PUBLIC VERSION

LUOYANG BEARING CORP. (GROUP), ZHEJIANG MACHINERY IMPORT & EXPORT CORP., CHINA NATIONAL MACHINERY IMPORT & EXPORT CORPORATION and WAFANGDIAN BEARING COMPANY LTD. v. UNITED STATES

Court No.01-00036

Slip Op. 04-53 (May 18, 2004)

FINAL RESULTS OF REDETERMINATION PURSUANT TO REMAND

SUMMARY

The Department of Commerce ("the Department") has prepared these final results pursuant to the remand order from the United States Court of International Trade ("CIT") in Luoyang Bearing Corp. (Group), Zhejiang Machinery Import & Export Corp., China National Machinery Import & Export Corporation, and Wafangdian Bearing Company, Ltd. v. United States, Slip Op. 04-53 (CIT 2004) ("Luoyang Bearing"). The CIT remanded the case to the Department to (1)(a) explain further why the surrogate values the Department chose for wooden cases and the steel used to produce tapered roller bearings ("TRBs") for Wafangdian Bearing Company, Ltd. ("Wafangdian") constitute the "best available information," and (b) address the aberrational record data that Luoyang Bearing Corp. (Group) ("Luoyang"), Wafangdian, and Zhejiang Machinery Import & Export Corp. ("ZMC") point to; and (2) conduct a separate rates analysis with respect to Premier Bearing & Equipment Ltd. ("Premier") and apply the People's Republic of China ("PRC') country-wide rate to all of Premier's United States sales if it is determined that Premier is not independent of government control.

For the reasons explained below, we have changed our valuation of the steel used to manufacture rollers, we have not changed our valuation of wooden cases, and we continue to find that Premier appropriately received a separate rate.

INTRODUCTION

The administrative review under remand is Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of 1998-1999 Administrative Review, Partial Rescission of Review, and Determination Not to Revoke Order in Part, 66 FR 1953 (January 10, 2001) ("TRBs XII").[1] The antidumping duty order covered by this review was issued on June 15, 1987. See Antidumping Duty Order; Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China, 52 FR 22667 (June 15, 1987). In this judicial proceeding, the plaintiffs are Luoyang, ZMC, China National Machinery Import & Export Corporation ("CMC"), Wafangdian and the Timken Company ("Timken"). Wafangdian and Timken are also defendant-intervenors.

On remand, the CIT remanded to the Department to: (1) further explain why the surrogate values it chose for wooden cases and the steel used to produce TRBs for Wafangdian constitute the "best available information," and address the aberrational data that Luoyang et al. point to; and (2) conduct the separate rates analysis with respect to Premier and apply the PRC rate to all of Premier's United States sales if it is determined that Premier is not independent of

[1]Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Amended Final Results of 1998-1999 Administrative Review and Determination To Revoke Order in Part, 66 FR 11562 (February 26, 2004)

government control. The CIT denied all of the other motions.

1) Valuing Factors Used in the Production of Rollers and Wooden Cases

DISCUSSION

In the Preliminary Results[2] of TRBs XII, the Department used Indonesian import statistics to value steel used to manufacture rollers and Indian import statistics to value wooden cases. After the Preliminary Results, Luoyang submitted new and more contemporaneous Indian import data for valuing roller steel, which the Department used in the final results of TRBs XII to calculate the surrogate value for steel used to make rollers. For wooden cases, the Department continued to use the same Indian import statistics it used in the Preliminary Results for the final results of TRBs XII.[3]

Luoyang et al. argued that the Department did not evaluate the import data when selecting surrogate values for the steel used to make rollers and for wooden cases.

For rollers, Luoyang et al. stated that the Department excluded Russia, the PRC, and all countries that do not produce bearing quality steel from the Indian import data used to calculate the roller steel surrogate value. See Luoyang Bearing at page 51. Luoyang et al. argued that the Department should have also excluded imports from Austria, Germany and France (the April through

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[2]Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Preliminary Results of 1998-1999 Administrative Review, Partial Rescission of Review, and Notice of Intent to Revoke Order in Part, 65 FR 41944 (July 7, 2000) ("Preliminary Results").

[3]More contemporaneous Indian import statistics were not submitted, as in the case of roller steel, for valuing wooden cases.

December 1998 data)[4] because the import prices for these countries were substantially above the other remaining countries' prices and above the upper U.S. benchmark value. Luoyang et al. further argued that the April through December 1998 data for Austria and France reflected extremely small quantities and should be excluded for this reason as well.

Luoyang et al. also argued that within the data used to value wooden cases, the import values and quantities varied widely from country to country. Luoyang et al. contended that the Department should exclude shipments from the United Kingdom because they reflected small quantities and should exclude imports from Spain because the unit value was very high when compared to the other import prices. Finally, Luoyang et al. asserted that the Department should evaluate the data overall and determine which entries constituted the best available information. If any data is determined aberrational, Luoyang et al. argued that the Department should exclude it from the surrogate value calculation.

Timken argued that Luoyang et al. did not exhaust their administrative remedies because Luoyang submitted the import data at issue here and did not make any arguments in regard to the quality of that data until after the TRBs XII final results. Timken contended that Luoyang et al. only stated their concerns about the import data in a clerical error allegation to the Department, which was submitted after the release of the final results. According to Timken, the Department rightfully rejected this argument as methodological in nature thus finding that it did not constitute a clerical error. Therefore, Timken argued that the appropriate time has lapsed in which Luoyang et al. can properly

[4]The period of review in TRBs XII is June 1, 1998, through May 31, 1999.

raise this issue. Furthermore, Timken contended that Wafangdian did not show that the Department erred in its valuation of wooden cases or the steel input used to manufacture rollers.

The CIT disagreed with Timken's argument and ruled that Luoyang et al. did give the Department sufficient opportunity to reply to the issues raised by Luoyang et al. in the TRBs XII administrative review. The CIT pointed to the TRBs XII Decision Memorandum,[5] where the Department summarized Luoyang et al.'s arguments as follows: (1) "in valuing rollers used in the production of TRBs, the Department should utilize more current Indian import data which was placed on the record subsequent to the Preliminary Results;" (2) "the Department should generally avoid using U.S. values as benchmarks, and should specifically refrain from doing so for roller steel;" and (3) "in using U.S. values as benchmarks for the purpose of factor valuation, the Department risks transforming the United States into the surrogate country even though the record does not support the use of the United States as the appropriate surrogate country."[6] See Luoyang Bearing at page 57. Based on these statements, the CIT concluded that Luoyang et al. exhausted their administrative remedies and has the right to raise the issues before the CIT.

The CIT also stated that it was not satisfied that the Department ". . . acted within its discretion

[5]Memorandum from Richard Moreland to Troy Cribb, "Issues and Decision Memorandum," dated January 3, 2001 ("TRBs XII Decision Memorandum")

[6]We note that the second and third positions the CIT attributed to Luoyang et al. were actually argued by Timken, as described in Comment 5 of the TRBs XII Decision Memorandum.

in selecting surrogate values for wooden cases . . .” and for the steel used to produce rollers. See Luoyang Bearing at page 57. According to the CIT, the Department failed to explain why the values used for wooden cases and roller steel were the best available information. Therefore, the CIT instructed the Department to “address the aberrational record data that Luoyang et al. point to.” See Luoyang Bearing at page 58.

ANALYSIS

In accordance with the CIT’s instructions, we reviewed the record and re-examined this Indian import data.

The Tariff Act, as amended (“the Act”), requires the Department, when dealing with an NME country, to base the valuation of the factors of production on “the best available information regarding the values of such factors in a market economy country or countries considered to be appropriate by the administering authority.”[7] As the CIT has noted on several occasions, the statute does not define what constitutes “best available information.” See, e.g., Baoding Yude Chem. Indus. Co., Ltd., 170 F. Supp. 2d 1335 (CIT 2001); Shandong Huarong Gen. Corp. v. United States, 159 F. Supp. 2d 714 (CIT 2001). Instead, the court has recognized that the statute grants the Department broad discretion to determine what the best available information is, on a case-by-case basis, so long as the Department does so in a reasonable manner. Rhodia, Inc. v. United States, 185 F. Supp. 2d 1343 (CIT 2001)

[7] See Section 773(c)(1) of the Act

citing Timken Co. v. United States, 166 F. Supp. 2d 608 (CIT 2001).

While the statute does not define what constitutes best available information, the Department has promulgated regulations and established practices that enable the Department to select among different surrogate values, so that the normal value of the NME-produced merchandise is based on the best available information. These regulations and practices reflect the Department's desire to promote accuracy, fairness, and predictability in our calculations. See Oscillating Fans and Ceiling Fans from the People's Republic of China, 56 FR 55271, 55275 (October 25, 1991).[8]

For example, 19 CFR 351.408(c)(1) of the Department's regulations states that the Department will normally value overhead, general expenses, and profit using data from producers of identical or comparable merchandise in the surrogate country. As explained in the preamble to the Department's proposed regulations, we believe that by focusing narrowly on the producers in the industry in question, our calculations will be more accurate. See Notice of Proposed Rulemaking and Request for Public Comments, 61 FR 7345 (February 27, 1996) ("Proposed Rules"). Similarly, as a matter of practice, the Department normally seeks to use factor values that are contemporaneous with the Period of Review ("POR"). Again, this is done to promote accuracy in our calculation of the normal value of the merchandise sold to the United States. In selecting accurate information, the

[8] The Department's approach was upheld by the CAFC in Lasko Metal Products, Inc. v. The United States, 43 F.3d. 1446 (Fed.Cir. 1994) ("Lasko").

Department is also selecting the best available information. Moreover, because these decision rules have been promulgated as regulations or established as a matter of practice, our proceedings are more predictable (parties know the types of data we are seeking to use) and fairer (the parties are in a better position to submit data that will eventually be used).

When calculating surrogate values, the Department will generally rely on data from its primary surrogate country, which in this review was India. To value the steel used in the production of TRBs, the Department calculates a weighted average of the import prices into India from market economy countries, excluding any countries from which the imports were less than seven metric tons and all countries the Department has determined to be NMEs. In TRB proceedings, the Department also excludes imports from countries that do not produce bearing quality steel when valuing steel used in the production of cups, cones, and rollers. See TRBs XI.[9] In TRB administrative reviews, it is the Department's practice to compare a potential steel surrogate value to a benchmark consisting of U.S. import prices. The Department has repeatedly used U.S. import prices as a benchmark because the Harmonized Tariff Schedule of the United States ("HTSUS") category is the only harmonized tariff schedule category of which we are aware that explicitly contains the type of bearing quality steel used to manufacture TRBs. Thus, by using values from this HTSUS category, the Department is able to test whether the potential surrogate values (usually of broader HS categories) likely reflect imports of bearing quality steel. The use of the U.S. data to test surrogate values has been upheld by the CIT.

[9]Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China; Final Results of 1997-1998 Antidumping Duty Administrative Review and Final Results of New Shipper Review, 64 FR 61837 (November 15, 1999) ("TRBs XI")

See, e.g., Timken Company v. United States, 59 F. Supp. 2d 1371 (CIT 1999), Timken Company v. United States, 166 F. Supp. 2d 608 (CIT 2001); and Timken Company v. United States, 201 F. Supp. 2d 1316 (CIT 2002).

In addition to the above, on a case-by-case basis, the Department has excluded from the data used to calculate the surrogate value, country-specific values that were determined unreliable when compared to other corresponding data on the record. Specifically, the Department has excluded imports from a country when the total amount imported from that country is small and the per-unit value of those imports is substantially different from the per-unit values of larger-quantity imports of that product from other countries that exported to the surrogate country. See TRBs XII Decision Memorandum at Comment 6 ("{I}t is the Department's practice to 'disregard small-quantity import data when the per-unit value is substantially different from the per-unit values of the larger-quantity imports of that product from other countries.'"). In conducting this analysis, it is not Departmental practice to exclude certain months of a country's data from our surrogate value calculation based solely on the fact that the volume of imports from that country are small in a particular month. See TRBs XII Decision Memorandum at Comment 6 ("We disagree in this instance that we should exclude certain monthly Japanese export data from our calculations–specifically October 1998 and May 1999 data–based solely on the fact that it is small in quantity, as all of the data is from the same country").

In the Preliminary Results, the Department used Indonesian import data from Indonesian HS category 7228.50000 (Other Bars & Rods, Not Further Worked Than Cold-Formed or Cold-Finished) to calculate the surrogate value for roller steel. The Department used Indonesian import data instead of data from India, our primary surrogate, because the Indian import data for HS category

7228.5009 (Other Bars and Rods, Not Further Worked Than Cold-Form or Cold-Finished)[10] that was available at the time of the Preliminary Results was found unreliable when compared to the U.S. benchmark. See Steel and Surrogate Country Memo.[11] After the Preliminary Results, Luoyang submitted new Indian import data (for the period April 1998 to

January 1999) that was more contemporaneous with the POR for Indian HS category 7228.5009. See TRBs XII Decision Memorandum at Comment 5.

For the final results of TRBs XII, we made the adjustments discussed above to this updated Indian import data. We excluded from the Indian import data all imports from the PRC and Russia, as NME countries, and excluded imports from Australia, Sweden and the United Kingdom because each country's total imports during the reporting period did not exceed seven metric tons. We combined the values and volumes from the remaining countries to calculate a single Indian import value for roller steel. We then compared this Indian value to the U.S. benchmark[12] and found the Indian import value to be within reasonable range of the U.S. benchmark. Therefore, because this data was the most contemporaneous data on the record, yielded a value that was reliable when compared to the U.S.

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[10]This HS category has been identified in prior TRBs reviews as the only Indian import category containing the bearing quality steel used to manufacture rollers.

[11]Memorandum to Susan Kuhbach, dated June 29, 2000, "Selection of a Surrogate Country and Steel Values Sources" ("Steel and Surrogate Country Memo").

[12]We used U.S. import data as a benchmark because the U.S. HTS is sufficiently detailed to provide a category for bearing quality steel. This is in contrast to other official government trade statistics, where the HS categories are broader. Due to the breadth of these categories, and because the values can vary widely from one source to another, use of the more precise U.S. value as a benchmark permits us to identify the most accurate surrogate value.

benchmark value, and was from our primary surrogate country, India, we used this data to calculate the surrogate value for the steel used to manufacture rollers in the final results of TRBs XII.

In Luoyang Bearing, Luoyang et al. argued that Indian imports from Austria, France, and Germany, which comprised part of the calculated surrogate value, were aberrational and should have been excluded from the surrogate value calculation for roller steel. In accordance with the CIT's instructions, we have re-examined the Indian import statistics used in the final results of TRBs XII to determine whether any of the country-specific import data was aberrational, as argued by Luoyang et al.

The Department examined the per-unit values of imports from four countries whose POR exports to India were greater than seven metric tons but small relative to other countries: Austria (11 MT), France (11 MT), Germany (12 MT), and Italy (9 MT). We first compared the per-unit values of each of these four country's shipments to imports into India from Brazil and Japan. Imports from Brazil and Japan accounted for the majority (86 percent) of the Indian imports. The per-unit values of shipments from Austria and Germany, at $4,443.76/MT and $3,429.33/MT, respectively, were substantially higher than Brazil's per-unit value of $625.14/MT and Japan's per-unit value of $1,019.25/MT. The per-unit values of shipments from France and Italy, at $1,499.39/MT and $1,578.86, respectively, were not substantially different from the Japanese per-unit value ($1,019.25/MT).

Based on this analysis, the Department finds that imports into India from Austria and Germany were made in small quantities and at per-unit values which differed substantially from the per-unit values of the larger-quantity imports reported under HS 7228.50.5009. Although the imports from France

and Italy were also made in small quantities, the Department finds that both of the unit values from these countries appear to be in line with the unit values of the countries with larger quantities of exports to India. Therefore, for these final results pursuant to remand, the Department finds that it is appropriate to exclude all imports into India from Austria and Germany reported under Indian HS category 7228.50.5009 in our calculation of the surrogate value used to value the roller steel input.

As noted above (see page 9), it is not the Department's practice to exclude data for particular months if the POR value of a country's exports to India is otherwise determined to be appropriate for valuation purposes. Therefore, the Department is not rejecting imports from France during the April through December 1998 period of the POR because the imports in these months were made in extremely small quantities. Similarly, we do not reject imports from a particular country solely because their per-unit values are above the U.S. benchmark, as argued by Luoyang et al. Therefore, we are not rejecting imports from France or Italy on this basis.

For these final results pursuant to remand, we also excluded imports from [ ]. We did this because as noted in Comment 1 of the TRBs XII Decision Memorandum, we have reason to believe or suspect that prices from [ ] are distorted due to the availability of industry-specific subsidies and broadly available non-industry specific export subsidies. Therefore, in order to use the "best information available," we did not include imports into India from [ ] in our calculation of the surrogate value for roller steel.

The only data on the record regarding values for wooden cases pertained to imports into India under HS category 4415.1000 (Cases Boxes Crates Drums and Smlr Packing Cable-Drums of Wood)

for the period April 1998 to August 1998.[13] For the final results of TRBs XII, Wafangdian argued that the Department should use the Indian import data on the record of TRBs X.[14] In the final results, we considered this data, but rejected it because the Indian data on the record of TRBs XII was more contemporaneous than the data from a previous review. See TRBs XII Decision Memorandum at Comment 10. Therefore, in the final results of TRBs XII, the Department used Indian imports under HS category 4415.1000 from the period April 1998 to August 1998, exclusive of imports from the PRC, to value wooden cases. We used this data because we found it to be the best available information as it was contemporaneous with the POR and the surrogate value derived from this Indian import data was not substantially different from the surrogate value used in TRBs X. See TRBs XII Decision Memorandum at Comment 10 ("This value is not substantially different from the rate based on the Indian import statistics used in TRBs X ($2.07 per kilogram).").

As noted above in our discussion of roller steel surrogate data, the Department has excluded country-specific imports when the total volume of imports is small and the per-unit value of those entries is substantially different from the per-unit values of larger-quantity imports of that product from other countries that exported to the surrogate country.

In order to comply with the CIT's remand to address the aberrational data on the record, we have applied the test described above to the country-specific imports of wooden cases. Among the

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[13]None of the participating parties submitted any data for imports into Indonesia.

[14]The basis of Wafangdian's argument was that the Indian import statistics used in TRBs XII were reported on a per piece basis versus a per-kilogram basis. Therefore, Wafangdian argued that the Department should use the surrogate value for wooden cases calculated in TRBs X, because at that time the Indian import statistics were reported in kilograms.

Indian import data, as noted by Luoyang et al., imports into India from the United Kingdom account for only 1.17 percent of all imports while imports from the other countries each account for 7% or more. Because the United Kingdom shipped a small quantity of product to India, we compared the unit value of those imports with the other countries' larger-quantity import values.

The per-unit value of exports from the United Kingdom to India is $58.80/piece, which falls in between the per-unit values of exports to India from Germany ($44.76/piece) and the United States ($86.51/piece). Therefore, although the exports of wooden cases from the United Kingdom to India were made in small quantities, the per-unit value is comparable to the per-unit values of the other countries that exported larger quantities to India. Therefore, based on Departmental practice, we do not find the United Kingdom import data to be aberrational and have continued to use this data in our calculation of the wooden cases surrogate value.

Luoyang et al. also distinguished imports into India from Spain as aberrational. Luoyang et al. argued that Spain's import data should be excluded because "the value for wooden cases in Spain is very high when compared to other values." See Luoyang Bearing at page 52. However, as noted above, we will only exclude values when the total amount imported from that country is small and the per-unit value of those imports is substantially different from the per-unit values of larger-quantity imports of that product from other countries that exported to the surrogate country. In this instance, Luoyang et al. did not argue, and we do not find shipments from Spain to India to be in small quantities. Therefore, we did not exclude imports from Spain from our calculation of the surrogate value for wooden cases.

Based on these analyses, for these final results pursuant to remand, we determine that the

surrogate value for roller steel in TRBs XII should be revised to $772.25/MT. For wooden cases, no changes were made to the surrogate value relied on in TRBs XII.

2) Separate Rates Analysis of Premier Bearing and Equipment Ltd.

DISCUSSION

Premier was one of two respondents in the original investigation. See TRBs Investigation.[15] As the Department noted in the TRBs Preliminary Determination[16] and all subsequent reviews of Premier up until TRBs XII, Premier is a privately-owned trading company based in Hong Kong. Premier exports from Hong Kong to the United States subject merchandise produced by seventeen companies located in the PRC. See TRBs Preliminary Determination. Premier is not affiliated with any of these companies. See Premier's October 15, 1999, submission at page A-3.

In TRBs XII, Premier submitted to the Department factors of production ("FOP") data for three of its PRC suppliers. In the final results of TRBs XII, we found this information to be incomplete. Therefore, we did not use any of this FOP data in calculating Premier's antidumping duty margin. See Memorandum to File, "Calculations for Final Results for Premier," dated January 3, 2001. As discussed in the TRBs XII Decision Memorandum (at Comment 31), to calculate Premier's margin, we matched model-specific normal values calculated for other respondents that participated in TRBs XII to Premier's U.S. sales. In those instances where Premier's U.S. sales did not match any other respondents' model-specific normal values, we applied the adverse facts available rate of 25.56

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[15]Tapered Roller Bearings From the People's Republic of China; Final Determination of Sales at Less Than Fair Value, 52 FR 19748 (May 27, 1987) ("TRBs Investigation").

[16]Tapered Roller Bearings From the People's Republic of China; Preliminary Determination of Sales at Less Than Fair Value, 52 FR 3833 (February 6, 1987) ("TRBs Preliminary Determination").

percent[17] to Premier's corresponding U.S. sales. Thus, to calculate Premier's antidumping duty rate, the Department did not rely on the incomplete FOP data submitted by Premier's suppliers but rather calculated Premier's antidumping duty margin using information separately submitted by independent companies also participating in TRBs XII and, when that data was not applicable, Premier's highest margin calculated in a previous review.

Timken argued that in NME antidumping cases the Department maintains a rebuttable presumption that all producers in an NME country are part of a single non-market entity. According to Timken, the exception to this general rule is when a producer submits to the Department sufficient evidence that it is not controlled by the NME government. If the Department is satisfied by this evidence, the Department will calculate a company-specific dumping rate for that producer. Timken stated that Premier's seventeen suppliers never submitted affirmative evidence that they are not under government control nor ever responded to the Department's information requests. Furthermore, Timken argued that the statute requires the Department to determine normal value in NME proceedings on the basis of the FOP consumed in producing the subject merchandise. According to Timken, this determination is independent of

who actually exports the goods. Therefore, Timken contended that the Department acted contrary to law by assigning to Premier's goods anything other than the PRC-wide rate.

In Luoyang Bearing, the CIT instructed the Department to "conduct the separate rates analysis

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[17]The highest rated ever calculated for Premier in any segment of this proceeding as of TRBs XII.

with respect to {Premier} and apply the PRC rate to all of Premier's United States sales if {the Department} finds that Premier is not independent of government control." See Luoyang Bearing, Remand Order at pages 1 and 2. The CIT noted that the Department performs a separate rates analysis to determine whether the exporter is independent of government control, or so closely tied to the NME government as to not be affected by the vagaries of the free market. See Luoyang Bearing at page 66. The CIT stated that "Premier has not established such independence; to the contrary, Premier's Chinese suppliers failed to reply to {the Department's} questionnaires in this review." See Luoyang Bearing at page 66. Because the suppliers did not submit the requested information, the CIT concluded that the Department was prevented "...from determining whether state-controlled producers sold materials to Premier at state-controlled prices, thus causing Premier to resell products to the United States at unfair prices, albeit unknowingly." See Luoyang Bearing at pages 66-67.

ANALYSIS

It is the Department's standard policy to assign all exporters of the merchandise subject to review in NME countries a single antidumping duty rate, i.e., the PRC-wide rate. However, we allow respondent companies in NME countries to receive separate antidumping duty rates for purposes of assessment and cash deposits when those companies can demonstrate an absence of government control, both in law and in fact, with respect to export activities. See Preliminary Results. If a respondent company is determined ineligible for a separate rate, we will consider the company to be part of the PRC-wide entity. All respondent companies deemed a part of the PRC-wide entity are assigned the PRC country-wide rate, which was 33.18 percent for TRBs from the

PRC at the time of this review.[18]

In Luoyang Bearing, the CIT evinces concern about the possibility that the export activities of Premier's PRC suppliers are controlled by the PRC government. See Luoyang Bearing at page 66. However, we do not believe that these PRC suppliers' selling activities are relevant to our analysis.[19] The purpose of the separate rates analysis is to determine whether the exporter, not the producer operating in an NME country, is sufficiently independent to warrant a separate dumping margin. See Final Determination of Sales at Less Than Fair Value: Sparklers from the People's Republic of China, 56 FR 20588 (May 6, 1991) ("Sparklers") and Final Determination of Sales at Less Than Fair Value: Silicon Carbide from the People's Republic of China, 59 FR 22585 (May 2, 1994) ("Silicon Carbide"). The CIT upheld this analysis in Fujian Machinery and Equipment Import and Export Corporation v. United States, 178 F. Supp. 2d 1305, 1331 (2001) ("Fujian"). Fujian explains that "the essence of a separate rates analysis is to determine whether the exporter is an autonomous market participant, or whether instead it is so closely tied to the communist government as to be shielded from the vagaries of the free market." The focus is on the exporter because in an NME country, economic activities are generally presumed to be under the control of the government. The separate rates policy recognizes a very limited exception to this control relating solely to export activities and, in particular, to

[18]The PRC country-wide rate of 33.18 percent was the antidumping duty rate assigned to Xiangfan Machinery Import and Export (Group) Corp. in the 10th administrative review of TRBs and at the time of TRBs XII was the highest rate of any previous administrative reviews.

[19]In TRBs XII, the Department issued to Premier's PRC suppliers section A and D of the Department's questionnaire. Section A requests information about the company and its relationship with the PRC government and section D requests factors of production data. None of Premier's suppliers responded to this request for information. As a result, there is no information on the record to determine whether Premier's suppliers are independent of the PRC government.

the exporter's ability to set the United States price used in the Department's antidumping comparison. When the exporter can demonstrate that it has freedom to set its price to the United States, then that exporter becomes eligible to have its antidumping duty rate be determined based on the prices it charges in exporting to the United States instead of the export price of the PRC-wide entity.

In this review, we found that Premier's PRC suppliers do not establish the sales price for their merchandise when it is sold to the United States. Instead, it is Premier that sells the subject merchandise in the United States. Premier, as the exporter of the TRB merchandise, and separate from the PRC entity, sets the U.S. sales price. Therefore, the selling activities of Premier's PRC suppliers are not relevant to the Department's separate rates policy as dictated by Departmental practice and the judicial record.[20]

Furthermore, at the time of this review, Hong Kong was not part of the PRC entity and the Department did not view it as a non-market economy. Therefore, the separate rates test established in Sparklers and Silicon Carbide does not apply. To demonstrate, we conducted a separate rates analysis of Premier, which is explained below.[21]

To establish whether an exporter operating in an NME country is sufficiently independent to be

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[20]We note that

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[21]In the third administrative review of TRBs, the Department conducted a separate rates analysis of all eight companies participating in the review, one of which was Premier, and determined that company-specific dumping margins were warranted for all eight companies. See Preliminary Results of Antidumping Duty Administrative Review: Tapered Roller Bearings and Parts Thereof from the People's Republic of China, 56 FR 50309, 50310. A subsequent separate rates analysis of Premier was not conducted.

entitled to a separate rate, the Department analyzes each exporting entity under the test established in Sparklers, as amplified by the Silicon Carbide.

In order to determine separate rates, an exporter needs to demonstrate an absence of government control, both in law (*de jure*) and in fact (*de facto*), with respect to export activities. Evidence supporting, though not requiring, a finding of *de jure* absence of government control over export activities includes: 1) an absence of restrictive stipulations associated with the individual exporter's business and export licenses; 2) any legislative enactments decentralizing control of companies; and 3) any other formal measures by the government decentralizing control of companies. *De facto* absence of government control over exports is based on four factors: 1) whether each exporter sets its own export prices independently of the government and without the approval of a government authority; 2) whether each exporter retains the proceeds from its sales and makes independent decisions regarding the disposition of profits or financing of losses; 3) whether each exporter has the authority to negotiate and sign contracts and other agreements; and 4) whether each exporter has autonomy from the government regarding the selection of management. See Silicon Carbide, 59 FR at 22587, and Sparklers, 56 FR at 20589.

De Jure Analysis:

The following record evidence, which is contained in Premier's questionnaire responses on the TRBs XII record, demonstrates a lack of *de jure* government control over the export activities of Premier.

During the POR, Premier was a privately owned company located in Hong Kong, formed under the laws of Hong Kong, and controlled by Premier's individual owners, shareholders, and

directors. Premier stated that it has no relationship with any national, provincial, or local government, including ministries or offices of the government. Premier is not affiliated with any of its Chinese suppliers. Premier is affiliated with KML America Bearing, located in Illinois, United States of America.

As noted by Premier in its Section A response to the Department's questionnaire, Hong Kong is a market economy Special Administration Region. See Premier's October 15, 1999, submission at page A-4. Therefore, it was not possible for Premier to provide legislative enactments or other formal measures by the government that demonstrate centralized or decentralized control of the export activities of Premier. However, Premier did provide a copy of its business registration certificate that certified that Premier was operating legally in Hong Kong. There was no indication from the company responses that the subject merchandise was listed on any governmental list of export provisions or export licensing. In addition, there were no reported export quotas regarding the subject merchandise.

Consistent with Silicon Carbide, we determine that at the time of TRBs XII, there was an absence of *de jure* government control over Premier's export pricing and marketing decisions.

De Facto Analysis:

The following record evidence, which is contained in Premier's questionnaire responses, demonstrates a lack of *de facto* government control over the export activities of Premier.

Premier asserted that it established its own export prices, which were directly negotiated with its customers. Premier submitted price negotiation documentation as part of its October 15, 1999, submission in support of its statements. According to Premier's response, it did not coordinate or

consult with other exporters regarding its pricing. Furthermore, Premier stated that the Hong Kong Chamber of Commerce does not coordinate or influence Premier's export activities.

Premier's management is selected based on their performance and contribution to the company. Premier is not required to notify the Hong Kong government about its selection of managers. However, Premier is required to notify the government body of any appointments of directors by filing an Annual Return to the Company Registry. This is a requirement for all limited companies such as Premier. Although Premier reports its directors to the Hong Kong government, there is no evidence that any government authority controls the selection process or has rejected appointed directors.

Premier's source of funds was its own revenues or bank loans. Premier had sole control over, and access to, its bank accounts, which were held in Premier's own name. Furthermore, there were no restrictions on the use of its revenues or profits, including export earnings.

Premier had four departments responsible for daily activities. The Sales and Marketing department was responsible for sales activities and promotion of new products. The Administration and Accounting department was responsible for overall management in organization operation. The Shipping department was responsible for arranging shipment from the PRC or Hong Kong to overseas customers. The Technical department was responsible for new product design and technical support. The general manager, appointed by the Board of Directors, was responsible for the general decision-making procedures, had the right to negotiate and enter into contracts, and delegate this authority to other employees within the company. There was no evidence that this authority was subject to any

level of government approval.

This information supports a finding that there was an absence of *de facto* government control of the export functions of Premier during the POR of TRBs XII.

Consequently, we determine that Premier has met the *de jure* and *de facto* criteria for the application of separate rates. Therefore, consistent with the Department's finding in the third administrative review of TRBs from the PRC,[22] we find that Premier warranted a company-specific dumping margin in TRBs XII.

Therefore, we do not believe it appropriate to assign the PRC-wide rate to all of Premier's sales. As the CIT noted, Premier fully cooperated with the Department during TRBs XII and Premier "has no control over its suppliers' cooperation" with the Department. See Luoyang Bearing at Footnote 12 (page 66). Premier is the company that set the price at which the TRB merchandise was sold in the United States. Accordingly, for these final results pursuant to remand, we have continued to assign Premier a separate rate from the PRC-wide entity.

CLERICAL ERROR IN ZMC'S MARGIN CALCULATION

In recalculating ZMC's margin, we discovered a clerical error in the original program. This programming error assigned the surrogate value calculated for the steel used to manufacture cups and cones to not only the cup and cone steel input but to the roller and cage steel inputs as well. In correcting this error, ZMC's margin fell from 7.37 percent to 0.00 percent.[23] In TRBs XII, ZMC

[22]See Preliminary Results of Antidumping Duty Administrative Review: Tapered Roller Bearings and Parts Thereof from the People's Republic of China, 56 FR 50309, 50310.

[23]ZMC's margin fell to zero regardless of the changes made pursuant to the CIT's remand order in this case.

requested revocation[24] and we preliminarily found that ZMC qualified for revocation of the order on TRBs pursuant to 19 CFR 351.222(b). However, as ZMC was found to have a dumping margin of 7.37 percent in the final results of TRBs XII, we did not revoke ZMC from the order. Based on the correction of the above noted error, in the draft results of redetermination pursuant to remand, we re-analyzed the record evidence as it pertains to ZMC and determined that ZMC qualified for revocation under 19 CFR 351.222. However, upon further analysis we have reconsidered the draft results and have determined that the antidumping order should not be revoked for ZMC. For more discussion see **Comment 2** below.

INTERESTED PARTY COMMENTS

Comment 1: The Redetermination as to Premier

Timken's Argument:

Timken argues that the Department's response to the CIT's remand creates a loophole in the law that undercuts the law's remedial objective. Timken argues that the CIT recognized that state-controlled NME producers could sell their products at artificially low prices to trading companies, which could in turn export those products to the United States at prices below normal value. According to Timken, the CIT expressed concern that the exporter could be tainted by its relationship

[24]CMC, Wafangdian, and Wanxiang also requested revocation of the order in part. The Department's findings in TRBs XII as pertains to these companies have not changed based on these results pursuant to remand.

with the state-controlled supplier, whether knowingly or not.[25] Because Premier's suppliers did not submit FOP data or undergo a separate rates analysis, and absent such an analysis are presumed to be state-controlled, Timken argues that the CIT concluded that this lack of information should impact Premier's eligibility for a "separate rate" under the circumstances presented even though Premier is a Hong Kong operation. Timken argues that the CIT recognized that any other conclusion would create a loophole where NME suppliers can pick and choose when to answer questionnaires, and provide FOP data only when it is advantageous to the respondent(s).

Timken argues that the CIT's concerns do not apply to NME suppliers that cooperate with the Department and provide FOP information.[26] According to Timken, the problem arises when the NME supplier does not respond to the Department, which allows the NME supplier to control the antidumping process. In these situations, Timken argues the Department should apply the PRC-wide antidumping duty rate unless the "buyer" can otherwise demonstrate that another rate should apply. Absent this demonstration that another rate should apply, Timken argues that "Premier should not enjoy the advantages flowing from the suppliers' refusal to provide their all-important FOP information"

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[25]Timken argues that the CIT is concerned that Premier may be too close to its NME suppliers for Premier to preserve its independence. In support, Timken quoted the CIT: "the supplier's refusal to submit information prevented Commerce from determining whether state-controlled producers sold materials to Premier at state-controlled prices, thus causing Premier to resell products to the United States at unfair prices, albeit unknowingly." See Timken's September 8, 2004, submission at 3.

[26] According to Timken, as long as the NME supplier provides the FOP data, the Department is able to calculate the normal value in accordance with the Department's routine methodology.

(see Timken's September 8, 2004, submission at 4) and that it is not reasonable for the Department to use another independent company's information as benign facts available.

Timken further argues that the Department enforces other policies that roughly address the same basic problem that caused the CIT's concern in this case. For example, Timken states that the Department does not apply the so-called "trading-house rule" in NME U.S. price calculations when the trading house is an NME operation. Rather, Timken argues, the Department combines the specific exporters and suppliers, and treats the two as one. Timken also contends that when the Department considers revocation of the antidumping duty order for a non-producing exporter, the Department will revoke the order in part only with respect to subject merchandise produced or supplied by those companies that supplied the exporter during the time period that formed the basis for revocation. The reason for this, argues Timken, is that the Department recognizes that the producer's information is critical to determining whether an exporter truly qualifies for revocation. Additionally, Timken argues that an exporter would not be eligible to be reviewed as a new shipper merely by changing suppliers of the subject merchandise.

Timken further contends there is a well-established presumption that NME producers are under state control until those producers demonstrate otherwise. According to Timken, none of Premier's suppliers have demonstrated their independence from government control. Therefore, Timken argues, unless the Department can prove that Premier's suppliers are independent of government control, the Department should calculate Premier's normal value at the PRC-wide rate.

In conclusion, Timken states that the Department technically complied with the remand order, but failed to address the CIT's fundamental concern. This failure, argues Timken, requires the

Department to modify its position to eliminate the "offending loophole."

Premier did not submit any comments on this issue.

Department's Position:

We have considered Timken's interpretation of the CIT's meaning in Luoyang Bearing and it is the Department's position that the draft results of redetermination pursuant to remand appropriately responded to the CIT's concerns and instructions as delineated in Luoyang Bearing. Timken also concedes this point noting that the Department "did what was technically ordered." See Timken's September 8, 2004, submission at 7. Furthermore, in essence, Timken's comments continue with the same line of argumentation previously made before the CIT. See Timken's October 31, 2001, submission to the CIT.

Timken again argues, although couched in slightly different terms, that the Department should apply the PRC-wide rate, i.e., adverse facts available, to Premier because Premier's suppliers did not respond to the questionnaire nor submit any FOP data. However, in Luoyang Bearing the CIT rejected this line of argumentation, stating that it will not apply adverse facts available to Premier, a company that fully participated in the review process, just because Premier's NME suppliers, companies that are not interested parties in the review, failed to provide information requested by the Department. See Luoyang Bearing at Footnote 12 (page 66). The CIT made it clear that the PRC-wide rate should be applied to all of Premier's United States sales only if it is determined that Premier is not independent of government control.

We believe that the Department's position, as explained above, fully takes into account the

CIT's concerns and properly followed the CIT's instructions. As the Department explained, the purpose of the separate rates analysis is to determine whether the exporter is sufficiently independent of government control to establish the price it charges for subject merchandise sold in the United States and, thus, to receive a separate dumping margin. As evidenced by the analysis performed in this redetermination on remand, Premier is independent of PRC government control and, hence, entitled to a separate rate.

Although we took into consideration Timken's interpretation of the CIT's meaning in Luoyang Bearing, we see no reason to reconsider our own understanding of Luoyang Bearing. Therefore, for these final results pursuant to remand, the Department stands by its original response as presented to the interested parties in the draft results.

Comment 2: The Proposed Revocation of ZMC

Timken's Argument:

Timken provides two reasons why the Department should not revoke the order as it pertains to ZMC.

First, Timken states that the Department's regulations provide that the Department will revoke an order in part if, among other things, "the exporter or producer agrees in writing to its immediate reinstatement . . . if the Secretary concludes that the exporter or producer, subsequent to the revocation, sold the subject merchandise at less than fair value." See 19 CFR 351.333(b)(2)(i)(B). ZMC agreed to this provision when it made its request for revocation in TRBS XII. Timken argues

that ZMC has violated this commitment because it sold subject merchandise as less than normal value as determined in the final results of TRBs XIV.[27] Therefore, Timken argues that the Department should deny revocation of the order as it pertains to ZMC or revoke the order and then immediately reinstate it in compliance with 19 CFR 351.333(b)(2)(i)(B).

Second, Timken contends that the Department made a major change in its normal value methodology in the final results of TRBs XII. According to Timken, in TRBs XII the Department, for the first time, began to reject prices paid to market economy countries by NME producers for inputs used in the production of the subject merchandise based on a reason to believe or suspect that such prices may be subsidized. Based on this, Timken contends that it is not clear from the public record whether ZMC would have had zero margins in the two reviews (1996-1997 and 1997-1998) prior to the current review. However, Timken argues that it is clear that ZMC purchased steel from a market economy country in the 1996-1997 POR. Therefore, Timken contends that "under the circumstances presented, given {the Department's} new methodology, a possibility clearly exists that ZMC's predicate for revocation (three years of zero or *de minimis* margins) is based on a calculation methodology that {the Department} would no longer apply." See Timken's September 8, 2004, submission at 10.

Timken concludes by pointing out that revocations are not automatic. The Department must

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[27]Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, from the People's Republic of China: Final Results of 2000-2001 Administrative Review, Partial Rescission of Review, and Determination to Revoke Order, in Part, 67 FR 68990 (November 14, 2002); and as amended, Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: Amended Final Results of 2000-2001 Administrative Review, 67 FR 72147 (December 4, 2002) ("TRBs XIV").

consider whether the continued application of the antidumping duty order is necessary to offset dumping and, in light of the issues raised, Timken argues the Department should not revoke the order *vis-a-vis* ZMC.

ZMC's Argument:

ZMC disagrees with Timken's position. ZMC first notes that Timken failed to mention that ZMC challenged the Department's findings in the 2000-2001 review. ZMC further argues it first learned that the Department would reject market economy steel prices on January 10, 2001, when the final results in TRBs XII were published. This knowledge came eight months into the 2000-2001 POR and after ZMC in good faith purchased steel from a market economy country. ZMC contends that it cannot now be found to have violated a commitment when the prices it set were based on a good faith reliance that the price it paid to the market economy would be accepted by the Department.

ZMC also argues that Timken's position to reinstate the order for ZMC is contrary to Nystrom v. Trex Company, Inc., 83 Fed. App. 321 (Fed.Cir 2003). According to ZMC, the Federal Circuit held that an amended judgment constituted a "substantive change" affecting the time to file an appeal such that the final judgment begins to run on the date of the amendment. The final judgment does not revert back. Accordingly, ZMC argues that TRBs XIV would similarly constitute a substantive change. "The change may relate back, but the effect does not and the ZMC margin for the 2000-2001 POR does not occur after the revocation." See ZMC's September 13, 2004, submission at 5. Moreover, ZMC contends that once an order is revoked, an exporter can and does increase the price of subject merchandise. This slight increase would have eliminated the margin for the 2000-2001 POR.

Finally, ZMC rejects Timken's argument that ZMC might have had margins prior to the 1998-1999 review if the subsidy suspicion policy were in place prior to the final results of TRBs XII as speculative at best. Specifically, ZMC notes that in fact, the Department argued, and the CIT agreed, in cases like Luoyang Bearing Factory v. United States, Slip Op. 03-41 (CIT 2003), that the subsidy suspicion policy did not change in TRBs XII. See ZMC's September 13, 2004, submission at 5. Therefore Timken's "what might have been" argument is unsupported by the facts.

Department's Position:

When considering revoking an order in part, the Department considers three criteria.[28] One of these three criteria is whether continued application of the antidumping duty order as to the exporter or producer is necessary to offset dumping. With this in mind, the Department's regulations require the exporter/producer requesting revocation to provide in writing its agreement to the immediate

[28]The three criteria for revocation (19 CFR 351.222(b)(2)) are as follows: (1) the company in question has sold subject merchandise at not less than NV for a period of at least three consecutive years; (2) the continued application of the antidumping duty order is not otherwise necessary to offset dumping; and (3) the company has agreed to its immediate reinstatement in the order if the Department concludes that the company, subsequent to the revocation, sold subject merchandise at less than NV.

reinstatement of the antidumping duty order, as long as the order is in place, if the Department concludes that, subsequent to the revocation, that exporter/producer sold the subject merchandise at less than normal value. See 19 CFR 351.222(b)(2)(i)(B).

Timken argues that the results of TRBs XIV show that ZMC violated this agreement. We disagree. ZMC was not bound by the certification it provided in TRBs XII because the Department did not revoke the order for ZMC in that review. However, as ZMC was found to have sold subject merchandise at less than normal value in TRBs XIV, the Department determines that sufficient positive evidence exists showing that the discipline of the order continues to be necessary to offset dumping by ZMC. Based on this evidence that ZMC is likely to continue to dump subject merchandise in the United States, we determine that ZMC does not satisfy all of the three criteria required for revocation. This determination is consistent with Brass Sheet from Canada.[29]

In Brass Sheet from Canada, the respondent was determined to have sold subject merchandise at not less than normal value for the first two years of the three consecutive year period making up the respondent's revocation request, but was denied revocation because in the third year the company was found to have made sales at less than normal value. The respondent challenged this finding. On remand the Department recalculated the company's margin and the respondent received a *de minimis* margin. However, as the Department had found the respondent to have dumped subject merchandise in the United States in the administrative review following the case remanded, the Department did not

[29]Brass Sheet and Strip From Canada: Amended Final Results of Antidumping Duty Administrative Review in Accordance With Panel Decision Upon Remand, 65 FR 10048 (February 25, 2004) ("Brass Sheet from Canada").

revoke the order because there was sufficient

evidence that the discipline of the order continued to be necessary to offset dumping by the respondent. See Brass Sheet at 10049.

Therefore, although ZMC had three consecutive years of no dumping, we are not revoking the order as it pertains to ZMC.

FINAL RESULTS OF REDETERMINATION PURSUANT TO REMAND

As a result of this remand, we have recalculated the company-specific margins for only the companies that were party to the litigation of the 1998-1999 administrative review.[30] The "PRC-Wide" rate for this review, 33.18, is not affected by these remand results. The recalculated company-specific weighted-average margin percentages are as follows:

Exporter/manufacturer	**TRBs XII Weighted-average margin percentage**	**Remand Weighted-average margin percentage**
Wafangdian	0.00	0.00
CMC	0.82	0.78
ZMC	7.37	0.00
Luoyang	4.37	3.85
PRC-wide rate	33.18	33.18

CONCLUSION

These final results pursuant to remand are being issued in accordance with the order of the CIT

[30]In the draft results of redetermination pursuant to remand we incorrectly indicated that the company-specific margins were recalculated for all of the companies that participated in TRBs XII.

in Luoyang Bearing Corp. (Group), Zhejiang Machinery Import & Export Corp., China National Machinery Import & Export Corporation, and Wafangdian Bearing Company, Ltd. v. United States, Slip Op. 04-53 (CIT 2004).

James J. Jochum
Assistant Secretary
for Import Administration

(Date)