, 23 Ct. Int'l Trade 380, 382 (1999) (emphasis added). This Court held that Commerce failed to provide an adequate explanation for its decision to reject Hynix's reported amortized R&D costs that were consistent with Korean GAAP and had been verified by Commerce. *Hynix I*, 248 F. Supp. 2d at 1312–13; *Hynix II*, 295 F. Supp. 2d at 1370–71. This Court noted that, while Hynix changed R&D accounting methods from amortizing to expensing during the First through Fourth Administrative Reviews and back to amortizing during the Fifth Administrative Review of the subject merchandise, Hynix stopped expensing R&D costs in the year incurred in 1997, and since then has utilized amortization as its R&D accounting method. *Hynix I*, 248 F. Supp. 2d at 1312 (citing *Final Decision Memorandum* at 8–11 (Pub. Doc. No. 72); *Hynix Semiconductor, Inc. v. United States*, No. 01–00988 (Ct. Int'l Trade May 21, 2002) (Pls.' Mot. for J. Upon the Agency R. at 21)). Moreover, prior to the initiation of administrative reviews, Plaintiffs,

while operating as Hyundai, historically amortized R&D costs. *Hynix II*, 295 F. Supp. 2d at 1369–70 & n.2 (citing *Hynix I*, 248 F. Supp 2d at 1306; *Micron Tech., Inc. v. United States*, 893 F. Supp. 21, 28–29 (Ct. Int'l Trade 1995)). The Court held that Commerce "failed to establish through evidence on the record that an understatement of R&D costs has occurred in this period of review [based upon] the change of accounting methods, such that Plaintiffs' reported and verified amortized R&D costs do not 'reasonably reflect the costs associated with production and sale of the merchandise.' " *Id.* (quoting 19 U.S.C. § 1677b(f)(1)(A)).

In *Remand Results II*, Commerce appears to be unwilling or unable to articulate a reasoned explanation, supported by substantial evidence on the record, that a change from one permissible accounting method to another necessarily creates a distortion in the cost of production calculation for this period of review. Based upon the fact that Hynix's reported and verified amortized R&D costs for this period of review are consistent with Korean GAAP and the fact that Commerce has not established through substantial evidence on the record that these reported costs do not reasonably reflect the cost of production, this Court affirms Commerce's decision to recalculate Hynix's cost of production, using Hynix's reported amortized R&D costs in *Remand Results II*.

II. Commerce's Decision to Exclude Non-Subject Merchandise R&D Costs is Affirmed.

The Court holds that Commerce's decision to exclude non-subject merchandise R&D costs from calculations of the cost of production for the subject merchandise is supported by substantial evidence on the record and is otherwise in accordance with law. As the Court held in *Hynix I* and *Hynix II*, the memorandum of Dr. Jhabvala, which was prepared for a different administrative review evaluating different products produced by different parties under conditions that were not established to be similar to those of this case, and the listing of the names of six R&D projects in Hynix's non-memory R&D laboratory, with nothing more, were not substantial evidence to support Commerce's theory of cross-fertilization in this case. *See Hynix I*, 248 F. Supp. 2d at 1316 (noting that Dr. Jhabvala's memorandum was originally prepared for use in *Notice of Final Determination of Sales at Less Than Fair Value: Static Random Access Memory Semiconductors From the Republic of Korea*, 63 Fed. Reg. 8,934, 8,939–40 (Feb. 23, 1998) (citing Mem from Dr. Murzy Jhabvala's to Thomas Futtner of 9/8/97, "Cross Fertilization of Research and Development of Semiconductor Memory Devices")); *Hynix II*, 295 F. Supp. 2d at 1372. Commerce has historically excluded R&D expenses for non-subject merchandise where a respondent maintains product-specific R&D costs and the expenses benefitted non-subject merchandise. *See, e.g., High-Tenacity Rayon*

Filament Yarn From Germany, 60 Fed. Reg 15,897, 15,899 (Mar. 28, 1995); *Large Power Transformers from Japan; Final Results of Antidumping Duty Review*, 57 Fed. Reg. 45,767, cmt.3 (Oct. 5, 1992). Here, Hynix maintained product-specific R&D costs, and Commerce has not established through substantial evidence on the record that the subject merchandise is benefitted from R&D activities conducted for non-subject merchandise products. Therefore, this Court holds that substantial evidence supports Commerce's decision in *Remand Results II* to recalculate the cost of production for the subject merchandise by excluding non-subject merchandise R&D expenses.

III. Commerce's Decision to Accept the Reported Average Useful Lives for Hynix's Fixed Assets is Affirmed.

Commerce's decision to recalculate depreciation expenses using Hynix's reported AULs, which included an accounting adjustment revising Hynix's AULs, is supported by substantial evidence and otherwise in accordance with law. In *Hynix II*, the Court concluded that Commerce did not provide a reasoned explanation, supported by substantial evidence on the record, for accepting Plaintiffs' 1996 AUL revision but rejecting Plaintiffs' AUL revision for this period of review. *Hynix II*, 295 F. Supp. 2d at 1373. Further, this Court found that Commerce's decision to accept Plaintiffs' appraisers report with respect to revaluation of assets, while challenging the qualifications of the same appraisers and the adequacy of the same report with respect to the revision of Plaintiffs' AULs, was not supported by substantial evidence on the record. *Id.* at 1374.

Commerce appears to be unwilling or unable to provide an explanation as to why it characterized two AUL revisions differently in *Remand Results II*. *See Remand Results II* at 5. The record established that Commerce accepted the quality of Hynix's appraisers and the adequacy of the appraisers report for the revaluation of Hynix's assets in the *Final Results*. *See Hynix II*, 295 F. Supp. 2d at 1373–74 (citing *Final Results*, 63 Fed. Reg. at 50,871; *Final Decision Memorandum at* 15–18 (Pub. Doc. No. 72)). Commerce has, however, failed to provide a reasonable explanation for rejecting the same appraisers and the same report addressing Hynix's revised AULs. The record, nevertheless, demonstrates that Commerce verified the information contained in Hynix's appraisers' report addressing the AUL revision. *See id.* at 1375 (citing *Final Decision Memorandum* at 17–18 (Pub. Doc. No. 72)). This Court holds that there is substantial evidence on the record to support Commerce's decision to recalculate the cost of production using Hynix's revised AULs.

IV. Micron's Request for Remand Based on a Possible Clerical Error is Denied.

The Court notes that Micron has pointed out a possible clerical error in the calculation of the assessment rate. (Def.-Int.'s Reply at 18–

20.) The Court has found no indication that Micron brought this clerical error to Commerce's attention prior to filing its comments to *Remand Results II*, and Commerce made no mention of this error in *Remand Results II*. *See id.; see also, Remand Results II*. Additionally, Plaintiffs have not mentioned this clerical error in their comments to *Remand Results II*. (*See* Pls.' Cmts.) Micron did, however, notify Commerce of this same error three days after Commerce issued the *Final Results* in October 2001. (*See* Def.-Int.'s Cmts. Conf. Ex. 3 at 1.) In a memorandum addressing Micron's notification, Commerce identified this error as a ministerial error, "defined under 19 CFR 351.244(f) as 'an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which [Commerce] considers ministerial.' " (*Id*.) Commerce agreed with Micron and corrected the error, noting that correction of the error "would have no impact on the dumping margin [and would not require] publi[cation] [of] amended final results." (*Id*. at 2–3.) The Court declines to address this issue, but leaves it to Commerce to determine whether there is a clerical error, as alleged by Micron, and to correct that error as it deems appropriate.

CONCLUSION

The Court finds that Commerce's *Remand Results II* is supported by substantial evidence or otherwise in accordance with law. *See* 19 U.S.C. § 1516a(b)(1)(B)(i). Accordingly, *Remand Results II* is affirmed in its entirety and this case is dismissed.

Slip Op. 04–31

THE COALITION FOR THE PRESERVATION OF AMERICAN BRAKE DRUM AND ROTOR AFTERMARKET MANUFACTURERS, PLAINTIFF, v. UNITED STATES, DEFENDANT.

Court No. 01–00825

[Plaintiff's motion for judgment on the agency record granted; remanded to the International Trade Administration.]

Decided: April 1, 2004

Porter Wright Morris & Arthur LLP (*Leslie Alan Glick*) for the plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Lucius B. Lau*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Stephen C. Tosini*); and Office of Chief Counsel for Import Administration, U.S. Department of Commerce (*Augusto Guerra*), of counsel, for the defendant.

Opinion & Order

AQUILINO, Judge: This case is cause to consider, yet again, the People's Republic of China ("PRC"), which the International Trade Administration, U.S. Department of Commerce ("ITA") continues to deem a "nonmarket economy country" within the meaning of the Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100–418, § 1316(b), 102 Stat. 1107, 1187, 19 U.S.C. § 1677(18)[1] . The matter arises out of the ITA's *Notice of Final Determinations of Sales at Less Than Fair Value: Brake Drums and Brake Rotors From the People's Republic of China*, 62 Fed.Reg. 9,160 (Feb. 28, 1997), in particular, the agency's subsequent determination reported *sub nom. Brake Rotors From the People's Republic of China: Final Results and Partial Rescission of Fifth New Shipper Review*, 66 Fed. Reg. 44,331 (Aug. 23, 2001).

As these citations indicate, motor-vehicle brake parts cast in China have been found to have been dumped in the U.S. aftermarket encompassing automobiles, all-terrain and recreational vehicles, trucks, and vans weighing less than a ton and a half. The underlying determinations set China-wide rates of 86.02 percent for the brake drums and 43.32 percent for the brake rotors. *See* 62 Fed.Reg at 9,174. Only the rotor rate, however, has remained of moment, since the International Trade Commission thereafter determined that the U.S. industry was not being materially injured or threatened with material injury by reason of the brake-drum imports. *See Certain Brake Drums and Rotors From China*, 62 Fed.Reg. 18,650 (April 16, 1997), *aff'd sub nom. Coalition for the Preservation of American Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 22 CIT 520, 15 F.Supp.2d 918 (1998). And that country-wide rotor rate has led to applications by Chinese exporters for individuated rates in lieu thereof.

I

Such an application underlies this case. It was made pursuant to 19 U.S.C. § 1675(a)(2)(B) and 19 C.F.R. §§ 351.214, 351.221 (2000) by Shandong Laizhou Huanri Group General Co. ("Huanri General") as an alleged "new shipper" of subject merchandise produced by Laizhou Huanri Automobile Parts Co., Ltd. ("HAP"). The application represented HAP to be a "limited liability enterprise"[2] and Huanri

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[1] That term is defined by subsection (A) of this section 1677(18) to mean

> any foreign country that the [ITA] determines does not operate on market principles of cost or pricing structures, so that sales of merchandise in such country do not reflect the fair value of the merchandise.

[2] Plaintiff's Appendix, Pub.Doc. 3, Exhibit 4, fourth page.

General as a "collectively owned enterprise"[3] duly registered in China. The application certified that the export activities of both enterprises "are not controlled by the central government."[4] Nonetheless, in its notice of review, the ITA pointed out that

> the Department's practice in cases involving non-market economies [is] to require that a company seeking to establish eligibility for an antidumping duty rate separate from the country-wide rate provide de jure and de facto evidence of an absence of government control over the company's export activities. Accordingly, we will issue a questionnaire to . . . Huanri. . . . If the response . . . provides sufficient indication that it is not subject to either de jure or de facto government control with respect to its exports of brake rotors, each review will proceed. If, on the other hand, a respondent does not demonstrate its eligibility for a separate rate, then it will be deemed to be affiliated with other companies that exported during the POI, and the review of that respondent will be rescinded.

Brake Rotors From the People's Republic of China: Initiation of New Shipper Antidumping Duty Reviews, 65 Fed.Reg. 70,694, 70,695 (Nov. 27, 2000). In response to the ITA's questionnaire, Huanri General stated that it "has no relationship with any level of the PRC government"[5]; that it established HAP, which also "has no relationship with any level of the PRC government"[6]; and that it is "not owned or controlled by a provincial or local government . . . [and] has never been owned or controlled by any level of the PRC government"[7] .

The agency record at bar refers to a village of Panjacun, town of Tushan, city of Laizhou, all within Shandong province, which lies to

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[3] Plaintiff's Appendix, Pub.Doc. 3, Exhibit 3, first page; Exhibit 4, second page. Attached to that exhibit 4 is an English translation of the Administrative Regulations of The P[RC] Governing the Registration of Legal Corporations, article 1 of which states that they have been promulgated, among other things, "to safeguard social and economic order." Article 2 thereof provides that an

> enterprise which meets the requirements of a legal person shall register as a corporation in accordance with the provisions of these Regulations if it is:
>
> (1) an enterprise owned by the whole people;
> (2) a collectively-owned enterprise;
> (3) an allied enterprise;
> (4) a Sino-foreign joint equity enterprise, Sino-foreign co-operative enterprise or sole foreign investment enterprise established within the territory of the P[RC];
> (5) a private enterprise; or
> (6) another type of enterprise which is legally required to register as a corporation.

[4] Plaintiff's Appendix, Pub.Doc. 3, Exhibit 1, first and second pages.

[5] Plaintiff's Appendix, Pub.Doc. 24, p. A–2.

[6] *Id.*

[7] *Id.* at A–3.

the south and east of Beijing. A visit there by ITA staff led to the "significant" finding that

> Huanri General is owned and controlled by the Panjacun village committee which has a relationship with the Tushan town government. . . . Accordingly, the Department must consider whether the company sufficiently demonstrated its entitlement to a separate rate.

Plaintiff's Appendix, Pub.Doc. 52, p. 3. The staff verification report indicates that the residents of Panjacun select 41 village representatives who, in turn, elect five of their number to comprise the village's "committee". *See id.* at 7. That committee set up Huanri General with the approval of the Laizhou Industrial and Commercial Administration Bureau for the purpose of selling brake rotors and other parts and also set up other companies, including HAP. The committee appointed the directors of those firms and named its chairman as the chairman of Huanri General. *See id.* at 7–8.

The petitioner, above-encaptioned, Coalition reacted to this report, in part, as follows:

> . . . [T]he fact that Huanri General is owned and controlled by a *Village Committee* means that it is owned or controlled by a *governmental entity*. Moreover, information about the village system in China[ ] demonstrates that the responsibilities of the Village Committee go beyond what was disclosed by Huanri General. It is commonly known by researchers and scholars that villages in China are the lowest official level in China's government and their leaders and committees are assisted and controlled by the government. *See A Tale of 2 Village[ ]s: China's 'Democracy' Shows Different Faces, International Herald Tribune*, (August 28, 2000). . . .
>
> Village committees were instituted in 1987 with the Organic Law on Village Committees in the P[RC]. Respondent did not provide a copy of this law to the [ITA], which should have been required when it became apparent that Huanri General was owned and controlled by the Village Committee, and [ ] thus [ ] failed to affirmatively demonstrate absence of *de jure* governmental control. The village committees are responsible for supervising the management of village affairs. *See Anhui Villagers Supporting Rural Democracy*, BBC Monitoring Asia Pacific (June 19, 1998). . . . "A village committee is a self-governing organization that oversees public affairs and public welfare, mediates public disputes, maintains public order and assists the township government." *See Why China Practices Direct Election[ ] of Village Committees*[,] Xinhua News Agency (April 12, 1997). . . . The villagers also elect representatives who solicit opinions from villagers on major affairs of the village. The vil-

> lage representatives then elect five people for the village committee, which decides how the village uses profits from *village-owned businesses*, mediates civil disputes and enforces governmental policies. *See China Villagers*, AP Worldstream (April 2, 2000)(emphasis added). . . .[8]

Whereupon the petitioner requested that the ITA deny a separate antidumping-duty rate on the grounds that

1. Huanri General is owned and controlled by a disguised governmental entity, the Village Committee.
2. Huanri General withheld information related to its ownership structure and dealings with the town government.

* * *

4. The corrections of Huanri General, Huanri Auto . . . at the start and during verification are so substantial that tainted [*sic*] the integrity of their overall responses.

Plaintiff's Appendix, Pub.Doc. 56, p. 22.

To the extent the petitioner's request also pertained to another alleged new PRC shipper, the ITA concurred, but it does not agree with regard to Huanri General, to wit:

> . . . After examining the information provided by the petitioner in the context of the laws we have examined in previous NME proceedings, we do not have a sufficient basis in this proceeding to conclude that the information provided by the petitioner constitutes grounds for conclusively determining that collectively owned companies (such as Huanri General) are controlled *de jure* by the PRC government because the information noted above does not directly relate to the company under review.
>
> 2. *De Facto Control*
>
> As stated in previous cases, there is some evidence that certain enactments of the PRC central government have not been implemented uniformly among different sectors and/or jurisdictions in the PRC. . . . Therefore, the Department has determined that an analysis of *de facto* control is critical in determining whether the respondents are, in fact, subject to a degree of governmental control which would preclude the Department from assigning separate rates.
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> * * *
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> . . . [T]he Department preliminarily finds that Huanri General has demonstrated a *de facto* absence of government control and is entitled to a separate rate for . . . several reasons. As detailed

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[8] Plaintiff's Appendix, Pub.Doc. 56, pp. 5–6 (underscoring and italics in original). A copy of each of the underscored references is appended to this record document.

in the verification report and supported by documentation examined at verification, Huanri General was set up by the Panjacun village committee through capital voluntarily provided by all of the inhabitants of Panjacun village. At verification, the Department further clarified that the members of the village committee were elected to the committee by the villagers who also provided the capital to set up Huanri General. . . . Data on the record establishes that the villagers are the long-term investors/shareholders in Huanri General and that the villagers determine via election the individuals who serve on the village committee. Further, the villagers have entrusted the village committee to decide how and when Huanri General's profits are to be distributed. In this case, the villagers have in fact elected a group within the same village (*i.e.* the village committee) to handle the business decisions and operation strategy of the company which is wholly owned by all the villagers, some of whom are also elected members of the village committee. Based on these facts, we conclude that the central government does not control Huanri General's export activities.

The petitioner contends . . . that the village committee is a PRC government entity which has a financial relationship with the town government and that this link constitutes government control of Huanri General's operations. We have ruled in previous NME cases 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 set forth in *Sparklers* and amplified in *Silicon Carbide and Furfuryl Alcohol*. For example, in one NME case, the Department found that[,] although [ ] the local government owned an exporting company, that company elected its own management and was responsible for all decisions such as determining export prices, allocation and retention of profits on export sales, and negotiating export sales contracts. . . . The Department also found in another NME case that, although the provincial government appointed the management of a company, that company was entitled to a separate rate because it was able to demonstrate that it solely performed the *de facto* activities noted above and there was no evidence of significant government involvement in that company's business operations. . . .

With respect to Huanri General, the data on the record demonstrates that, unlike the situations which existed in *Lug Nuts* and *Pure Magnesium*, we have no evidence that this company is owned by the town government or that its management is appointed by the town government. Rather, this company is ulti-

> mately owned by the villagers of Panjacun village. Moreover, the president of the company (who is also the company's legal representative on the company's business license and was elected by the villagers as the chairman of the village committee) appoints the managers. Consistent with the facts in *Pure Magnesium* and *Lug Nuts*, Huanri General in this case has also 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. Although the village committee actually decides how the company's profits are to be distributed, we do not find that the village committee constitutes a form of central or provincial government control over the company, especially since all of the village committee members are investors in the company.
>
> We also are not convinced by the petitioner's argument that the village committee's dealings with the town government constitute evidence that the town government controls both the village committee's and Huanri General's operations. Based on our examination of the village committee's financial records at verification, we found that the village committee is an entity which simply pays infrastructure taxes to the town government and to which the town government owes money. . . . Thus, in this case, the town government is a debtor to the village committee. These activities are no different than those of any company paying its taxes and operating a business without government interference in the PRC. Moreover, the information provided by Huanri General in its response and amplified and/or clarified at verification supports a preliminary finding that there is de facto absence of governmental control of the export functions of Huanri General. . . . Consequently, we have preliminarily determined that Huanri General has met the criteria for the application of separate rates.[9]

A subsequent plea by the petitioner that the ITA reconsider this preliminary determination as to Huanri General[10] was denied, with the agency reporting that "[a]ll issues raised in the case briefs are addressed in the Decision Memo, which is . . . adopted by this notice", *Brake Rotors From the People's Republic of China: Final Re-*

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[9] *Brake Rotors From the People's Republic of China: Preliminary Results and Partial Rescission of the Fifth New Shipper Review*, 66 Fed.Reg. 29,080, 29,082–83 (May 29, 2001), citing, among other precedent, *Chrome-Plated Lug Nuts From The P[RC]; Preliminary Results of Antidumping Duty Administrative Review*, 60 Fed.Reg. 42,504 (Aug. 16, 1995), and *Pure Magnesium From the P[RC]: Final Results of Antidumping Duty New Shipper Administrative Review*, 63 Fed.Reg. 3,085 (Jan. 21, 1998). The "NME" in this determination is, of course, an abbreviation of "nonmarket economy".

[10] As indicated above, a second enterprise, Beijing Concord Auto Technology Inc., was denied an individuated antidumping-duty rate. *See* 66 Fed.Reg. at 44,332.

sults and Partial Rescission of Fifth New Shipper Review, 66 Fed.Reg. at 44,332. This action ensued pursuant to 28 U.S.C. §§ 1581(c), 2631(c).

II

The courts have affirmed the ITA's above-stated approach of requiring that an NME entity like Huanri General "provide de jure and de facto evidence of an absence of government control over [it]s export activities." *E.g., Sigma Corp. v. United States*, 117 F.3d 1401, 1405–07 (Fed.Cir. 1997); *Coalition for the Preservation of American Brake Drum & Rotor Aftermarket Mfrs. v. United States*, 23 CIT 88, 100–01, 44 F.Supp.2d 229, 242–43 (1999)[hereinafter referred to as "*Coalition Case II*"].

Here, the plaintiff Coalition contends that the agency did not fully follow its own, established approach. With regard to the *de jure* test, it points out, *inter alia*, that the

> Chinese law that regulates the establishment and functioning of village committees . . . is the Organic Law of the Village Committee of the P[RC] . . . , effective since June 1st, 1988. . . . Huanri General *did not provide to the Department the Village Committee law*, although Plaintiff brought this issue to the Department's attention in a letter dated May 2, 2001, before the Department's deadline for the preliminary determination, and again in Plaintiff's case brief dated July 16, 2001. . . . The failure of Huanri General to supply this law, which appears to be easily obtainable since Plaintiff was able to locate it, was a major omission in Huanri General's response.

Plaintiff's Memorandum of Law, p. 9 (emphasis in original, citations omitted). As for the analysis *de facto*, the plaintiff argues that the ITA's verification report itself contains sufficient evidence of government control of Huanri General to deny the company a separate antidumping-duty rate. *See generally id.* at 10– 17.

A

According to the court in *Coalition Case II*, to determine whether or not *de jure* government control exists, the ITA examines evidence of:

> (1) An absence of restrictive stipulations associated with an individual exporter's business and export licenses;
>
> (2) any legislative enactments decentralizing control of companies; or
>
> (3) any other formal measures by the government decentralizing control of companies.

23 CIT at 101, 44 F.Supp.2d at 242–43, citing *Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China*, 56 Fed.Reg. 20,588 (May 6, 1991); *Air Products & Chemicals, Inc. v. United States*, 22 CIT 433, 14 F.Supp.2d 737 (1998).

That kind of evidence is in short supply in the record at bar. Rather, the defendant relies on the conclusions set forth in the agency's *Preliminary Results*, *supra*, and then reformulated in the Issues and Decision Memorandum ("DecMemo")[11] adopted by the *Final Results*. Indeed, the defendant repeats the position now that it was "unnecessary"[12] to produce for examination the PRC's Organic Law of the Village Committee.[13] That is, "this law in and of itself is not dispositive of de jure government control". Plaintiff's Appendix, Pub.Doc. 77 (DecMemo, p. 5). Perhaps, but the impression the *Preliminary Results* attempt to foment, 66 Fed.Reg. at 29,082, that the agency has "analyzed" this law is not supported by the prior proceedings referred to therein, namely, *Final Determination of Sales at Less Than Fair Value: Furfuryl Alcohol From the People's Republic of China*, 60 Fed.Reg. 22,544 (May 8, 1995), and *Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Certain Partial-Extension Steel Drawer Slides With Rollers from the People's Republic of China*, 60 Fed.Reg. 29,571 (June 5, 1995). Neither they nor any other PRC-based proceedings appear to have considered that country's village committee law in particular. *Furfuryl Alcohol*, for example, refers to the Law of the P[RC] on Industrial Enterprises Owned by the Whole People (April

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[11] *See* Plaintiff's Appendix, Pub.Doc. 77.

[12] Defendant's Response in Opposition to Plaintiffs' Motion for Judgment Upon the Agency Record [hereinafter referred to as "Defendant's Memorandum"], p. 13, citing the Decision Memorandum, p. 5.

[13] *Cf.* 19 U.S.C. §§ 1677e(a) and (b) re consequences of failure to produce requested information. Two other points asserted in support of the ITA's determination *de jure* are out of place, to wit:

> Commerce also verified that the Panjacun village committee fell among those elected by the local villagers and not those appointed by any level of the Chinese government[,]
>
> and
>
> Commerce explained that the agency's practice since 1995 did not foreclose the use of separate rates for municipal or provincial government controlled exporters.

Defendant's Memorandum, pp. 13–14. But they are relevant to the analysis of *de facto* control. As this court has opined, it must evaluate the validity of an ITA determination on the basis of the reasoning presented in the decision itself. *Neenah Foundry Co. v. United States*, 25 CIT ____, ____, 142 F.Supp.2d 1008, 1020–21 (2001), relying on *Hoogovens Staal BV v. United States*, 24 CIT 44, 86 F.- Supp.2d 1317 (2000).

> . . . While the court will uphold a decision of less-than-ideal clarity if the agency's path may be reasonably discerned, *e.g.*, *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 595 (1945), it may not conjure a reasoned basis for the agency's action that Commerce itself has not given. *SEC v. Chenery Corp.*, 332 U.S. 194, 196–97 (1947). *See also Hoogovens Staal BV v. United States*, 22 CIT 139, 142, 4 F.Supp.2d 1213, 1219 (1998).
>
> *Ibid.*

13, 1988), the Regulations for Transformation of Operational Mechanism of State-Owned Industrial Enterprises (Aug. 23, 1992), the Temporary Provisions for Administration of Export Commodities (Dec. 21, 1992), and to the Emergent Notice of Changes in Issuing Authority for Export Licenses Regarding Public Quota Bidding for Certain Commodities (April 1994). *See* 60 Fed.Reg. at 22,544. *Steel Drawer Slides* added to this list the Law of the P[RC] on Chinese-Foreign Contractual Joint Ventures (April 13, 1988) and the Foreign Trade Law of the P[RC] (May 12, 1994). *See* 60 Fed.Reg. at 29,573. In fact, of the five PRC laws referenced in the agency record now at bar, only two, the 1988 law with regard to industrial enterprises owned by the whole people and the 1992 transformation regulations, were apparently considered in those cited, prior ITA proceedings. In short, defendant's attempted impression does not withstand this court's scrutiny.

Moreover, the investigations in *Furfuryl Alcohol* and *Steel Drawer Slides* entailed enterprises "owned by the whole people", the latter also involving joint ventures within the purview of the above-noted PRC Administrative Regulations Governing the Registration of Legal Corporations, whereas Huanri General alleges itself to be a collectively-owned enterprise, another and separate category of company according to those regulations. Indeed, given that their six enumerated categories of endeavor are set forth in the disjunctive, and only one thereof, number (5), is deemed "private", it can be assumed that all the other kinds are distinct forms of the Chinese people's business. That the ITA has investigated some of them does not foreclose necessary inquiry as to a different kind, not yet considered by the agency *de jure*. What that other investigation does foreclose, however, is that a reasonable mind might accept it on its face as adequate analysis of a disparate legal status. *Cf. Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938).

Whatever the interpretation of the statutory standard of review in trade cases like this per 19 U.S.C. § 1516a(b)(1)(B)(i), this court cannot and therefore does not conclude that the ITA's refusal to even look at the PRC law that may well govern the kind of enterprise under review for the first time herein was in accordance with law governing this case.

B

The plaintiff is of the view that the agency's separate-rate test should not be limited to proving absence of national-government ownership but should be applied to whatever level of governmental control is implicated. *See* Plaintiff's Memorandum of Law, p. 5. The court concurs, given the broad statutory and concomitant administrative caution about a nonmarket economy, *supra*, and the longstanding emphasis of the Communist Party on the "grass roots" of China. *See, e.g., Preface I to Socialist Upsurge in China's Country-*

side (Sept. 25, 1955), V Selected Works of Mao Tse-Tung, p. 237 (1st ed. Foreign Language Press Peking 1977). Indeed, as quoted above, the ITA's staff verification report commences with the "significant" finding that Huanri General is owned and controlled by the Panjacun village committee, which has a relationship with the Tushan town government, and accordingly, "the Department must consider whether the company sufficiently demonstrated its entitlement to a separate rate."

In its final analysis, the agency concedes that "the information in the record suggests that the village committee could be a form of government depending on the township and/or province in which it is located". Plaintiff's Appendix, Pub.Doc. 77 (DecMemo, p. 5). That analysis recites the representation of the respondent Huanri General that the "townships are run by officials who are selected by Communist Party-dominated local legislatures"[14], and this court understands that Shandong is one of China's most important provinces for industry. *See, e.g.*, Hong Kong Trade Development Council, *Market Profiles on Chinese Cities & Provinces* (visited March 24, 2004) <http://www.tdctrade.com/mktprof/china/mpzhj.htm>. Hence, the ITA "determined that an analysis of *de facto* control is critical"[15] in this matter and proceeded to point out that it

> typically considers four factors in evaluating whether each respondent is subject to *de facto* governmental control of its export functions: (1) Whether the export prices are set by, or subject to the approval of, a governmental 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.

66 Fed.Reg. at 29,082. *Cf. Coalition Case II*, 23 CIT at 101, 44 F.Supp.2d at 243. Such consideration led the staff to conclude that Huanri General demonstrated a *de facto* absence of government control of its export function and was therefore entitled to a separate antidumping-duty rate. *See* Plaintiff's Appendix, Pub. Doc. 77 (DecMemo, p. 5).

The dispositive Decision Memorandum upon which the ITA finally relies barely addresses the foregoing four factors postulated in the

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[14] Plaintiff's Appendix, Pub.Doc. 77 (DecMemo, p. 4).

[15] 66 Fed.Reg. at 29,082.

agency's *Preliminary Results*. Rather, it states with approval the staff verification that Huanri General

> was set up by the Panjacun village committee through capital voluntarily provided by *all* of the inhabitants of Panjacun village.

Id. at 4 (emphasis added). This collectively-owned enterprise thus may be a most-perfect form of *commun*ism in action. As such, there would seem to be little room to differentiate between the business of Huanri General and that of the village and governing village committee, *e.g.*:

> The financial records of Huanri General and the village committee examined at verification all indicated that the villagers have entrusted the village committee to decide how and when Huanri General's profits are to be distributed. Specifically, the village committee has been entrusted to handle the business decisions and operation strategy of the company which is wholly owned by all the villagers, some of whom are also elected members of the village committee.

Id. Whereupon the memorandum continues that these facts "suggest that the central government does not control Huanri General's export activities"[16]:

> . . . Although the village committee actually decides how the company's profits are to be distributed, we do not find that the village committee constitutes a form of central or provincial government control over the company, especially because all of the village committee members are investors in the company.[17]

But the linchpin to this thesis is missing, namely, the village committee law, which may or may not be a promulgation of the central government and which may or may not provide that government or a subordinate, even grass-roots village, government with ultimate, nonmarket control. In short, as is true *de jure*, without the content of that law and the ITA's analysis of the meaning thereof on the record herein, this court is unable to affirm the foregoing *de facto* reasoning. This is the case now because none of the prior cases cited by the defendant or reviewed by the court has considered the nature and impact of that particular law under the U.S. statute that requires the ITA to take the extent of home-market government ownership or control carefully into account. *See* 19 U.S.C. § 1677(18)(B).

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[16] Plaintiff's Appendix, Pub.Doc. 77 (DecMemo, p. 4).

[17] *Id*. at 5. The Decision Memorandum also rejects the petitioner's contention that the Panjacun village committee is controlled by the Tushan town government. *See id*.

III

In view of the foregoing, plaintiff's motion for judgment upon the agency record must be granted at least to the extent of remand to the ITA for reconsideration of its determination to grant Shandong Laizhou Huanri Group General Co. a separate antidumping duty rate in the absence of the company's production of the PRC's Organic Law of the Village Committee and any agency analysis thereof. The defendant may have 90 days to reopen the record in this regard and to report to the court the results of any reconsid eration thereof, whereupon the plaintiff may comment within 30 days of receipt.