Slip Op. 05–137

SLATER STEELS CORPORATION, *ET AL.*, Plaintiffs, v. UNITED STATES, Defendant
VIRAJ GROUP, Plaintiff, v. UNITED STATES, Defendant, AND SLATER STEELS CORPORATION, *ET AL.*, Defendant-Intervenors

Before: Judith M. Barzilay, Judge
Consol Ct. No. 02–00551

[Department of Commerce's *Final Results of Redetermination Pursuant to Remand III* sustained.]

Dated: October 20, 2005

Collier, Shannon, Scott, PLLC, (*Robin H. Gilbert*), for Plaintiffs and Defendant-Intervenors Slater Steels Corp., *et al.*

Miller & Chevalier Chartered, (*Peter J. Koenig*), for Plaintiff Viraj Group.

(*Jeanne E. Davidson*), Deputy Director, Commercial Litigation Branch, Civil Division, United States Department of Justice; (*Stephen C. Tosini*), Attorney, Commercial Litigation Branch, Civil Division, United States Department of Justice; *Matthew D. Walden*, Office of Chief Counsel for Import Administration, United States Department of Commerce, of counsel, for Defendant.

OPINION

I. Introduction

This case concerns repeated attempts by the United States Department of Commerce ("DOC", "government", or "Commerce") to collapse companies within the Viraj Group,[1] an Indian importer, pursuant to 19 C.F.R. § 351.401(f) (2000).[2] Plaintiff Viraj Group

[1] The relevant Viraj Group companies in this action are Viraj Alloys, Ltd. ("VAL"), Viraj Impoexpo, Ltd. ("VIL"), and Viraj Forgings, Ltd. ("VFL").

[2] The regulation states:

(f) Treatment of affiliated producers in antidumping proceedings–
(1) In general. In an antidumping proceeding under this part, the Secretary will treat two or more affiliated producers as a single entity where those producers have production facilities for similar or identical products that would not require substantial retool-

("Viraj") and Defendant-Intervenors ("Slater") have brought successive challenges to Commerce's administrative decision to collapse three affiliated Viraj companies in order to calculate the dumping margin against imports of certain subject merchandise[3] entered during the period of review ("POR") between February 1, 2000, and January 31, 2001. The court has remanded this case to the government three times for reevaluation, and this opinion focuses on the resulting third set of remand results. *See Slater Steels Corp. v. United States*, 27 CIT ___ , 279 F. Supp. 2d 1370 (2003) ("*Slater I*"); *Slater Steels Corp. v. United States*, 28 CIT ___ , 316 F. Supp. 2d 1368 (2004) ("*Slater II*"); *Slater Steels Corp. v. United States*, 29 CIT ___ , Slip Op. 05–23 (Feb. 17, 2005) ("*Slater III*").

In *Slater I* and *Slater II*, the court held that there did not exist substantial evidence on the record to warrant the government's collapse of VAL, VIL, and VFL under the three-prong test outlined in 19 C.F.R. § 351.401(f)(1). This test requires that the government must find that "(1) the [Viraj] companies are affiliated pursuant to 19 U.S.C. § 1677(33), (2) the companies are capable of producing similar or identical products without substantial retooling of each producer's facility, and (3) there is significant potential for the manipulation of price or production." *Slater I*, 279 F. Supp. 2d at 1376. In *Slater III*, the court reminded Commerce that the agency must "either employ the same methodology or give reasons for changing its practice" if it desires to break with its previous determinations. *Slater III*, Slip Op. at 9 (citing *Cinsa, S.A. de C.V. v. United States*, 21 CIT 341, 349, 966 F. Supp. 1230, 1238 (1997).

II. Standard of Review

This court has jurisdiction over this matter pursuant to 28 U.S.C. § 1581(c) (2004). The court "must sustain 'any determination, finding or conclusion found' by Commerce unless it is 'unsupported by substantial evidence on the record, or otherwise not in accordance with the law.' " *Fujitsu Gen. Ltd. v. United States*, 88 F.3d 1034, 1038 (Fed. Cir. 1996) (quoting 19 U.S.C. § 1516a(b)(1)(B)). Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Matsushita Elec. Indus. Co. v. United States*, 750 F.2d 927, 933 (Fed. Cir. 1984) (quoting *Consol. Edison Co. of N.Y. v. NLRB*, 305 U.S. 197, 229 (1938)) (quotations omitted). Further, it is crucial to recall that "the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported

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ing of either facility in order to restructure manufacturing priorities and the Secretary concludes that there is a significant potential for the manipulation of price or production.

19 C.F.R. § 351.401(f)(1).

[3] The subject merchandise at issue is stainless steel bar.

by substantial evidence." *Id.* (quoting *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 619–20 (1966)) (quotations omitted). The court therefore "affirms Commerce's factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions." *Olympia Indus, Inc. v. United States*, 22 CIT 387, 389, 7 F. Supp. 2d 997, 1000 (1998) (citing *Atl. Sugar, Ltd. v. United States*, 744 F.2d 1556, 1563 (Fed. Cir. 1984)). The court may not re-weigh the evidence or substitute its own judgment for that of the agency. *See Granges Metallverken AB v. United States*, 13 CIT 471, 474, 716 F. Supp. 17, 21 (1989).

III. Discussion

A. Collapsing VIL & VFL

In Commerce's *Final Results of Redetermination Pursuant to Remand III* ("*Remand Results III*"), the government collapsed VIL and VFL while treating VAL as a separate entity.[4] *See Slater III*, Slip Op. at 15; *Remand Results III* at 1. Plaintiff has never challenged the collapsing of VIL and VFL. *Comments on Commerce's Final Results of Redetermination Pursuant to Remand III* ("*Remand Results III Comments*") at 9. The government did not explain its method of determination within this set of Remand Results in accordance with *Slater I* and *Slater II*. *See Slater II*, 316 F. Supp. 2d at 1372; *Slater I*, 279 F. Supp. 2d at 1376, 1379. Nevertheless, because Plaintiff does not object to the final Remand Results, the issues regarding the interpretation of the collapsing regulation as raised in *Slater I* and *Slater II* are moot. Therefore, this court SUSTAINS the *Final Results of Redetermination Pursuant to Remand III*.

B. Issues Contested by Plaintiff

In its Comments on the DOC's *Remand Results III*, Plaintiff claims the government "failed to calculate the most accurate and complete uncollapsed VIL margin by ignoring the record evidence." *Remand Results III Comments* at 9. Specifically, Plaintiff wants the court to have Commerce alter alleged errors within VIL/VFL's claimed U.S. indirect selling expenses and then adjust the starting price of the constructed export price ("CEP") accordingly. *See Remand Results III Comments* at 9.

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[4] Contrary to the DOC's contention, this court did not forbid the government from collapsing all three companies within the Viraj Group; *Slater III* simply insisted that Commerce "provide an explanation regarding its method of determining the sufficiency" of such a departure from its precedent. *Slater III*, Slip. Op. at 14. *But see Def.'s Resp. Pl.'s Comments Concerning Third Remand Results* at 2, 4. It would lend credence to the DOC's arguments if it *accurately* and *consistently* cited to its sources.

The government and Viraj rebut that Plaintiff's claim "exceeds the Court's directive." *Remand Results III* at 21. As Commerce correctly notes, "during the proceeding underlying *Slater III*, no party objected to Commerce's treatment of Viraj's U.S. CEP selling expenses." *Remand Results III* at 21. In fact, in the course of this case's history, Plaintiff never raised this issue and has not even exhausted its administrative remedies. *Cf. Slater I*, 279 F. Supp. 2d at 1372 (noting that "sole issue" in case is collapsing of Viraj Group companies).

The court concurs with Commerce and Viraj. This court "generally takes a strict view of the need to exhaust remedies by raising all arguments." *Pohang Iron & Steel Co. v. United States*, 23 CIT 778, 792, 1999 WL 970743, at *13 (1999). When examining whether a party may raise an issue for the first time on appeal, "the court looks at administrative efficiency and fairness" in making its decision. *Id.* As a general rule, "the doctrine of exhaustion holds that 'no one is entitled to judicial relief . . . until the prescribed administrative remedy has been exhausted.' " *Ta Chen Stainless Steel Pipe, Ltd. v. United States*, 28 CIT ___ , ___ , 342 F. Supp. 2d 1191, 1205 (2004) (quoting *Sandvik Steel Co. v. United States*, 164 F.3d 596, 599 (Fed. Cir. 1998) (quoting *McKart v. United States*, 395 U.S. 185, 193 (1969))); *see* 28 U.S.C. § 2637(d). In certain cases, when mandating administrative exhaustion would prove "futile or an insistence on a useless formality[,]" the court has waived the requirement. *Alhambra Foundry Co. v. United States*, 12 CIT 343, 347, 685 F. Supp. 1252, 1256 (1988). The issue raised by Plaintiff in this case, however, does not meet these criteria. *See, e.g., Budd Co., Wheel & Brake Div. v. United States*, 15 CIT 446, 452 n.2, 773 F. Supp. 1549, 1555 n.2 (1991).[5] Therefore, the court cannot address Plaintiff's claim at this time.

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[5] The four scenarios in which the court waives administrative exhaustion requirements are when:

1. Plaintiff raised a new argument that was purely legal and required no further agency involvement.
2. Plaintiff did not have timely access to the confidential record.
3. A judicial interpretation intervened since the remand proceeding, changing the agency result.
4. It would have been futile for plaintiff to have raised its argument at the administrative level.

Budd Co., 15 CIT at 452 n.2 (citations omitted).

SLIP OP. 05–138

UNITED STATES, Plaintiff, v. AEGIS SECURITY INSURANCE COMPANY, Defendant.

Before: Jane A. Restani, Chief Judge
Court No. 05–00276

[Defendant's motion to dismiss duty collection suit because administrative proceedings are pending is denied.]

Dated: October 24, 2005

Peter D. Keisler, Assistant Attorney General, *David M. Cohen*, Director, *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Mark T. Pittman*); *Edward Greenwald*, Attorney, Bureau of Customs & Border Protection, of counsel, for the plaintiff.

Sandler, Travis & Rosenberg and Glad & Ferguson (*T. Randolph Ferguson*); *Sandler, Travis & Rosenberg, PA* (*Arthur K. Purcell*) for the defendant.

OPINION

Restani, Chief Judge: This matter is before the court on defendant's motion to dismiss as premature the government's suit to collect duties allegedly owed under 19 U.S.C. § 1592(d) (2000)[1] from a surety, Aegis Security Insurance Company ("Aegis"), for a violation of 19 U.S.C. § 1592(a) (2000).[2]

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[1] 19 U.S.C. § 1592(d) reads as follows:

(d) Deprivation of lawful duties, taxes, or fees

Notwithstanding section 1514 of this title, if the United States has been deprived of lawful duties, taxes, or fees as a result of a violation of subsection (a) of this section, the Customs Service shall require that such lawful duties, taxes, and fees be restored, whether or not a monetary penalty is assessed.

[2] 19 U.S.C. § 1592(a) reads as follows:

(a) Prohibition

(1) General rule

Without regard to whether the United States is or may be deprived of all or a portion of any lawful duty, tax, or fee thereby, no person, by fraud, gross negligence, or negligence –

(A) may enter, introduce, or attempt to enter or introduce any merchandise into the commerce of the United States by means of –

(i) any document or electronically transmitted data or information, written or oral statement, or act which is material and false, or

(ii) any omission which is material, or

(B) may aid or abet any other person to violate subparagraph (A).

(2) Exception

Clerical errors or mistakes of fact are not violations of paragraph (1) unless they are part of a pattern of negligent conduct. The mere nonintentional repetition by an electronic system of an initial clerical error does not constitute a pattern of negligent conduct.

The court has jurisdiction pursuant to 28 U.S.C. § 1582(2) (2000) (suit to recover on a bond relating to the importation of merchandise). There is no dispute that Aegis is the surety on such a bond and that suit was filed within the applicable limitations period. In fact, the press of the limitations period led to filing of the action at this time. *See* 19 U.S.C. § 1621 (2000) (5-year statute of limitations for duty collection actions under 19 U.S.C. § 1592(d)).

For purposes of the motion to dismiss, the only relevant fact is undisputed, which is that the United States has not completed administrative proceedings with respect to penalty claims against the importer or other persons. The parties here dispute whether such proceedings had been commenced at the time suit was filed,[3] but it is completion of such proceedings, not commencement or some later stage, that is of concern if exhaustion of such proceedings is a prerequisite to suit, as defendant alleges. Defendant's argument that the importer must have an opportunity to respond to a pre-penalty notice before the government can assert a 19 U.S.C. § 1592(a) violation and a § 1592(d) claim does not stem from either provision. Defendant, rather, infers this to be so from the detailed penalty procedures of 19 U.S.C. § 1592(b) (2000).

With regard to penalty actions by the United States involving the procedures of § 1592(b), the courts have indicated in *dicta* or suggested by detailed discussion of the issue that such procedures should be exhausted prior to suit. *See, e.g., United States v. Priority Prods., Inc.*, 9 CIT 383, 615 F. Supp. 591 (1985); *United States v. Action Prods. Int'l, Inc.*, 25 CIT 139 (2001); *United States v. Maxi Switch, Inc.*, 22 CIT 778, 18 F. Supp. 2d 1040 (1998). But in each of these cases sufficient compliance with the statutory procedures was found so that, in fact, no further exhaustion was required as a prerequisite to suit. This, of course, is not a penalty collection action.

In another type of collection case, involving liquidated damages for imported automobiles not meeting emissions standards, the court did dismiss the government's suit against the surety because its administrative protest was unresolved. *See United States v. Bavarian Motors, Inc.*, 4 CIT 83, 86 (1982). This case is not like *Bavarian* because, *inter alia*, Aegis did not protest or even respond to the demand upon it.[4]

Suits under 19 U.S.C. § 1592(d) for duties may proceed whether or not penalties are assessed. *See United States v. Blum*, 858 F.2d 1566, 1569–70 (Fed. Cir. 1988). With respect to penalties, Customs has the discretion to mitigate penalties, *see* 19 U.S.C. § 1592(b)(2) (2000), and to reduce penalties for prior disclosures, *see* 19 U.S.C.

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[3] By the time of oral argument herein, it was undisputed that the penalty proceedings were well underway.

[4] At oral argument, Aegis conceded demand was made some weeks in advance of suit.

§ 1592(c)(4) (2000). On the other hand, section 1592(d) "require[s]" restoration of duties, irrespective of penalty assessment.

The government has alleged a violation of 19 U.S.C. § 1592(a) and loss of duties, which are the essential elements of § 1592(d) liability. It has made demand on the defendant, and defendant has chosen to sit back and wait for suit against it, as is its right. Defendant, however, has cited no statutory or regulatory administrative procedure applicable to simple duty collection, as opposed to penalty assessment, which has not been fulfilled. Accordingly, there appears to be no bar to suit.

As the government has chosen to proceed before the completion of related penalty administrative procedures, as Congress has established a limitations period to prevent stale suits, and as defendant objects, this action will not be stayed.

ACCORDINGLY, defendant's motion to dismiss is denied and this action will proceed. The parties will file a case management plan within 30 days hereof.

Slip Op. 05–139

ZHEJIANG MACHINERY IMPORT & EXPORT CORP., *Plaintiff*, v. UNITED STATES, *Defendant*, and THE TIMKEN COMPANY, *Defendant-Intervenor*.

Court No. 02–00792

[Plaintiff's motion to remand denied.]

Dated: October 25, 2005

Hume & Associates PC (*Robert T. Hume*), for Plaintiff.

Peter D. Keisler, Assistant Attorney General; *David M. Cohen*, Director, and *Patricia M. McCarthy*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Claudia Burke*); *Amanda L. Blaurock*, Office of the Chief Counsel for Import Administration, U.S. Department of Commerce, Of Counsel; for Defendant.

Stewart and Stewart (*Terence P. Stewart* and *Wesley K. Caine*), for Defendant-Intervenor.

OPINION

RIDGWAY, Judge:

Before the Court is the Motion of Plaintiff Zhejiang Machinery Import & Export Corporation ["ZMC"] to Remand to Department of Commerce to Correct an Error and Consider Revocation of the Antidumping Order With Respect to ZMC ("Pl.'s Motion to Remand"), which "challenges the surrogate value for steel scrap for cups, cones,

and rollers used by [the U.S. Department of] Commerce in computing the dumping margin imposed against ZMC." Pl.'s Motion to Remand at 2. *See also* Memorandum in Support of Plaintiff Zhejiang Machinery Import & Export Corporation's Motion to Remand to Department of Commerce to Correct an Error and Consider Revocation of the Antidumping Order With Respect to ZMC ("Pl.'s Brief"); Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Remand ("Pl.'s Reply Brief").[1]

Both the Government and defendant-intervenor Timken vigorously oppose the Motion to Remand. *See* Defendant's Opposition to Plaintiff's Motion to Remand ("Def.'s Brief"); Response of The Timken Company, Defendant Intervenor, to 'Motion of Plaintiff Zhejiang Machinery Import & Export Corporation to Remand to Department of Commerce to Correct an Error and Consider Revocation of the Antidumping Order With Respect to ZMC' ("Def.-Int.'s Brief").

For the reasons set forth below, ZMC's Motion to Remand is denied.

I. *Background*

In this action, ZMC challenges Commerce's Final Determination, as amended, in the fourteenth administrative review of the antidumping order covering tapered roller bearings ("TRBs") and their parts from China ("TRBs XIV").[2] The contested review covers merchandise imported between June 1, 2000 and May 31, 2001. The sole issue specifically identified in ZMC's Complaint is Commerce's "refus[al] to use the price the Plaintiff paid its market-economy supplier with U.S. dollars for the steel the Plaintiff used to produce TRBs." Complaint ¶ 6.[3]

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[1] Also pending before the Court is a motion to strike ZMC's Reply Brief, filed by defendant-intervenor The Timken Company. As Timken correctly observes, a movant has no right to file a reply brief on a non-dispositive motion. *See generally* Motion of the Timken Company, Defendant Intervenor, to Strike Plaintiff's Reply to Defendant's Opposition to Plaintiff's Motion for Remand; USCIT Rule 7(d); *see also Save Domestic Oil, Inc. v. United States*, 24 CIT 281, 282 n.2 (2000); *United States Steel Corp. v. United States*, 3 CIT 170, 170–71 (1982).

However, it is not entirely clear whether ZMC's Motion to Remand should fairly be characterized as dispositive or non-dispositive. Although it is not so captioned, ZMC's motion is – in certain respects – a motion for judgment on the agency record (which is clearly a dispositive motion). *See* USCIT Rule 7(g). In any event, the ruling on ZMC's Motion to Remand does not differ depending on whether or not ZMC's Reply Brief is considered. Out of an abundance of caution, therefore, Timken's motion to strike is denied.

[2] *See* 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 Fed. Reg. 68,990 (Nov. 14, 2002), *as amended by* 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 Fed. Reg. 72,147 (Dec. 4, 2002) (collectively "TRBs XIV").

[3] The Complaint also alleges broadly that "[*i*]*n addition to the issue enumerated in paragraph 6, supra,* the administrative determinations were otherwise not supported by sub-

By its Motion to Remand, ZMC now seeks to interject into this action a second specific issue – more than two full years after the publication of Commerce's Amended Final Results (and the release of its underlying calculations) as well as the filing of ZMC's Complaint, almost 17 months after the filing of Commerce's redetermination on remand,[4] and approximately 14 months after the completion of briefing on ZMC's Motion for Judgment on the Agency Record.

Specifically, ZMC now asserts that – in computing the dumping margin for ZMC – "Commerce used an incorrect quantity figure for Indian imports of steel scrap from the United Kingdom and thus calculated an incorrect surrogate value for the steel scrap for cups, cones, and rollers." Pl.'s Brief at 3. ZMC further contends that correction of the alleged error would yield a dumping margin below the *de minimis* level, and that – in turn – the antidumping order with respect to ZMC would be subject to revocation by Commerce, because ZMC would have established a record of at least three consecutive years of sales at not less than normal value. Pl.'s Brief at 3–7; Pl.'s Reply Brief at 2, 4–5, 7.[5]

ZMC thus asserts that the requested remand would moot this case and obviate any need for the Court to reach the sole issue that is specifically identified in ZMC's Complaint and briefed in the parties'

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stantial evidence on the record and were not in accordance with law." Complaint ¶ 7 (emphasis added). *See also* Complaint ¶ 6 (alleging that "[t]he administrative determinations herein are arbitrary and capricious, are unsupported by substantial evidence on the record, and are otherwise not in accordance with law.").

[4] After ZMC filed its Motion for Judgment on the Agency Record but before the Government or Timken responded, the Government sought and was granted a voluntary remand to permit Commerce to respond for purposes of this case to concerns raised in an opinion issued in a related case – specifically, *China National Machinery Import & Export v. United States*, 27 CIT ____ , 264 F. Supp. 2d 1229 (2003), which concerned "TRBs XIII" (the thirteenth administrative review of the same antidumping order at issue in this action). The voluntary remand ordered in this case was intended to allow the agency to provide "a more thorough explanation of its determination to use a surrogate value for steel inputs, as opposed to the price ZMC paid to a market-economy supplier for those steel inputs." *See* Def.'s Motions to Remand and Suspend Briefing Schedule; Order (June 5, 2003).

[5] Pursuant to 19 C.F.R. § 351.222(b)(2)(i), in determining whether to revoke an antidumping order, Commerce considers:

(A) Whether one or more exporters or producers covered by the order *have sold the merchandise at not less than normal value for a period of at least three consecutive years*;

(B) Whether, for any exporter or producer that the Secretary [of Commerce] previously has determined to have sold the subject merchandise at less than normal value, the exporter or producer agrees in writing to its immediate reinstatement in the order, as long as any exporter or producer is subject to the order, if the Secretary concludes that the exporter or producer, subsequent to the revocation, sold the subject merchandise at less than normal value; and

(C) Whether the continued application of the antidumping duty order is otherwise necessary to offset dumping.

19 C.F.R. § 351.222(b)(2)(i) (2005) (emphasis added).

ZMC asserts that, if the requested remand is granted and the newly-alleged error is corrected, it will satisfy all three of the regulatory criteria. *See* Pl.'s Brief at 5–7; Pl.'s Reply Brief at 5.

submissions on ZMC's Motion for Judgment on the Agency Record – ZMC's challenge to "Commerce's determination that there was 'reason to believe or suspect' that ZMC's market-economy steel prices were subsidized." Pl.'s Brief at 3, 7; Pl.'s Reply Brief at 2; Memorandum of Points and Authorities in Support of Motion of Plaintiff Zhejiang Machinery Import & Export Corp. for Judgment on the Agency Record ("Pl.'s Brief on Motion for Judgment on Agency Record") at 3.

II. *Analysis*

The Government maintains that ZMC's newly-asserted challenge to the surrogate value of scrap is untimely. The Government reasons that ZMC's allegation – even if true – amounts to a claim of "ministerial error." According to the Government, ZMC was obligated to bring any such errors to Commerce's attention within five days of the agency's disclosure of the calculations underlying its determination, in December 2002.[6] Def.'s Brief at 2–3 (*citing* 19 C.F.R. § 351.224(c)(2) (2002)).[7] *See also* Def.-Int.'s Brief at 2 *et seq*.

Timken seconds the Government's argument on timeliness, and adds that – quite apart from the timing of ZMC's allegation – ZMC also has failed to follow proper procedure in raising the matter. Specifically, Timken contends that "if the Court is, in principle, inclined to allow a completely fresh claim," ZMC must first seek to amend its Complaint pursuant to CIT Rule 15(a), which requires either leave of the court or the written consent of all adverse parties. Def.-Int.'s Brief at 5.

Timken asserts that any such motion to amend the Complaint "would have to provide convincing reasons for why the Court should grant the request [to amend the Complaint], and . . . would presumably include an explanation for ZMC's significant delay." *Id*. (footnote

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[6] The Government's brief includes conflicting statements as to the timeliness of ZMC's new allegation. In at least two places, the Government indicates that ZMC's allegation is "over *one year* after the deadline to submit . . . a request" for correction of a ministerial error. *See* Def.'s Brief at 2 (emphasis added); *see also id*. at 6 (asserting that ZMC "was required to notify Commerce more than *one year* ago") (emphasis added). Elsewhere, however, the Government asserts that ZMC was required to request correction of ministerial errors within five days of disclosure of its calculations in December 2002. *See* Def.'s Brief at 2. If the Government's position is that ZMC was required to request correction of ministerial errors in December 2002, then it follows that the Government actually contends that ZMC's allegation is more than *two years* late.

[7] Commerce's regulations require parties to file comments identifying any ministerial errors in the agency's final margin calculations within five days after the earlier of either the date on which Commerce releases its calculation disclosure documents or the date on which Commerce holds its disclosure meeting. *See* 19 C.F.R. § 351.224(c)(2) (2002).

In addition to its argument that ZMC's claim of error is untimely, the Government also asserts that ZMC has proffered no "discernible evidence" of the alleged error. *See* Def.'s Brief at 3–4. *But see* Pl.'s Reply Brief at 5–6. Under the circumstances, there is no need here to reach the merits of the Government's second argument.

omitted). Timken observes that – in the event that ZMC were to be allowed to amend its Complaint to include its new claim as to the surrogate value of scrap – ZMC could then file an appropriate motion for judgment on the agency record addressing that issue, which would be fully briefed by all parties to properly frame it for the Court. *Id.* Timken emphasizes that "[t]here is every reason for the Court to require this full and deliberate procedure here." *Id.* at 5–6.

Because ZMC's motion fails for other reasons, there is no need to here decide whether – as the Government alleges – the mistake alleged by ZMC constitutes "ministerial error."[8] At least at first blush, that characterization would seem to be at odds with the Government's claim (in another forum) that the alleged error is "complex" and would require "careful examination and recalculation." *See* Def.-Int.'s Brief at 6 (*quoting* Defendant's Response to Plaintiff's and Defendant-Intervenor's Comments Upon Commerce's Final Results of Redetermination Pursuant to Remand (Dec. 6, 2004) at 9, *filed in Luoyang Bearing Corp. v. United States*, Court No. 01–00036).[9] Nor is there any need to deal here either with ZMC's argument that it could not have raised the alleged error before the agency because the error was discovered only after the Complaint was filed in this ac-

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[8] Timken does not take a definitive position on the alleged error's characterization as "ministerial." At some points, Timken appears to (at least implicitly) endorse that characterization. *See, e.g.*, Def.-Int.'s Brief at 2 (criticizing ZMC for failing to raise the alleged error "during the prescribed five-day period . . . when parties may allege ministerial errors"). But, elsewhere, Timken equivocates. *See, e.g.*, Def.-Int.'s Brief at 6 n.5 (observing that "the Commerce Regulations allow parties five days after disclosure of the final margin calculations to identify ministerial errors. . . . *Assuming ZMC's new 'error' is merely clerical*, it should have acted within that time.") (emphasis added).

ZMC itself seems to acquiesce in the characterization. *See, e.g.*, Pl.'s Reply Brief at 2 (noting its agreement that "typically an evaluation of a ministerial error would be first heard by Commerce," but arguing that – under the circumstances – the Court here has the authority "to remand this decision back to Commerce to address the ministerial mistakes made"), 3–4 (implicitly acquiescing in the Government's characterization of the error as "ministerial"), 5 (effectively adopting Commerce's characterization of the error as "ministerial").

[9] *See, e.g., Federal-Mogul Corp. v. United States*, 18 CIT 1168, 1175–76, 872 F. Supp. 1011, 1017 (1994) (adopting Commerce's characterization of "ministerial" errors as those that are, *inter alia*, "purely clerical and *would not require further examination of the facts*") (emphasis added).

Indeed, in *Luoyang*, the Government summarily rejected ZMC's characterization of the alleged error as "merely clerical." *See* Defendant's Response to Plaintiff's and Defendant-Intervenor's Comments Upon Commerce's Final Results of Redetermination Pursuant to Remand (Dec. 6, 2004) at 9, *filed in Luoyang Bearing Corp. v. United States*, Court No. 01–00036 ("[T]he errors that ZMC *claims to be* merely clerical in TRBs XIV are complex and would, if asserted, require careful examination and recalculation") (emphasis added).

It seems that the Government is trying to "have its cake and eat it too." In *Luoyang*, the Government's interest was in *magnifying* the nature of the alleged error and the extent of the effort required to address it. In contrast, in this case, the Government seeks to invoke the "five-day rule" for correction of ministerial errors. Thus, the Government here has an interest in *downplaying* the nature of the error. (It was Timken – not the Government – that drew the attention of the Court in this case to the Government's assertion in *Luoyang* that the alleged error is "complex.")

tion, or with Timken's claim that ZMC failed to timely avail itself of "multiple opportunities to detect and allege the newly claimed 'error.' " *See* Pl.'s Reply Brief at 2; Def.-Int.'s Brief at 4.

What is dispositive here is that, even after ZMC discovered the alleged error, ZMC failed to promptly raise the issue in this action. In other words, even assuming that the alleged error is not "ministerial" and even assuming that ZMC's delay in discovering the error was excusable, there is no excuse for ZMC's delay in notifying the Court and the parties to this action of the error once it was discovered.

At least on its face, ZMC's claim of error has no small appeal. The alleged error apparently is attributable solely to Commerce. Moreover, if ZMC's allegations are true, correction of the error would result not merely in a reduction of its dumping margin, but – rather – would render the margin *de minimis*. And the ultimate consequence of such a determination, according to ZMC, would be the revocation of the antidumping order with respect to ZMC, which would moot this case. *See generally* Pl.'s Brief at 3–7; Pl.'s Reply Brief at 2, 4–5, 7. The stakes for ZMC are potentially very high indeed. ZMC thus accuses the Government of "attempting to use a procedural argument to dismiss a substantively important matter." Pl.'s Reply Brief at 2.

To be sure, as ZMC emphasizes, Commerce is obligated to determine dumping margins "as accurately as possible." Pl.'s Reply Brief at 4 (*quoting Rhone Poulenc, Inc. v. United States*, 899 F.2d 1185, 1191 (Fed. Cir. 1990)). Similarly, as ZMC observes, Congress has evinced "a 'legislative preference for determinations that are factually correct. . . .' " Pl.'s Brief at 4 (*quoting Koyo Seiko Co. v. United States*, 14 CIT 680, 683, 746 F. Supp. 1108, 1111 (1990)). But timeliness and finality are also important values. And, as the Court of Appeals has acknowledged, "[i]n some instances, a tension may arise between finality and correct result." *NTN Bearing Corp. v. United States*, 74 F.3d 1204, 1208 (Fed. Cir. 1995) (where respondent *timely* identified clerical error and requested correction at preliminary determination stage, agency was required to make correction); *see also Alloy Piping Prods., Inc. v. Kanzen Tetsu Sdn. Bhd.*, 334 F.3d 1284, 1292 (Fed. Cir. 2003) (recognizing the "strong interest in the finality of Commerce's decisions," and ruling that "*NTN Bearing* does not require correction of errors after a final determination.").[10]

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[10] As the Supreme Court has noted:

> Whenever a question concerning administrative, or judicial, reconsideration arises, two opposing policies immediately demand recognition: the desirability of finality, on the one hand, and the public interest in reaching what, ultimately, appears to be the right result on the other.

Civil Aeronautics Board v. Delta Air Lines, Inc., 367 U.S. 316, 321 (1961) (footnote omitted), *quoted in NTN Bearing Corp.*, 74 F.3d at 1208.

This is just such a case. Whatever procedural paradigm is used to analyze ZMC's request, a key element of the analysis is the excusability of any delay in raising the new issue. *See*, *e.g.*, *Te-Moak Bands of Western Shoshone Indians of Nevada v. United States*, 948 F.2d 1258, 1261 (Fed. Cir. 1991), *quoting with approval Carson v. Polley*, 689 F.2d 562, 584 (5th Cir. 1982) ("[a] litigant's failure to assert a claim as soon as he could have is properly a factor to be considered in deciding whether to grant leave to amend").[11] And, whatever the merits of ZMC's other arguments about the relative prejudice to the parties of allowing ZMC to raise the new alleged error at this (relatively advanced) stage of these proceedings, there is simply no truth to its assertion that "[a]s soon as ZMC became aware of the calculation error, it filed a motion for remand with this Court." *See* Pl.'s Reply Brief at 3 (quoting from ZMC's argument that its motion for remand is timely); *id.* at 3–5 (arguing relative prejudice to the parties). That statement is demonstrably false.

The twelfth administrative review of TRBs – "TRBs XII" – was the subject of a related action in this court, *Luoyang Bearing Corp. v. United States*, Court No. 01–00036. ZMC raised its allegation of error in the surrogate value of scrap in TRBs XIV (the review at issue here) in a submission it filed in *Luoyang* on October 27, 2004 – a full three months before it filed the instant Motion for Remand.[12] *See* Comments of Zhejiang Machinery Import & Export Corp. on Commerce Department's Final Redetermination Results Pursuant to Remand at 6–8, *filed in Luoyang Bearing Corp. v. United States*, Court No. 01–00036.

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[11] It is not entirely clear that the newly-alleged error was beyond the scope of ZMC's Complaint at the time that document was filed. Besides the specific challenge to Commerce's reliance on the agency's "subsidy suspicion" policy to disregard "the price the Plaintiff paid its market-economy supplier with U.S. dollars for the steel the Plaintiff used to produce TRBs," the Complaint also includes an additional "catch-all" claim which alleges that Commerce's Final Determination, as amended, is "otherwise not supported by substantial evidence on the record and . . . not in accordance with law." Complaint ¶ 7 (emphasis added). In other words, it is possible that – if ZMC had discovered the alleged error at issue here before it filed its Motion for Judgment on the Agency Record – ZMC might have briefed the alleged error in that motion, relying on the "catch-all" language in its Complaint.

In any event, as discussed above, ZMC did not discover the error until after briefing on its Motion for Judgment on the Agency Record was complete. And, as a practical matter, ZMC definitively delimited the issues in this action by its unequivocal statement in its Motion for Judgment on the Agency Record that "[t]he single issue before the Court is whether Commerce's determination that there was 'reason to believe or suspect' that ZMC's market-economy steel prices were subsidized was supported by substantial evidence and otherwise in accordance with law." *See* Pl.'s Brief on Motion for Judgment on Agency Record at 3. Moreover, all briefing on ZMC's Motion for Judgment on the Agency Record was confined to that single issue – the single issue specifically identified in the Complaint.

There is therefore no occasion here to parse the language of ZMC's Complaint to decide whether, under principles of "notice" pleading, ZMC's new allegation of error could have been found to fall within the scope of that Complaint if it had been raised earlier in this proceeding.

[12] Obviously, if ZMC's October 27, 2004 submission in *Louyang* disclosed the alleged error, ZMC must have discovered the error some days, weeks or even months before that date.

In *Luoyang*, ZMC was ultimately found to have a 0.00% margin. It therefore pressed to have the antidumping order against it revoked, emphasizing that – as of the period of review at issue in that case (TRBs XII) – it had established a record of three consecutive years of no dumping. Commerce nevertheless declined to revoke the order, pointing to its determination that ZMC had dumped merchandise during the period covered by TRBs XIV, the administrative review at issue in this proceeding. In response, ZMC argued in *Luoyang* both that it was improper for Commerce to consider the results of a subsequent administrative review, *and* that Commerce's Final Determination in TRBs XIV was inaccurate because of the very error that ZMC now seeks to raise here. *See generally* Def.'s Brief at 4–5 (summarizing the relevant history of the *Luoyang* case).

The *Louyang* Court made short work of ZMC's arguments, sustaining Commerce's right to consider the results of a subsequent review, and rejecting ZMC's attempt to collaterally attack in that proceeding (which concerned TRBs XII) the results in TRBs XIV (which are the subject of this proceeding). *See Luoyang Bearing Corp. v. United States*, 29 CIT ___, ___ & n.3, 358 F. Supp. 2d 1296, 1300–02 & n.3 (2005). Only *after* it failed in its attempt to use *Louyang* as an "end run" around this proceeding did ZMC file its Motion for Remand here.[13]

III. *Conclusion*

In short, it is indisputable that ZMC could have raised the alleged error in the surrogate value of scrap in TRBs IV by October 2004 at the very latest. Indeed, ZMC did so – albeit in another case. ZMC's failure to promptly raise the alleged error in *this* action is fatal to the instant Motion to Remand (and would similarly doom any other motion seeking comparable relief, no matter how it were cast).

ZMC's Motion to Remand is therefore denied.

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[13] As the Government wryly notes, "[i]t can be no coincidence" that ZMC filed its Motion to Remand seeking to raise the issue of the surrogate value of scrap in this action almost immediately after the *Louyang* Court declined to consider the allegation in that case. *See* Def.'s Brief at 5 n.1.