U.S. Customs and Border Protection

Slip Op. 10–23

DIAMOND SAWBLADES MANUFACTURERS COALITION, Plaintiff, v. UNITED STATES, Defendant, AND EHWA DIAMOND INDUSTRIAL CO., LTD., SH TRADING, INC., AND SHINHAN DIAMOND INDUSTRIAL CO., LTD., Defendant-Intervenors.

Before: R. Kenton Musgrave, Senior Judge
Court No. 06–00248

[Granting Defendant's motion for correction of ministerial errors; granting Plaintiff leave to file an amended summons and complaint upon publication of amended final results; denying as moot Defendant's motion to expedite consideration of this matter; staying all other court proceedings in this matter until issuance of a conclusive court decision in *Diamond Sawblades Manufacturers' Coalition v. United States*, Slip Op. 09–5.]

Dated: March 11, 2010

Wiley Rein LLP (*Daniel B. Pickard*), for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Delisa M. Sanchez*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Hardeep Kaur Josan*) of counsel, for the defendant U.S. Department of Commerce.

Akin Gump Strauss Hauer & Feld LLP (*Lisa-Marie W. Ross, Jarrod M. Goldfeder*), for the defendant-intervenors Ehwa Diamond Industrial Co., Ltd.

Perkins Coie, LLP (*Michael P. House*) for defendant-intervenor SH Trading Inc., and Shinhan Diamond Industrial Co., Ltd.

OPINION AND ORDER

Musgrave, Senior Judge:

I.
Introduction

Before the court is a motion submitted by Defendant United States Department of Commerce, International Trade Administration ("Commerce" or "the Department") seeking leave from the Court to issue and publish an amended determination that incorporates corrections to certain alleged ministerial errors in the dumping margin calculation set forth in its final affirmative antidumping determination regarding diamond sawblades and parts thereof imported from

the Republic of Korea. *See* Def.'s Mot. for Leave to Publish Am. Final Determ. Correcting Ministerial Errors ("Def.'s Mot."); *Notice of Final Determination of Sales at Less than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed. Reg. 29310 (May 22, 2006) ("*Final Results*"). Defendant-Intervenors Ehwa Diamond Industrial Co., Ltd., ("Ehwa"), Shinhan Diamond Industrial Co., Ltd. ("Shinhan"), and SH Trading, Inc., have consented to the motion; Plaintiff Diamond Sawblades Manufacturers' Coalition ("DSMC") opposes the motion on several grounds, and moves in the alternative for leave from the court to file an amended summons and complaint if the motion is granted. Pl.'s Opp'n to Def.s' Mot. for Leave to Amend Final Determ. ("Pl.'s Opp'n"). For the reasons set forth below, both motions will be granted. Further, Defendant's motion to expedite consideration of this matter will be denied as moot.

II.
Background

Commerce published the *Final Results* on May 22, 2006. The Final Results differed from the preliminary determination in several respects that are relevant to this matter. First, contrary to its preliminary findings, Commerce determined that Ehwa and Shinhan should not be "collapsed" into a single entity and instead treated them as separate entities with different dumping margins. *See Final Results*, 71 Fed. Reg. at 29312; Issues and Decision Memorandum ("Decision Mem."), Pub. R. Doc. 529 at 51. Second, the weighted average dumping margins were revised upward from 11.25% to 12.76% for Ehwa, from 11.25% to 26.55% for Shinhan, and 16.39% for the "all others" rate, which had been previously set at 10.25%. *Final Results*, 71 Fed. Reg. at 29312. *See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Preliminary Critical Circumstances Determination: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 70 Fed. Reg. 77135 (Dept. Commerce, Dec. 29, 2005) ("*Preliminary Results*"). Finally, the Department found that, due (at least in part) to the higher dumping margins, "critical circumstances" existed for Shinhan and for the "all others" category of companies, triggering the 90-day "retroactive" suspension of liquidation pursuant to 19 U.S.C. § 1673d(c)(4)(B). *Final Results*, 71 Fed. Reg. at 29312.

Shortly after the publication of the *Final Results*, Ehwa and Shinhan submitted, in compliance with the Department's regulations, ministerial error comments alleging, among other things, that the dumping margin calculation was incorrect because Commerce had inadvertently failed to allow for a constructed export price ("CEP")

offset in its calculations for Ehwa and Shinhan. *See* May 24, 2006 Ministerial Error Comments, Pub. R. Docs. 542, 543. In rebuttal, then-petitioner DSMC argued that the Department's failure to include a CEP offset was not a ministerial error because the lack of analysis in the *Final Results* indicated that "Commerce did not analyze whether Ehwa or Shinhan are entitled to . . . a CEP offset adjustment as separate entities." May 30, 2006 Ministerial Error Reply, Pub. R. Doc. 545.

In a June 28, 2006 memorandum to the Acting Director, a senior International Trade Compliance Analyst concluded that the Department had indeed made a ministerial error with respect to Ehwa and Shinhan's CEP offset, and recommended that the error be corrected. *Ministerial Allegations Mem*., Pub. R. Doc. 547 at 2, 4. The analyst explained that "given that the preliminary determination analysis was based upon Shinhan and Ehwa's individual selling functions, and given that no information or argument was submitted subsequent to the preliminary determination to demonstrate otherwise, we find that a ministerial error occurred . . . ." Pub. R. Doc. 547 at 2–3.

However, two subsequent events prevented Commerce from implementing the recommended corrections. First, on July 11, 2006, the International Trade Commission ("ITC") published in the Federal Register its final determination that the domestic diamond sawblade industry was not materially injured or threatened with material injury by reason of the subject imports. *See Diamond Sawblades and Parts Thereof from China and Korea*, Investigation Nos. 731–TA–1092 and 1093 (Final), 71 Fed. Reg. 39128 (ITC July 11, 2006). Accordingly, and pursuant to the Department's own regulations, the antidumping investigation terminated automatically on that date. *See* 19 C.F.R. § 351.207(d) (2009) (stating that "an investigation terminates automatically upon publication in the Federal Register" of negative ITC determination). *See also* Customs Telex, Pub. R. Doc. 553. Second, as noted by the defendant, DSMC initiated this challenge to the *Final Results* on July 25, 2006, which divested Commerce of jurisdiction over the matter.

On October 12, 2006, this challenge to the *Final Results* was stayed pending the outcome of Court No. 06–00247, DSMC's parallel action contesting the ITC's negative-injury determination. *See* October 12, 2006 Stay Order, Court No. 06–00248. DSMC's challenge to the ITC determination is not yet resolved. After a remand and subsequent reversal by the ITC on the question of threat-of-material-injury, the court issued a final decision sustaining the ITC's (now affirmative) remand determination on January 25, 2009. *Diamond Sawblades Manufacturers' Coalition v, United States*, 33 CIT __, Slip Op. 09–5

(*appeal docketed*, Oct. 15, 2009; *argued* Feb. 2, 2010) ("*Diamond Sawblades II*"). Yet because *Diamond Sawblades II* is now pending appeal before the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), the conclusive outcome of that case has not been determined. The court here clarifies that the merits of this action (Court No. 06–00248) will remain stayed until issuance of a final and conclusive decision in that case.

Three other actions challenging the *Final Results* have been commenced in this Court pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(II). [1] *See Ehwa Diamond Industrial Co., Ltd., v. United States*, (Court No. 09–00508), *Shinhan Diamond Industrial Co., Ltd., v. United States*, (Court No. 09–00509), and *Hyosung D & P Co., Ltd., v. United States*, (Court No. 09–00510). The government filed in those actions parallel motions to issue an amended *Final Results* correcting ministerial errors; plaintiffs in those actions are unopposed to the motion, but DSMC, having been granted Defendant-Intervenor status in those actions, opposes.

DSMC opposes the motion on the grounds that (1) the alleged errors are not ministerial; (2) the defendant has failed to show good cause for making the corrections; and (3) the balance of hardships are in DSMC's favor, because the merits of the case will reveal that the cash deposit rate is "already lower than it should be" and that even if it is determined otherwise, any excess cash deposits would ultimately be returned. Pl.'s Opp'n at 2, 5, 6.

III.
Discussion

A.

The court's jurisdiction over this matter is derived from 28 U.S.C. 1581(c) (2006). The term "ministerial error" is defined both in statute and regulation as "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial." 19 U.S.C. § 1623d(e) (2006); 19 C.F.R. § 351.224(f) (2009). The power of an administrative agency to correct its own ministerial errors is presumed and considered analogous to the power of a court to correct ministerial errors set

[1] Pursuant to the mandamus relief granted in *Diamond Sawblades Mfrs.' Coalition v. United States*, 33 CIT __, 650 F. Supp 1331 (2009) (*appeal docketed*, Oct. 15, 2009) ("*Diamond Saawblades III* "), Commerce issued and published antidumping duty orders and ordered the collection of cash deposits on imports of subject merchandise. *See Diamond Sawblades and Parts Thereof From the People's Republic of China and the Republic of Korea: Antidumping Duty Orders*, 74 Fed. Reg. 57145 (Dep't Commerce Nov. 4, 2009).

forth in Federal Rule of Procedure ("FRCP") Rule 60(a). *American Trucking Ass'n v. Frisco*, 358 U.S. 133, 145 (1958). In this case, Congress expressly delegated that power to the Department by the enactment of section 1333 of The Omnibus Trade and Competitiveness Act of 1988 (codified as 19 U.S.C. § 1673d(e)).

However, once a lawsuit has been commenced in this Court, Commerce is no longer authorized to amend its determination. *See* 28 U.S.C. § 1581(c). As the *Zenith* Court explained, "once [this] court's exclusive jurisdiction has been invoked, Commerce may correct clerical errors only with the court's prior authorization." *Zenith Electronics Corp. v. United States*, 884 F.2d 566, 561 (Fed. Cir. 1989). The "prior authorization" requirement announced in *Zenith* is also analogized from FRCP Rule 60(a), which provides that, once an appeal has been docketed in the appellate court, clerical mistakes may only be corrected "with leave of the appellate court." FRCP Rule 60(a); USCIT Rule 60(a). Without the court's authorization, Commerce would be left to correct the errors only if the judicial review process results in a remand to the agency that specifically or implicitly contemplates such correction rather than through the procedure contemplated by section 1673d(e). *See NTN Corp v. United States*, 32 CIT __, 587 F. Supp.2d 1313 (2008).

On the other hand, "it is axiomatic that fair and accurate determinations are fundamental to the proper administration of our dumping laws[;] [c]onsequently, courts have uniformly authorized the correction of any clerical errors which would affect the accuracy of a determination." *Koyo Seiko Co. v. United States*, 14 CIT 680, 682, 746 F. Supp. 1108, 1110 (1990). Moreover, where, as here, Congress has provided a specific mechanism for the correction of ministerial errors, the enactment of those provisions may be interpreted to "indicate[] a legislative preference for determinations that are factually correct." *Koyo Seiko*, 14 CIT at 683, 746 F. Supp. 2d at 1111. Accordingly, it follows that allowing correction of a ministerial error contained in a dumping margin calculation would further the congressional purpose underlying 19 U.S.C. § 1673d(e).

The decision of whether to allow correction of ministerial errors is left to the court's discretion. In this Court, that determination has generally turned on whether the proposed correction will be procedurally unfair or cause prejudice to one of the parties. *See, e.g., NTN*, 587 F. Supp.2d at 1313. However, where the issue is contested, the court must first determine whether the error described by the defendant's motion is accurately characterized as ministerial; in which case, the court will uphold that characterization if it is supported by substantial evidence of record. *See* 19 U.S.C. § 1516a(b)(1)(B)(i);

American Trucking, 358 U.S. 133 (reversing decision of district court on the ground that substantial evidence supported Interstate Commerce Commission's finding that an error was inadvertent and ministerial).

In the context of Rule 60(a), whether the alleged error is truly ministerial is generally the only question before the court. In that regard, it has been observed that a ministerial error "encompasses only errors mechanical in nature, apparent on the record, and not involving an error of substantive judgment," or includes only "mindless and mechanistic mistakes [and] minor shifting of facts." *Pfizer Inc. v. Uprichard*, 422 F.3d 124, 129–130 (3d Cir. 2005) (describing ministerial errors in a Rule 60(a) analysis) (internal quotes and citation omitted). Although the expansive final clause contained in definition of "ministerial error" set forth in section 1623d(e) (" . . . and any other similar type of unintentional error which the Secretary considers ministerial") may indicate a broader scope than Rule 60(a), the definition cannot be seen as open ended; mistakes of law or mistakes that require "cerebration or research into the law or planetary excursions into facts" are not reasonably viewed as ministerial errors. *Pfizer*, 422 F.3d at 130 (citing *In re W. Tex. Mktg.*, 12 F.3d 497, 504 (5th Cir. 1994)).

The additional question of whether allowing the correction will result in procedural unfairness or prejudice appears limited to the context of administrative law. Courts have disallowed ministerial corrections where doing so violates statutorily-mandated procedural requirements (*see Utility Solid Waste Activities Group v. E.P.A.*, 236 F.3d 749 (D.C. Cir. 2001) (setting aside EPA Rule amendment on the ground that rule correction, even if ministerial, required proper notice and comment procedure)); where a party was not afforded adequate due process at the agency level (*see Zenith Electronics Corp. v. United States*, 12 CIT 932, 699 F. Supp. 296 (1988) *aff'd*, 884 F.2d 566 (Fed. Cir. 1989) (enjoining Commerce from amending dumping margin where, *inter alia*, evidence suggested that plaintiff was not provided an opportunity to express its views on the errors before the agency)); and have indicated that a correction might be disallowed if the procedure were to cause unnecessary delay or expense to one of the parties (*see NTN*, 587 F. Supp.2d at 1316 (giving consideration to the court's "obligations to prevent unfairness to any party and to avoid unnecessary delay or expense.") (citing USCIT Rule 1)).

B.

In this action, the ministerial nature of the error is apparent from the record. In the *Preliminary Results*, the Department noted its decision to grant a CEP offset to Ehwa and Shinhan as a collapsed entity, 70 Fed. Reg. 77141, and it is undisputed that no party challenged the CEP offset. However, in the *Final Results*, the CEP offset was omitted from the margin calculations without either notation in the decision itself or discussion of the issue in the Decision Memorandum. In contrast, when Commerce (after receiving comments disputing the issue) changed its decision to collapse Ehwa and Shinhan and instead treated them as separate entities, it included in the Decision Memorandum nearly six pages of discussion on the matter. Decision Mem., 46–52. That the CEP offset was omitted without explanation mitigates strongly toward the conclusion that the omission was inadvertent, particularly when none of the interested parties disputed the preliminary grant of it, and where the failure to explain a decision to exclude it would have been improper. Accordingly, the court finds that the evidence supports the conclusion that the omission of the CEP offset was unintentional and hence a "ministerial error" pursuant to the broad definition of that term set forth in 19 C.F.R. § 351.224(f).

Although DSMC argues that the error is not ministerial, its argument is more accurately characterized as a disagreement with the manner in which the Department chose to correct the error, *i.e.*, that the decision to allow a CEP offset for Ehwa and Shinhan as separate entities is not supported by substantial evidence of record. However, that point goes to the merits of the determination, which are not currently before the court. The only question at issue here is whether the Department's omission of the CEP offset in the *Final Results* was an unintentional, ministerial error. DSMC presented its argument via the procedures for ministerial error comments set forth in regulation 351.224, but the Department ultimately disagreed and determined that the CEP offset was inadvertently omitted. Accordingly, DSMC's argument is more appropriately raised in the complaint, or as the case may be, in an amended complaint.

DSMC next argues that the court should disallow the motion because the defendant "has not shown that good cause exists for the Court to grant its request" and notes that the Department's correction "would have no effect on whether critical circumstances are established . . . ." Pl.'s Opp'n at 2. This argument is misplaced. As discussed *supra*, the courts are very much in favor of correcting ministerial errors where possible, and the clear Congressional preference for accuracy in antidumping determinations strengthens that tendency.

Accordingly, if it is determined that an error is, in fact, ministerial, the burden of persuasion is essentially on the opponent of the motion to show good cause why the motion should *not* be granted by showing that prejudice or some other fundamental unfairness would result, and none has been shown here. DSMC's "balance of hardships" argument is similarly irrelevant because such a test is simply not part of the determination.

DSMC asserts further that, "given the Department's flawed analysis," allowing correction of the errors would not increase the accuracy of the dumping margins, but only distort them further, and that delaying the ultimate adjudication of the issues serves only to prejudice the DSMC members. Pl.'s Opp'n at 5. These arguments go to the merits of the case and must be rejected in the context of the instant motion to correct ministerial errors. Moreover, given that the merits adjudication of this matter must await the outcome of Federal Circuit's decision in *Diamond Sawblades II*, the corrections proposed by the Department will cause no delay whatsoever.

Finally, DSMC contends that "the issue of whether to correct the alleged ministerial errors is not properly before this court" because the CEP offset issue was not raised in this case (Court No. 06–00248) nor by the plaintiffs in the "companion case" (Court No. 09–00510). Accordingly, says DSMC, "this claim is outside the scope of the pleadings before the Court in either case," and the court therefore lacks jurisdiction to consider it. Pl.'s Opp'n at 3–4 (citing *Nat'l Ass'n of Mirror Manufacturers v. United States*, 11 CIT 648, 670 F. Supp. 1013 (1987).

This argument must be rejected for several reasons. First, DSMC's interpretation would seem to leave the issue in a jurisdictional limbo: Commerce is without jurisdiction to make the correction without leave of the court, but the court is without jurisdiction to grant the motion because it is allegedly "outside the scope of the pleadings." Second, contrary to DSMC's proposed theory, the jurisdictional questions addressed in *British Steel* and *Mirror Manufacturers* have no applicability in this matter. Those cases involved a party's attempt to inject into the proceedings an additional claim or argument that was, in reality, a new and separate cause of action subject to the jurisdictional time limits set forth in section 1516a. *See Mirror Manufacturers*, 11 CIT at 649, 670 F. Supp. at 1014; *British Steel Corp. v. United States*, 10 CIT 661, 647 F. Supp. 928 (1986). The Department's motion to correct ministerial errors does not constitute a "cause of action" challenging its own determination and is not subject to the jurisdictional time periods for seeking judicial review.

IV.
Conclusion

In consideration of the foregoing, the court concludes that the Department should be permitted to issue and publish an amended determination that incorporates the ministerial corrections set forth in its motion. Accordingly, in consideration of all papers submitted herein, it is hereby

ORDERED that Defendant's Motion for Leave to Publish Amended Final Results Correcting a Ministerial Error, as filed on January 13, 2010, be, and hereby is GRANTED and that the time for correcting the ministerial errors and publishing the amended determination will be within 15 days of the date of this order. It is further

ORDERED that if amended final results are issued, the plaintiff, pursuant to USCIT Rule 3(e), is hereby granted leave to file an amended summons and, pursuant to USCIT Rule 15(a), an amended complaint, by no later than 30 days after the Federal Register publication of the amended final results. It is further

ORDERED that the defendant-intervenors Ehwa Diamond Industrial Co., Ltd., SH Trading Inc., and Shinhan Diamond Industrial Co., Ltd., will maintain their status as defendant-intervenors following the issuance of an amended final results and the filing of an amended summons and complaint as authorized by this order. It is further

ORDERED that all other proceedings in this case be, and hereby are, STAYED pending issuance of a final and conclusive decision in Diamond Sawblades Manufacturers' Coalition v. United States, Slip Op. 09–5, which is now pending appeal at the United States Court of Appeals for the Federal Circuit. It is further

ORDERED that, in light of this order and the court's January 26, 2010 vacatur of the three orders granting consent motions in Court Nos. 09–00508, 09–00509, and 09–00510, Defendant's Motion to Expedite Consideration of this motion be, and hereby is, DENIED as moot.

Dated: March 11, 2010
New York, New York

/s/ R. KENTON MUSGRAVE
R. KENTON MUSGRAVE, Senior Judge

Slip Op. 10–24

EHWA DIAMOND INDUSTRIAL CO., LTD., Plaintiff, v. UNITED STATES, Defendant, AND DIAMOND SAWBLADES MANUFACTURERS' COALITION, Defendant-Intervenor.

Before: R. Kenton Musgrave, Senior Judge
Court No. 09–00508

[Granting Defendant's motion for correction of ministerial errors; staying all other court proceedings in this matter until issuance of a conclusive court decision in *Diamond Sawblades Manufacturers' Coalition v. United States*, Slip Op. 09–5.]

Dated: Dated: March 11, 2010

Akin Gump Strauss Hauer & Feld LLP (Jarrod M. Goldfeder), for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Delisa M. Sanchez*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Joanna V. Theiss*), for the defendant U.S. Department of Commerce.

Wiley Rein LLP (Daniel B. Pickard, Maureen E. Thorson) for the defendant-intervenor.

OPINION AND ORDER

Musgrave, Senior Judge:

I.
Introduction

Before the court is a motion submitted by Defendant United States Department of Commerce, International Trade Administration ("Commerce" or "the Department") seeking leave from the Court to issue and publish an amended determination that incorporates corrections to certain alleged ministerial errors in the dumping margin calculation set forth in its final affirmative antidumping determination regarding diamond sawblades and parts thereof imported from the Republic of Korea. *See* Def.'s Mot. for Leave to Publish Am. Final Determ. Correcting Ministerial Errors ("Def.'s Mot."); *Notice of Final Determination of Sales at Less than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed. Reg. 29310 (May 22, 2006) ("*Final Results*"). Plaintiff Ehwa Diamond Industrial Co., Ltd., ("Ehwa") consents to the motion; Defendant-Intervenor Diamond Sawblades Manufacturers' Coalition ("DSMC") opposes the motion on several grounds. Def-Int's Opp'n to Def.s' Mot. for Leave to Amend Final Determ. ("Def-Int's Opp'n"). For the reasons set forth below, the motion will be granted.

II.
Background

Commerce published the *Final Results* on May 22, 2006. The *Final Results* differed from the preliminary determination in several respects that are relevant to this matter. First, contrary to its prelimi-

nary findings, Commerce determined that respondents Ehwa and Shinhan should not be "collapsed" into a single entity and instead treated them as separate entities with different dumping margins. *See Final Results*, 71 Fed. Reg. at 29312; Issues and Decision Memorandum ("Decision Mem."), Pub. R. Doc. 529 at 51. Second, the weighted average dumping margins were revised upward from 11.25% to 12.76% for Ehwa, from 11.25% to 26.55% for Shinhan, and 16.39% for the "all others" rate, which had been previously set at 10.25%. *Final Results*, 71 Fed. Reg. at 29312. *See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Preliminary Critical Circumstances Determination: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 70 Fed. Reg. 77135 (Dept. Commerce, Dec. 29, 2005) ("*Preliminary Results*"). Finally, the Department found that, due (at least in part) to the higher dumping margins, "critical circumstances" existed for Shinhan and for the "all others" category of companies, triggering the 90-day "retroactive" suspension of liquidation pursuant to 19 U.S.C. § 1673d(c)(4)(B). *Final Results*, 71 Fed. Reg. at 29312.

Shortly after the publication of the *Final Results*, Ehwa and Shinhan submitted, in compliance with the Department's regulations, ministerial error comments alleging, among other things, that the dumping margin calculation was incorrect because Commerce had inadvertently failed to allow for a constructed export price ("CEP") offset in its calculations for Ehwa and Shinhan. *See* May 24, 2006 Ministerial Error Comments, Pub. R. Docs. 542, 543. In rebuttal, then-petitioner DSMC argued that the Department's failure to include a CEP offset was not a ministerial error because the lack of analysis in the *Final Results* indicated that "Commerce did not analyze whether Ehwa or Shinhan are entitled to . . . a CEP offset adjustment as separate entities." May 30, 2006 Ministerial Error Reply, Pub. R. Doc. 545.

In a June 28, 2006 memorandum to the Acting Director, a senior International Trade Compliance Analyst concluded that the Department had indeed made a ministerial error with respect to Ehwa and Shinhan's CEP offset, and recommended that the error be corrected. *Ministerial Allegations Mem*., Pub. R. Doc. 547 at 2, 4. The analyst explained that "given that the preliminary determination analysis was based upon Shinhan and Ehwa's individual selling functions, and given that no information or argument was submitted subsequent to the preliminary determination to demonstrate otherwise, we find that a ministerial error occurred . . . ." Pub. R. Doc. 547 at 2–3.

However, two subsequent events prevented Commerce from implementing the recommended corrections. First, on July 11, 2006, the International Trade Commission ("ITC") published in the Federal Register its final determination that the domestic diamond sawblade industry was not materially injured or threatened with material injury by reason of the subject imports. *See Diamond Sawblades and Parts Thereof from China and Korea*, Investigation Nos. 731–TA–1092 and 1093 (Final), 71 Fed. Reg. 39128 (ITC July 11, 2006). Accordingly, and pursuant to the Department's own regulations, the antidumping investigation terminated automatically on that date. *See* 19 C.F.R. § 351.207(d) (2009) (stating that "an investigation terminates automatically upon publication in the Federal Register" of negative ITC determination). *See also* Customs Telex, Pub. R. Doc. 553. Second, as noted by the defendant, DSMC initiated a challenge to the *Final Results* on July 25, 2006 (*see Diamond Sawblades Manufacturers' Coalition v. United States*, Court No. 06–00248), which divested Commerce of jurisdiction over the matter.

On October 12, 2006, DSMC's Court No. 06–00248 challenge to the *Final Results* was stayed pending the outcome of Court No. 06–00247, DSMC's parallel action contesting the ITC's negative-injury determination. *See* October 12, 2006 Stay Order, Court No. 06–00248. The challenge to the ITC determination is not yet resolved. After a remand and subsequent reversal by the ITC on the question of threat-of-material-injury, the court issued a final decision sustaining the ITC's (now affirmative) remand determination on January 25, 2009. *Diamond Sawblades Manufacturers' Coalition v, United States*, 33 CIT __, Slip Op. 09–5 (*appeal docketed*, Oct. 15, 2009; *argued* Feb. 2, 2010) ("*Diamond Sawblades II* "). Yet because *Diamond Sawblades II* is now pending appeal before the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), the conclusive outcome of that case has not been determined. Because the outcome of that case has the potential to obviate Ehwa's current challenge to the *Final Results*, the court will stay the merits adjudication of this action until issuance of a final and conclusive decision in that case.

Pursuant to the mandamus relief granted in *Diamond Sawblades Mfrs.' Coalition v. United States*, 33 CIT __, 650 F. Supp 1331 (2009) (*appeal docketed*, Oct. 15, 2009) ("*Diamond Saawblades III* "), Commerce issued and published antidumping duty orders and ordered the collection of cash deposits on imports of subject merchandise. *See Diamond Sawblades and Parts Thereof From the People's Republic of China and the Republic of Korea: Antidumping Duty Orders*, 74 Fed. Reg. 57145 (Dep't Commerce Nov. 4, 2009). Accordingly, Ehwa, as well as two other plaintiffs have initiated challenges to the *Final Results*

pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(II). *See Shinhan Diamond Industrial Co., Ltd., v. United States*, (Court No. 09–00509) and *Hyosung D&P Co., Ltd., v. United States*, (Court No. 09–00510). In all four actions that challenge the *Final Results* the government has filed parallel motions for leave to issue an amended determination correcting ministerial errors; all but DSMC have consented to the motion.

DSMC opposes the motion on the grounds that (1) the alleged errors are not ministerial; (2) the defendant has failed to show good cause for making the corrections; and (3) the balance of hardships are in DSMC's favor, because the merits of the case will reveal that the cash deposit rate is "already lower than it should be" and that even if it is determined otherwise, any excess cash deposits would ultimately be returned. Def-Int's Opp'n at 2, 5, 6.

III.
Discussion

A.

The court's jurisdiction over this matter is derived from 28 U.S.C. 1581(c) (2006). The term "ministerial error" is defined both in statute and regulation as "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial." 19 U.S.C. § 1623d(e) (2006); 19 C.F.R. § 351.224(f) (2009). The power of an administrative agency to correct its own ministerial errors is presumed and considered analogous to the power of a court to correct ministerial errors set forth in Federal Rule of Procedure ("FRCP") Rule 60(a). *American Trucking Ass'n v. Frisco*, 358 U.S. 133, 145 (1958). In this case, Congress expressly delegated that power to the Department by the enactment of section 1333 of The Omnibus Trade and Competitiveness Act of 1988 (codified as 19 U.S.C. § 1673d(e)).

However, once a lawsuit has been commenced in this Court, Commerce is no longer authorized to amend its determination. *See* 28 U.S.C. § 1581(c). As the *Zenith* Court explained, "once [this] court's exclusive jurisdiction has been invoked, Commerce may correct clerical errors only with the court's prior authorization." *Zenith Electronics Corp. v. United States*, 884 F.2d 566, 561 (Fed. Cir. 1989). The "prior authorization" requirement announced in *Zenith* is also analogized from FRCP Rule 60(a), which provides that, once an appeal has been docketed in the appellate court, clerical mistakes may only be corrected "with leave of the appellate court." FRCP Rule 60(a); USCIT Rule 60(a). Without the court's authorization, Commerce would be left to correct the errors only if the judicial review process results in

a remand to the agency that specifically or implicitly contemplates such correction rather than through the procedure contemplated by section 1673d(e). *See NTN Corp v. United States*, 32 CIT __, 587 F. Supp.2d 1313 (2008).

On the other hand, "it is axiomatic that fair and accurate determinations are fundamental to the proper administration of our dumping laws[;] [c]onsequently, courts have uniformly authorized the correction of any clerical errors which would affect the accuracy of a determination." *Koyo Seiko Co. v. United States*, 14 CIT 680, 682, 746 F. Supp. 1108, 1110 (1990). Moreover, where, as here, Congress has provided a specific mechanism for the correction of ministerial errors, the enactment of those provisions may be interpreted to "indicate[] a legislative preference for determinations that are factually correct." *Koyo Seiko*, 14 CIT at 683, 746 F. Supp. 2d at 1111. Accordingly, it follows that allowing correction of a ministerial error contained in a dumping margin calculation would further the congressional purpose underlying 19 U.S.C. § 1673d(e).

The decision of whether to allow correction of ministerial errors is left to the court's discretion. In this Court, that determination has generally turned on whether the proposed correction would be prejudicial or procedurally unfair to one of the parties. *See, e.g., NTN*, 587 F. Supp.2d at 1313. However, where the issue is contested, the court must first determine whether the error described by the defendant's motion is accurately characterized as ministerial; in which case the court will uphold that characterization if it is supported by substantial evidence of record. *See* 19 U.S.C. § 1516a(b)(1)(B)(i); *American Trucking*, 358 U.S. 133 (reversing decision of district court on the ground that substantial evidence supported Interstate Commerce Commission's finding that an error was inadvertent and ministerial).

In the context of Rule 60(a), whether the alleged error is truly ministerial is generally the only question before the court. In that regard, it has been observed that a ministerial error "encompasses only errors mechanical in nature, apparent on the record, and not involving an error of substantive judgment," or includes only "mindless and mechanistic mistakes [and] minor shifting of facts." *Pfizer Inc. v. Uprichard*, 422 F.3d 124, 129–130 (3d Cir. 2005) (describing ministerial errors in a Rule 60(a) analysis) (internal quotes and citation omitted). Although the expansive final clause contained in definition of "ministerial error" set forth in section 1623d(e) (". . . and any other similar type of unintentional error which the Secretary considers ministerial") may indicate a broader scope than Rule 60(a), the definition cannot be seen as open ended; mistakes of law or

mistakes that require "cerebration or research into the law or planetary excursions into facts" are not reasonably viewed as ministerial errors. *Pfizer*, 422 F.3d at 130 (citing *In re W. Tex. Mktg.*, 12 F.3d 497, 504 (5th Cir. 1994)).

The additional question of whether allowing the correction will result in procedural unfairness or prejudice appears limited to the context of administrative law. Courts have disallowed ministerial corrections where doing so violates statutorily-mandated procedural requirements (*see Utility Solid Waste Activities Group v. E.P.A.*, 236 F.3d 749 (D.C. Cir. 2001) (setting aside EPA Rule amendment on the ground that rule correction, even if ministerial, required proper notice and comment procedure)); where a party was not afforded adequate due process at the agency level (*see Zenith Electronics Corp. v. United States*, 12 CIT 932, 699 F. Supp. 296 (1988) (*aff'd*, 884 F.2d 566 (Fed. Cir. 1989) (enjoining Commerce from amending dumping margin where, *inter alia*, evidence suggested that plaintiff was not provided an opportunity to express its views on the errors before the agency)); and have indicated that a correction might be disallowed if the procedure were to cause unnecessary delay or expense to one of the parties (*see NTN*, 587 F. Supp.2d at 1316 (giving consideration to the court's "obligations to prevent unfairness to any party and to avoid unnecessary delay or expense.") (citing USCIT Rule 1)).

B.

In this action, the ministerial nature of the error is apparent from the record. In the *Preliminary Results*, the Department noted its decision to grant a CEP offset to Ehwa and Shinhan as a collapsed entity, 70 Fed. Reg. 77141, and it is undisputed that no party challenged the CEP offset. However, in the *Final Results*, the CEP offset was omitted from the margin calculations without either notation in the decision itself or discussion of the issue in the Decision Memorandum. In contrast, when Commerce (after receiving comments disputing the issue) changed its decision to collapse Ehwa and Shinhan and instead treated them as separate entities, it included in the Decision Memorandum nearly six pages of discussion on the matter. Decision Mem., 46–52. That the CEP offset was omitted without explanation mitigates strongly toward the conclusion that the omission was inadvertent, particularly when none of the interested parties disputed the preliminary grant of it, and where the failure to explain a decision to exclude it would have been improper. Accordingly, the court finds that the evidence supports the conclusion that

the omission of the CEP offset was unintentional and hence a "ministerial error" pursuant to the broad definition of that term set forth in 19 C.F.R. § 351.224(f).

Although DSMC argues that the error is not ministerial, its argument is more accurately characterized as a disagreement with the manner in which the Department chose to correct the error, *i.e.*, that the decision to allow a CEP offset for Ehwa and Shinhan as separate entities is not supported by substantial evidence of record. However, that point goes to the merits of the determination, which are not currently before the court. The only question at issue here is whether the Department's omission of the CEP offset in the *Final Results* was an unintentional, ministerial error.

DSMC next argues that the court should deny the motion because the defendant "has not shown that good cause exists for the Court to grant its request" and notes that the Department's correction "would have no effect on whether critical circumstances are established . . . ." Def-Int's Opp'n at 2. This argument is misplaced. As discussed *supra*, the courts are very much in favor of correcting ministerial errors where possible, and the clear Congressional preference for accuracy in antidumping determinations strengthens that tendency. Accordingly, if it is determined that an error is, in fact, ministerial, the burden of persuasion is essentially on the opponent of the motion to show good cause why the motion should *not* be granted by showing that prejudice or some other fundamental unfairness would result, and none has been shown here. DSMC's "balance of hardships" argument is similarly irrelevant because such a test is simply not part of the determination.

DSMC asserts further that, "given the Department's flawed analysis," allowing correction of the errors would not increase the accuracy of the dumping margins, but only distort them further, and that delaying the ultimate adjudication of the issues serves only to prejudice the DSMC members. Def-Int's Opp'n at 5. These arguments go to the merits of the case and must be rejected in the context of the instant motion to correct ministerial errors. Moreover, given that the merits adjudication of this matter must await the outcome of Federal Circuit's decision in *Diamond Sawblades II*, the corrections proposed by the Department will cause no delay whatsoever.

V.
Conclusion

In consideration of the foregoing, the court concludes that the Department should be permitted to issue and publish an amended

determination that incorporates the ministerial corrections set forth in its motion. Accordingly, in consideration of all papers submitted herein, it is hereby

ORDERED that Defendant's Motion for Leave to Publish Amended Final Results Correcting a Ministerial Error, as filed on January 13, 2010, be, and hereby is GRANTED and that the time for correcting the ministerial errors and publishing the amended determination will be within 15 days of the date of this order. It is further

ORDERED that all other proceedings in this case be, and hereby are, STAYED pending issuance of a final and conclusive decision in *Diamond Sawblades Manufacturers' Coalition v. United States*, Slip Op. 09–5, which is now pending appeal at the United States Court of Appeals for the Federal Circuit.

Dated: March 11, 2010
New York, New York

/s/ R. KENTON MUSGRAVE
R. KENTON MUSGRAVE, Senior Judge

Slip Op. 10–25

SHINHAN DIAMOND INDUSTRIAL CO., LTD., Plaintiff, v. UNITED STATES, Defendant, AND DIAMOND SAWBLADES MANUFACTURERS' COALITION, Defendant-Intervenor.

Before: R. Kenton Musgrave, Senior Judge
Court No. 09–00509

[Granting Defendant's motion for correction of ministerial errors; staying all other court proceedings in this matter until issuance of a conclusive court decision in *Diamond Sawblades Manufacturers' Coalition v. United States*, Slip Op. 09–5.]

Dated: March 11, 2010

Perkins Coie, LLP (Michael P. House), for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Delisa M. Sanchez*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Joanna V. Theiss*), for the defendant U.S. Department of Commerce.

Wiley Rein LLP (Daniel B. Pickard, Maureen E. Thorson) for the defendant-intervenor.

OPINION AND ORDER

Musgrave, Senior Judge:

I.
Introduction

Before the court is a motion submitted by Defendant United States Department of Commerce, International Trade Administration ("Commerce" or "the Department") seeking leave from the Court to issue and publish an amended determination that incorporates corrections to certain alleged ministerial errors in the dumping margin calculation set forth in its final affirmative antidumping determination regarding diamond sawblades and parts thereof imported from the Republic of Korea. *See* Def.'s Mot. for Leave to Publish Am. Final Determ. Correcting Ministerial Errors ("Def.'s Mot."); *Notice of Final Determination of Sales at Less than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed. Reg. 29310 (May 22, 2006) ("*Final Results*"). Plaintiff Shinhan Diamond Industrial Co., Ltd., ("Shinhan") consents to the motion; Defendant-Intervenor Diamond Sawblades Manufacturers' Coalition ("DSMC") opposes the motion on several grounds. Def-Int's Opp'n to Def.s' Mot. for Leave to Amend Final Determ. ("Def-Int's Opp'n"). For the reasons set forth below, the motion will be granted.

II.
Background

Commerce published the *Final Results* on May 22, 2006. The *Final Results* differed from the preliminary determination in several respects that are relevant to this matter. First, contrary to its preliminary findings, Commerce determined that respondents Ehwa and Shinhan should not be "collapsed" into a single entity and instead treated them as separate entities with different dumping margins. *See Final Results*, 71 Fed. Reg. at 29312; Issues and Decision Memorandum ("Decision Mem."), Pub. R. Doc. 529 at 51. Second, the weighted average dumping margins were revised upward from 11.25% to 12.76% for Ehwa, from 11.25% to 26.55% for Shinhan, and 16.39% for the "all others" rate, which had been previously set at 10.25%. *Final Results*, 71 Fed. Reg. at 29312. *See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Preliminary Critical Circumstances Determination: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 70 Fed. Reg. 77135 (Dept. Commerce, Dec. 29,

2005) ("*Preliminary Results*"). Finally, the Department found that, due (at least in part) to the higher dumping margins, "critical circumstances" existed for Shinhan and for the "all others" category of companies, triggering the 90-day "retroactive" suspension of liquidation pursuant to 19 U.S.C. § 1673d(c)(4)(B). *Final Results*, 71 Fed. Reg. at 29312.

Shortly after the publication of the *Final Results*, Ehwa and Shinhan submitted, in compliance with the Department's regulations, ministerial error comments alleging, among other things, that the dumping margin calculation was incorrect because Commerce had inadvertently failed to allow for a constructed export price ("CEP") offset in its calculations for Ehwa and Shinhan. *See* May 24, 2006 Ministerial Error Comments, Pub. R. Docs. 542, 543. In rebuttal, then-petitioner DSMC argued that the Department's failure to include a CEP offset was not a ministerial error because the lack of analysis in the *Final Results* indicated that "Commerce did not analyze whether Ehwa or Shinhan are entitled to . . . a CEP offset adjustment as separate entities." May 30, 2006 Ministerial Error Reply, Pub. R. Doc. 545.

In a June 28, 2006 memorandum to the Acting Director, a senior International Trade Compliance Analyst concluded that the Department had indeed made a ministerial error with respect to Ehwa and Shinhan's CEP offset, and recommended that the error be corrected. *Ministerial Allegations Mem*., Pub. R. Doc. 547 at 2, 4. The analyst explained that "given that the preliminary determination analysis was based upon Shinhan and Ehwa's individual selling functions, and given that no information or argument was submitted subsequent to the preliminary determination to demonstrate otherwise, we find that a ministerial error occurred . . . ." Pub. R. Doc. 547 at 2–3.

However, two subsequent events prevented Commerce from implementing the recommended corrections. First, on July 11, 2006, the International Trade Commission ("ITC") published in the Federal Register its final determination that the domestic diamond sawblade industry was not materially injured or threatened with material injury by reason of the subject imports. *See Diamond Sawblades and Parts Thereof from China and Korea*, Investigation Nos. 731–TA–1092 and 1093 (Final), 71 Fed. Reg. 39128 (ITC July 11, 2006). Accordingly, and pursuant to the Department's own regulations, the antidumping investigation terminated automatically on that date. *See* 19 C.F.R. § 351.207(d) (2009) (stating that "an investigation terminates automatically upon publication in the Federal Register" of negative ITC determination). *See also* Customs Telex, Pub. R. Doc. 553. Second, as noted by the defendant, DSMC initiated

a challenge to the *Final Results* on July 25, 2006 (*see Diamond Sawblades Manufacturers' Coalition v. United States*, Court No. 06–00248), which divested Commerce of jurisdiction over the matter.

On October 12, 2006, DSMC's Court No. 06–00248 challenge to the *Final Results* was stayed pending the outcome of Court No. 06–00247, DSMC's parallel action contesting the ITC's negative-injury determination. *See* October 12, 2006 Stay Order, Court No. 06–00248. The challenge to the ITC determination is not yet resolved. After a remand and subsequent reversal by the ITC on the question of threat-of-material-injury, the court issued a final decision sustaining the ITC's (now affirmative) remand determination on January 25, 2009. *Diamond Sawblades Manufacturers' Coalition v, United States*, 33 CIT __, Slip Op. 09–5 (*appeal docketed*, Oct. 15, 2009; *argued* Feb. 2, 2010) ("*Diamond Sawblades II* "). Yet because *Diamond Sawblades II* is now pending appeal before the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), the conclusive outcome of that case has not been determined. Because the outcome of that case has the potential to obviate Shinhan's current challenge to the *Final Results*, the court will stay the merits adjudication of this action until issuance of a final and conclusive decision in that case.

Pursuant to the mandamus relief granted in *Diamond Sawblades Mfrs.' Coalition v. United States*, 33 CIT __, 650 F. Supp 1331 (2009) (*appeal docketed*, Oct. 15, 2009) ("*Diamond Saawblades III* "), Commerce issued and published antidumping duty orders and ordered the collection of cash deposits on imports of subject merchandise. *See Diamond Sawblades and Parts Thereof From the People's Republic of China and the Republic of Korea: Antidumping Duty Orders*, 74 Fed. Reg. 57145 (Dep't Commerce Nov. 4, 2009). Accordingly, Shinhan, as well as two other plaintiffs have initiated challenges to the *Final Results* pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(II). *See Ehwa Diamond Industrial Co., Ltd., v. United States*, (Court No. 09–00508) and *Hyosung D&P Co., Ltd., v. United States*, (Court No. 09–00510). In all four actions that challenge the *Final Results* the government has filed parallel motions for leave to issue an amended determination correcting ministerial errors; all but DSMC have consented to the motion.

DSMC opposes the motion on the grounds that (1) the alleged errors are not ministerial; (2) the defendant has failed to show good cause for making the corrections; and (3) the balance of hardships are in DSMC's favor, because the merits of the case will reveal that the cash deposit rate is "already lower than it should be" and that even if it is determined otherwise, any excess cash deposits would ultimately be returned. Def-Int's Opp'n at 2, 5, 6.

III.
Discussion

A.

The court's jurisdiction over this matter is derived from 28 U.S.C. 1581(c) (2006). The term "ministerial error" is defined both in statute and regulation as "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial." 19 U.S.C. § 1623d(e) (2006); 19 C.F.R. § 351.224(f) (2009). The power of an administrative agency to correct its own ministerial errors is presumed and considered analogous to the power of a court to correct ministerial errors set forth in Federal Rule of Procedure ("FRCP") Rule 60(a). *American Trucking Ass'n v. Frisco*, 358 U.S. 133, 145 (1958). In this case, Congress expressly delegated that power to the Department by the enactment of section 1333 of The Omnibus Trade and Competitiveness Act of 1988 (codified as 19 U.S.C. § 1673d(e)).

However, once a lawsuit has been commenced in this Court, Commerce is no longer authorized to amend its determination. *See* 28 U.S.C. § 1581(c). As the *Zenith* Court explained, "once [this] court's exclusive jurisdiction has been invoked, Commerce may correct clerical errors only with the court's prior authorization." *Zenith Electronics Corp. v. United States*, 884 F.2d 566, 561 (Fed. Cir. 1989). The "prior authorization" requirement announced in *Zenith* is also analogized from FRCP Rule 60(a), which provides that, once an appeal has been docketed in the appellate court, clerical mistakes may only be corrected "with leave of the appellate court." FRCP Rule 60(a); USCIT Rule 60(a). Without the court's authorization, Commerce would be left to correct the errors only if the judicial review process results in a remand to the agency that specifically or implicitly contemplates such correction rather than through the procedure contemplated by section 1673d(e). *See NTN Corp v. United States*, 32 CIT __, 587 F. Supp.2d 1313 (2008).

On the other hand, "it is axiomatic that fair and accurate determinations are fundamental to the proper administration of our dumping laws[;] [c]onsequently, courts have uniformly authorized the correction of any clerical errors which would affect the accuracy of a determination." *Koyo Seiko Co. v. United States*, 14 CIT 680, 682, 746 F. Supp. 1108, 1110 (1990). Moreover, where, as here, Congress has provided a specific mechanism for the correction of ministerial errors, the enactment of those provisions may be interpreted to "indicate[] a legislative preference for determinations that are factually correct."

Koyo Seiko, 14 CIT at 683, 746 F. Supp. 2d at 1111. Accordingly, it follows that allowing correction of a ministerial error contained in a dumping margin calculation would further the congressional purpose underlying 19 U.S.C. § 1673d(e).

The decision of whether to allow correction of ministerial errors is left to the court's discretion. In this Court, that determination has generally turned on whether the proposed correction would be prejudicial or procedurally unfair to one of the parties. *See, e.g., NTN*, 587 F. Supp.2d at 1313. However, where the issue is contested, the court must first determine whether the error described by the defendant's motion is accurately characterized as ministerial; in which case the court will uphold that characterization if it is supported by substantial evidence of record. *See* 19 U.S.C. § 1516a(b)(1)(B)(i); *American Trucking*, 358 U.S. 133 (reversing decision of district court on the ground that substantial evidence supported Interstate Commerce Commission's finding that an error was inadvertent and ministerial).

In the context of Rule 60(a), whether the alleged error is truly ministerial is generally the only question before the court. In that regard, it has been observed that a ministerial error "encompasses only errors mechanical in nature, apparent on the record, and not involving an error of substantive judgment," or includes only "mindless and mechanistic mistakes [and] minor shifting of facts." *Pfizer Inc. v. Uprichard*, 422 F.3d 124, 129–130 (3d Cir. 2005) (describing ministerial errors in a Rule 60(a) analysis) (internal quotes and citation omitted). Although the expansive final clause contained in definition of "ministerial error" set forth in section 1623d(e) (". . . and any other similar type of unintentional error which the Secretary considers ministerial") may indicate a broader scope than Rule 60(a), the definition cannot be seen as open ended; mistakes of law or mistakes that require "cerebration or research into the law or planetary excursions into facts" are not reasonably viewed as ministerial errors. *Pfizer*, 422 F.3d at 130 (citing *In re W. Tex. Mktg.*, 12 F.3d 497, 504 (5th Cir. 1994)).

The additional question of whether allowing the correction will result in procedural unfairness or prejudice appears limited to the context of administrative law. Courts have disallowed ministerial corrections where doing so violates statutorily-mandated procedural requirements (*see Utility Solid Waste Activities Group v. E.P.A.*, 236 F.3d 749 (D.C. Cir. 2001) (setting aside EPA Rule amendment on the ground that rule correction, even if ministerial, required proper notice and comment procedure)); where a party was not afforded adequate due process at the agency level (*see Zenith Electronics Corp. v.*

United States, 12 CIT 932, 699 F. Supp. 296 (1988) (*aff'd*, 884 F.2d 566 (Fed. Cir. 1989) (enjoining Commerce from amending dumping margin where, *inter alia*, evidence suggested that plaintiff was not provided an opportunity to express its views on the errors before the agency)); and have indicated that a correction might be disallowed if the procedure were to cause unnecessary delay or expense to one of the parties (*see NTN*, 587 F. Supp.2d at 1316 (giving consideration to the court's "obligations to prevent unfairness to any party and to avoid unnecessary delay or expense.") (citing USCIT Rule 1)).

B.

In this action, the ministerial nature of the error is apparent from the record. In the *Preliminary Results*, the Department noted its decision to grant a CEP offset to Ehwa and Shinhan as a collapsed entity, 70 Fed. Reg. 77141, and it is undisputed that no party challenged the CEP offset. However, in the *Final Results*, the CEP offset was omitted from the margin calculations without either notation in the decision itself or discussion of the issue in the Decision Memorandum. In contrast, when Commerce (after receiving comments disputing the issue) changed its decision to collapse Ehwa and Shinhan and instead treated them as separate entities, it included in the Decision Memorandum nearly six pages of discussion on the matter. Decision Mem., 46–52. That the CEP offset was omitted without explanation mitigates strongly toward the conclusion that the omission was inadvertent, particularly when none of the interested parties disputed the preliminary grant of it, and where the failure to explain a decision to exclude it would have been improper. Accordingly, the court finds that the evidence supports the conclusion that the omission of the CEP offset was unintentional and hence a "ministerial error" pursuant to the broad definition of that term set forth in 19 C.F.R. § 351.224(f).

Although DSMC argues that the error is not ministerial, its argument is more accurately characterized as a disagreement with the manner in which the Department chose to correct the error, *i.e.*, that the decision to allow a CEP offset for Ehwa and Shinhan as separate entities is not supported by substantial evidence of record. However, that point goes to the merits of the determination, which are not currently before the court. The only question at issue here is whether the Department's omission of the CEP offset in the *Final Results* was an unintentional, ministerial error.

DSMC next argues that the court should deny the motion because the defendant "has not shown that good cause exists for the Court to

grant its request" and notes that the Department's correction "would have no effect on whether critical circumstances are established . . . ." Def-Int's Opp'n at 2. This argument is misplaced. As discussed *supra*, the courts are very much in favor of correcting ministerial errors where possible, and the clear Congressional preference for accuracy in antidumping determinations strengthens that tendency. Accordingly, if it is determined that an error is, in fact, ministerial, the burden of persuasion is essentially on the opponent of the motion to show good cause why the motion should *not* be granted by showing that prejudice or some other fundamental unfairness would result, and none has been shown here. DSMC's "balance of hardships" argument is similarly irrelevant because such a test is simply not part of the determination.

DSMC asserts further that, "given the Department's flawed analysis," allowing correction of the errors would not increase the accuracy of the dumping margins, but only distort them further, and that delaying the ultimate adjudication of the issues serves only to prejudice the DSMC members. Def-Int's Opp'n at 5. These arguments go to the merits of the case and must be rejected in the context of the instant motion to correct ministerial errors. Moreover, given that the merits adjudication of this matter must await the outcome of Federal Circuit's decision in *Diamond Sawblades II*, the corrections proposed by the Department will cause no delay whatsoever.

IV.
Conclusion

In consideration of the foregoing, the court concludes that the Department should be permitted to issue and publish an amended determination that incorporates the ministerial corrections set forth in its motion. Accordingly, in consideration of all papers submitted herein, it is hereby

ORDERED that Defendant's Motion for Leave to Publish Amended Final Results Correcting a Ministerial Error, as filed on January 13, 2010, be, and hereby is GRANTED and that the time for correcting the ministerial errors and publishing the amended determination will be within 15 days of the date of this order. It is further

ORDERED that all other proceedings in this case be, and hereby are, STAYED pending issuance of a final and conclusive decision in *Diamond Sawblades Manufacturers' Coalition v. United States*, Slip Op. 09–5, which is now pending appeal at the United States Court of Appeals for the Federal Circuit.

Dated: March 11, 2010
New York, New York

/s/ R. KENTON MUSGRAVE
R. KENTON MUSGRAVE, Senior Judge

Slip Op. 10–26

HYOSUNG D & P CO., LTD., Plaintiff, v. UNITED STATES, Defendant, AND DIAMOND SAWBLADES MANUFACTURERS COALITION, Defendant-Intervenor.

Before: R. Kenton Musgrave, Senior Judge
Court No. 09–00510

[Granting Defendant's motion for correction of ministerial errors; staying all other court proceedings in this matter until issuance of a conclusive court decision in *Diamond Sawblades Manufacturers' Coalition v. United States*, Slip Op. 09–5.]

Dated: March 11, 2010

Perkins Coie, LLP (*Michael P. House*) for the plaintiff.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, *Franklin E. White, Jr.*, Assistant Director, Commercial Litigation Branch, Civil Division, U.S. Department of Justice (*Delisa M. Sanchez*); Office of the Chief Counsel for Import Administration, U.S. Department of Commerce (*Hardeep Kaur Josan*) of counsel, for the defendant U.S. Department of Commerce.

Wiley Rein LLP (Daniel B. Pickard, Maureen E. Thorson) for the defendant-intervenor.

OPINION AND ORDER

Musgrave, Senior Judge:

I.
Introduction

Before the court is a motion submitted by Defendant United States Department of Commerce, International Trade Administration ("Commerce" or "the Department") seeking leave from the Court to issue and publish an amended determination that incorporates corrections to certain alleged ministerial errors in the dumping margin calculation set forth in its final affirmative antidumping determination regarding diamond sawblades and parts thereof imported from the Republic of Korea. *See* Def.'s Mot. for Leave to Publish Am. Final Determ. Correcting Ministerial Errors ("Def.'s Mot."); *Notice of Final Determination of Sales at Less than Fair Value and Final Determination of Critical Circumstances: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 71 Fed. Reg. 29310 (May 22, 2006)

("*Final Results*"). Plaintiff Hyosung D&P Co., Ltd., ("Hyosung") consents to the motion; Defendant-Intervenor Diamond Sawblades Manufacturers' Coalition ("DSMC") opposes the motion on several grounds. Def-Int's Opp'n to Def.s' Mot. for Leave to Amend Final Determ. ("Def-Int's Opp'n"). For the reasons set forth below, the motion will be granted.

II.
Background

Commerce published the *Final Results* on May 22, 2006. The *Final Results* differed from the preliminary determination in several respects that are relevant to this matter. First, contrary to its preliminary findings, Commerce determined that respondents Ehwa and Shinhan should not be "collapsed" into a single entity and instead treated them as separate entities with different dumping margins. *See Final Results*, 71 Fed. Reg. at 29312; Issues and Decision Memorandum ("Decision Mem."), Pub. R. Doc. 529 at 51. Second, the weighted average dumping margins were revised upward from 11.25% to 12.76% for Ehwa, from 11.25% to 26.55% for Shinhan, and 16.39% for the "all others" rate, which had been previously set at 10.25%. *Final Results*, 71 Fed. Reg. at 29312. *See Notice of Preliminary Determination of Sales at Less Than Fair Value, Postponement of Final Determination, and Negative Preliminary Critical Circumstances Determination: Diamond Sawblades and Parts Thereof from the Republic of Korea*, 70 Fed. Reg. 77135 (Dept. Commerce, Dec. 29, 2005) ("*Preliminary Results*"). Finally, the Department found that, due (at least in part) to the higher dumping margins, "critical circumstances" existed for Shinhan and for the "all others" category of companies, triggering the 90-day "retroactive" suspension of liquidation pursuant to 19 U.S.C. § 1673d(c)(4)(B). *Final Results*, 71 Fed. Reg. at 29312.

Shortly after the publication of the *Final Results*, Ehwa and Shinhan submitted, in compliance with the Department's regulations, ministerial error comments alleging, among other things, that the dumping margin calculation was incorrect because Commerce had inadvertently failed to allow for the constructed export price ("CEP") offset in its calculations for Ehwa and Shinhan. *See* May 24, 2006 Ministerial Error Comments, Pub. R. Docs. 542, 543. In rebuttal, then-petitioner DSMC argued that the Department's failure to include a CEP offset was not a ministerial error because the lack of analysis in the *Final Results* indicated that "Commerce did not analyze whether Ehwa or Shinhan are entitled to . . . a CEP offset adjustment as separate entities." May 30, 2006 Ministerial Error Reply, Pub. R. Doc. 545.

In a June 28, 2006 memorandum to the Acting Director, a senior International Trade Compliance Analyst concluded that the Department had indeed made a ministerial error with respect to Ehwa and Shinhan's CEP offset, and recommended that the error be corrected. *Ministerial Allegations Mem*., Pub. R. Doc. 547 at 2, 4. The analyst explained that "given that the preliminary determination analysis was based upon Shinhan and Ehwa's individual selling functions, and given that no information or argument was submitted subsequent to the preliminary determination to demonstrate otherwise, we find that a ministerial error occurred . . . ." Pub. R. Doc. 547 at 2–3.

However, two subsequent events prevented Commerce from implementing the recommended corrections. First, on July 11, 2006, the International Trade Commission ("ITC") published in the Federal Register its final determination that the domestic diamond sawblade industry was not materially injured or threatened with material injury by reason of the subject imports. *See Diamond Sawblades and Parts Thereof from China and Korea*, Investigation Nos. 731–TA–1092 and 1093 (Final), 71 Fed. Reg. 39128 (ITC July 11, 2006). Accordingly, and pursuant to the Department's own regulations, the antidumping investigation terminated automatically on that date. *See* 19 C.F.R. § 351.207(d) (2009) (stating that "an investigation terminates automatically upon publication in the Federal Register" of negative ITC determination). *See also* Customs Telex, Pub. R. Doc. 553. Second, as noted by the defendant, DSMC initiated a challenge to the *Final Results* on July 25, 2006 (*see Diamond Sawblades Manufacturers' Coalition v. United States*, Court No. 06–00248), which divested Commerce of jurisdiction over the matter.

On October 12, 2006, DSMC's Court No. 06–00248 challenge to the *Final Results* was stayed pending the outcome of Court No. 06–00247, DSMC's parallel action contesting the ITC's negative-injury determination. *See* October 12, 2006 Stay Order, Court No. 06–00248. The challenge to the ITC determination is not yet resolved. After a remand and subsequent reversal by the ITC on the question of threat-of-material-injury, the court issued a final decision sustaining the ITC's (now affirmative) remand determination on January 25, 2009. *Diamond Sawblades Manufacturers' Coalition v, United States*, 33 CIT __, Slip Op. 09–5 (*appeal docketed*, Oct. 15, 2009; *argued* Feb. 2, 2010) ("*Diamond Sawblades II* "). Yet because *Diamond Sawblades II* is now pending appeal before the United States Court of Appeals for the Federal Circuit ("Federal Circuit"), the conclusive outcome of that case has not been determined. Because the outcome of that case has

the potential to obviate Hyosung's challenge to the *Final Results*, the court will stay the merits adjudication of this action until issuance of a final and conclusive decision in that case.

Pursuant to the mandamus relief granted in *Diamond Sawblades Mfrs.' Coalition v. United States*, 33 CIT __, 650 F. Supp 1331 (2009) (*appeal docketed*, Oct. 15, 2009) ("*Diamond Saawblades III* "), Commerce issued and published antidumping duty orders and ordered the collection of cash deposits on imports of subject merchandise. *See Diamond Sawblades and Parts Thereof From the People's Republic of China and the Republic of Korea: Antidumping Duty Orders*, 74 Fed. Reg. 57145 (Dep't Commerce Nov. 4, 2009). Accordingly, Hyosung, as well as two other plaintiffs have initiated challenges to the *Final Results* pursuant to 19 U.S.C. § 1516a(a)(2)(A)(i)(II). *See Ehwa Diamond Industrial Co., Ltd., v. United States*, (Court No. 09–00508) and *Shinhan Diamond Industrial Co., Ltd., v. United States*, (Court No. 09–00509). In all of the actions that currently challenge the *Final Results* the government has filed parallel motions for leave to issue an amended *Final Results* correcting ministerial errors; all but DSMC have consented to the motion.

DSMC opposes the motion on the grounds that (1) the alleged errors are not ministerial; (2) the defendant has failed to show good cause for making the corrections; and (3) the balance of hardships are in DSMC's favor, because the merits of the case will reveal that the cash deposit rate is "already lower than it should be" and that even if it is determined otherwise, any excess cash deposits would ultimately be returned. Def-Int's Opp'n at 2, 5, 6.

III.
Discussion

A.

The court's jurisdiction over this matter is derived from 28 U.S.C. 1581(c) (2006). The term "ministerial error" is defined both in statute and regulation as "an error in addition, subtraction, or other arithmetic function, clerical error resulting from inaccurate copying, duplication, or the like, and any other similar type of unintentional error which the Secretary considers ministerial." 19 U.S.C. § 1623d(e) (2006); 19 C.F.R. § 351.224(f) (2009). The power of an administrative agency to correct its own ministerial errors is presumed and considered analogous to the power of a court to correct ministerial errors set forth in Federal Rule of Procedure ("FRCP") Rule 60(a). *American Trucking Ass'n v. Frisco*, 358 U.S. 133, 145 (1958). In this case, Congress expressly delegated that power to the Department by the

enactment of section 1333 of The Omnibus Trade and Competitiveness Act of 1988 (codified as 19 U.S.C. § 1673d(e)).

However, once a lawsuit has been commenced in this Court, Commerce is no longer authorized to amend its determination. *See* 28 U.S.C. § 1581(c). As the *Zenith* Court explained, "once [this] court's exclusive jurisdiction has been invoked, Commerce may correct clerical errors only with the court's prior authorization." *Zenith Electronics Corp. v. United States*, 884 F.2d 566, 561 (Fed. Cir. 1989). The "prior authorization" requirement announced in *Zenith* is also analogized from FRCP Rule 60(a), which provides that, once an appeal has been docketed in the appellate court, clerical mistakes may only be corrected "with leave of the appellate court." FRCP Rule 60(a); USCIT Rule 60(a). Without the court's authorization, Commerce would be left to correct the errors only if the judicial review process results in a remand to the agency that specifically or implicitly contemplates such correction rather than through the procedure contemplated by section 1673d(e). *See NTN Corp v. United States*, 32 CIT __, 587 F. Supp.2d 1313 (2008).

On the other hand, "it is axiomatic that fair and accurate determinations are fundamental to the proper administration of our dumping laws[;] [c]onsequently, courts have uniformly authorized the correction of any clerical errors which would affect the accuracy of a determination." *Koyo Seiko Co. v. United States*, 14 CIT 680, 682, 746 F. Supp. 1108, 1110 (1990). Moreover, where, as here, Congress has provided a specific mechanism for the correction of ministerial errors, the enactment of those provisions may be interpreted to "indicate[] a legislative preference for determinations that are factually correct." *Koyo Seiko*, 14 CIT at 683, 746 F. Supp. 2d at 1111. Accordingly, it follows that allowing correction of a ministerial error contained in a dumping margin calculation would further the congressional purpose underlying 19 U.S.C. § 1673d(e).

The decision of whether to allow correction of ministerial errors is left to the court's discretion. In this Court, that determination has generally turned on whether the proposed correction would be prejudicial or procedurally unfair to one of the parties. *See, e.g., NTN*, 587 F. Supp.2d at 1313. However, where the issue is contested, the court must first determine whether the error described by the defendant's motion is accurately characterized as ministerial; in which case the court will uphold that characterization if it is supported by substantial evidence of record. *See* 19 U.S.C. § 1516a(b)(1)(B)(i); *American Trucking*, 358 U.S. 133 (reversing decision of district court on the ground that substantial evidence supported Interstate Commerce Commission's finding that an error was inadvertent and ministerial).

In the context of Rule 60(a), whether the alleged error is truly ministerial is generally the only question before the court. In that regard, it has been observed that a ministerial error "encompasses only errors mechanical in nature, apparent on the record, and not involving an error of substantive judgment," or includes only "mindless and mechanistic mistakes [and] minor shifting of facts." *Pfizer Inc. v. Uprichard*, 422 F.3d 124, 129–130 (3d Cir. 2005) (describing ministerial errors in a Rule 60(a) analysis) (internal quotes and citation omitted). Although the expansive final clause contained in definition of "ministerial error" set forth in section 1623d(e) (". . . and any other similar type of unintentional error which the Secretary considers ministerial") may indicate a broader scope than Rule 60(a), the definition cannot be seen as open ended; mistakes of law or mistakes that require "cerebration or research into the law or planetary excursions into facts" are not reasonably viewed as ministerial errors. *Pfizer*, 422 F.3d at 130 (citing *In re W. Tex. Mktg.*, 12 F.3d 497, 504 (5th Cir. 1994)).

The additional question of whether allowing the correction will result in procedural unfairness or prejudice appears limited to the context of administrative law. Courts have disallowed ministerial corrections where doing so violates statutorily-mandated procedural requirements (*see Utility Solid Waste Activities Group v. E.P.A.*, 236 F.3d 749 (D.C. Cir. 2001) (setting aside EPA Rule amendment on the ground that rule correction, even if ministerial, required proper notice and comment procedure)); where a party was not afforded adequate due process at the agency level (*see Zenith Electronics Corp. v. United States*, 12 CIT 932, 699 F. Supp. 296 (1988) *aff'd*, 884 F.2d 566 (Fed. Cir. 1989) (enjoining Commerce from amending dumping margin where, *inter alia*, evidence suggested that plaintiff was not provided an opportunity to express its views on the errors before the agency)); and have indicated that a correction might be disallowed if the procedure were to cause unnecessary delay or expense to one of the parties (*see NTN*, 587 F. Supp.2d at 1316 (giving consideration to the court's "obligations to prevent unfairness to any party and to avoid unnecessary delay or expense.") (citing USCIT Rule 1)).

B.

In this action, the ministerial nature of the error is apparent from the record. In the *Preliminary Results*, the Department noted its decision to grant a CEP offset to Ehwa and Shinhan as a collapsed entity, 70 Fed. Reg. 77141, and it is undisputed that no party challenged the CEP offset. However, in the *Final Results*, the CEP offset was omitted from the margin calculations without either notation in

the decision itself or discussion of the issue in the Decision Memorandum. In contrast, when Commerce (after receiving comments disputing the issue) changed its decision to collapse Ehwa and Shinhan and instead treated them as separate entities, it included in the Decision Memorandum nearly six pages of discussion on the matter. Decision Mem., 46–52. That the CEP offset was omitted without explanation mitigates strongly toward the conclusion that the omission was inadvertent, particularly when none of the interested parties disputed the preliminary grant of it, and where the failure to explain a decision to exclude it would have been improper. Accordingly, the court finds that the evidence supports the conclusion that the omission of the CEP offset was unintentional and hence a "ministerial error" pursuant to the broad definition of that term set forth in 19 C.F.R. § 351.224(f).

Although DSMC argues that the error is not ministerial, its argument is more accurately characterized as a disagreement with the manner in which the Department chose to correct the error, *i.e.*, that the decision to allow a CEP offset for Ehwa and Shinhan as separate entities is not supported by substantial evidence of record. However, that point goes to the merits of the determination, which are not currently before the court. The only question at issue here is whether the Department's omission of the CEP offset in the *Final Results* was an unintentional, ministerial error.

DSMC next argues that the court should deny the motion because the defendant "has not shown that good cause exists for the Court to grant its request" and notes that the Department's correction "would have no effect on whether critical circumstances are established . . . ." Def-Int's Opp'n at 2. This argument is misplaced. As discussed *supra*, the courts are very much in favor of correcting ministerial errors where possible, and the clear Congressional preference for accuracy in antidumping determinations strengthens that tendency. Accordingly, if it is determined that an error is, in fact, ministerial, the burden of persuasion is essentially on the opponent of the motion to show good cause why the motion should *not* be granted by showing that prejudice or some other fundamental unfairness would result, and none has been shown here. DSMC's "balance of hardships" argument is similarly irrelevant because such a test is simply not part of the determination.

DSMC asserts further that, "given the Department's flawed analysis," allowing correction of the errors would not increase the accuracy of the dumping margins, but only distort them further, and that delaying the ultimate adjudication of the issues serves only to prejudice the DSMC members. Def-Int's Opp'n at 5. These arguments go to

the merits of the case and must be rejected in the context of the instant motion to correct ministerial errors. Moreover, given that the merits adjudication of this matter must await the outcome of Federal Circuit's decision in *Diamond Sawblades II*, the corrections proposed by the Department will cause no delay whatsoever.

Finally, DSMC contends that "the issue of whether to correct the alleged ministerial errors is not properly before this court" because the "[n]one of the issues raised in Plaintiff Hyosung's complaint are in any way related to this issue." Accordingly, says DSMC, the CEP-offset claim is outside the scope of the pleadings before the Court," and the court therefore lacks jurisdiction to consider it. Def-Int's Opp'n at 3–4 (citing *Nat'l Ass'n of Mirror Manufacturers v. United States*, 11 CIT 648, 670 F. Supp. 1013 (1987).

This argument must be rejected for several reasons. First, DSMC's interpretation would seem to leave the issue in a jurisdictional limbo: Commerce is without jurisdiction to make the correction without leave of the court, but the court is without jurisdiction to grant the motion because it is allegedly "outside the scope of the pleadings." Second, contrary to DSMC's proposed theory, the jurisdictional questions addressed in *British Steel* and *Mirror Manufacturers* have no applicability in this matter. Those cases involved a party's attempt to inject into the proceedings an additional claim or argument that was, in reality, a new and separate cause of action subject to the jurisdictional time limits set forth in section 1516a. *See Mirror Manufacturers*, 11 CIT at 649, 670 F. Supp. at 1014; *British Steel Corp. v. United States*, 10 CIT 661, 647 F. Supp. 928 (1986). The Department's motion to correct ministerial errors does not constitute a "cause of action" challenging its own determination and is not subject to the jurisdictional time periods for seeking judicial review.

IV.
Conclusion

In consideration of the foregoing, the court concludes that the Department should be permitted to issue and publish an amended determination that incorporates the ministerial corrections set forth in its motion. Accordingly, in consideration of all papers submitted herein, it is hereby

ORDERED that Defendant's Motion for Leave to Publish Amended Final Results Correcting a Ministerial Error, as filed on January 13, 2010, be, and hereby is GRANTED and that the time for correcting the ministerial errors and publishing the amended determination will be within 15 days of the date of this order. It is further

ORDERED that all other proceedings in this case be, and hereby are, STAYED pending issuance of a final and conclusive decision in

Diamond Sawblades Manufacturers' Coalition v. United States, Slip Op. 09–5, which is now pending appeal at the United States Court of Appeals for the Federal Circuit.

Dated: March 11, 2010
New York, New York

/s/ R. Kenton Musgrave
R. KENTON MUSGRAVE, SENIOR JUDGE

Slip Op. 10–27

NEREIDA TRADING CO., INC., Plaintiff, v. UNITED STATES, Defendant.

Before: WALLACH, Judge
Court. No.: 06–00194

[Defendant's Motion to Dismiss Plaintiff's third and fourth causes of action is GRANTED.]

Dated: March 12, 2010

Stein Shostak Shostak Pollack & O'Hara, LLP (*Elon A. Pollack* and *Juli C. Schwartz*) for Plaintiff Nereida Trading Co., Inc.

Tony West, Assistant Attorney General; *Jeanne E. Davidson*, Director, and *Patricia M. McCarthy*, Assistant Director, Civil Division, U.S. Department of Justice (*Edward F. Kenny* and *David S. Silverbrand*); *Chi S. Choy*, Office of the Chief Counsel, U.S. Customs and Border Protection, Of Counsel; and *David Richardson*, Department of Commerce, Office of the Chief Counsel, Import Administration, Of Counsel, for Defendant United States.

OPINION

Wallach, Judge:

I.
Introduction

Plaintiff Nereida Trading Co., Inc. ("Nereida") challenges the imposition of antidumping duties on a single entry of frozen fish fillets from the Socialist Republic of Vietnam ("the subject entry"). Pursuant to U.S. Court of International Trade Rule 12(b)(5), Defendant United States ("Defendant") has moved to dismiss the third and fourth causes of action in Nereida's Complaint "for failure to state a claim upon which relief can be granted." Defendant's Memorandum in Support of Its Motion to Dismiss ("Defendant's Memo") at 1; *see* Defendant's Motion to Dismiss ("Defendant's Motion"). These causes of action are based on the Fifth Amendment of the U.S. Constitution and the Administrative Procedure Act, 5 U.S.C. §§ 701 *et seq*. ("APA"). Because Nereida has not pled facts that show a deprivation of con-

stitutional due process and has not demonstrated that its facts support an independent right of action under the APA, Defendant's Motion is GRANTED and Nereida's third and fourth causes of action are DISMISSED.

II.
Background

Nereida imported the subject entry in early 2003. Nereida alleges that this entry arrived on or before January 30, 2003, Complaint ¶ 11, but Defendant avers that this entry arrived on February 2, 2003, Answer to Complaint ("Answer") ¶ 11. [1] The supplier of this entry was a company known as Mekonimex. Complaint ¶ 9; Answer ¶ 9. [2]

On January 31, 2003, the U.S. Department of Commerce ("Commerce") announced its preliminary determination "that certain frozen fish fillets from . . . Vietnam are being, or are likely to be, sold in the United States at less than fair value." Notice of Preliminary Determination of Sales at Less Than Fair Value, Affirmative Preliminary Determination of Critical Circumstances and Postponement of Final Determination: Certain Frozen Fish Fillets From the Socialist Republic of Vietnam, 68 Fed. Reg. 4,986, 4,986 (January 31, 2003) ("Preliminary Determination"). Commerce accordingly stated that it would direct U.S. Customs and Border Protection ("Customs") to "suspend liquidation of all imports of subject merchandise, entered . . . for consumption on or after" January 31, 2003 and to "require a cash deposit or posting of a bond equal to the estimated preliminary dumping margins." *Id*. at 4,997. The preliminary weighted-average margin for Mekonimex was 49.16 percent. *Id*. Commerce subsequently reduced this margin to 36.76 percent. *See* Notice of Amended Preliminary Antidumping Duty Determination of Sales at Less Than Fair Value: Certain Frozen Fish Fillets From the Socialist Republic of Vietnam, 68 Fed. Reg. 10,440, 10,443 (March 5, 2003) ("Amended Preliminary Determination").

Although Commerce also announced a preliminary finding of critical circumstances with respect to some suppliers, this finding did not

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[1] In the Answer, Defendant requested leave to delay its specific answer to the third and fourth causes of action until resolution of its motion to dismiss those causes of action. *See* Answer ¶¶ 43–61. This request is GRANTED. Defendant need not specifically answer those causes of action, as they are dismissed.

[2] Mekonimex is the company alternatively referred to as Mekong Fish Company, Mekongfish Company, and Mekong Industries Joint Stock Company. *See* Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Notice of Preliminary Results and Partial Rescission of the Third Antidumping Duty Administrative Review, 72 Fed. Reg. 53,527, 53,528 (September 19, 2007); Notice of Amended Final Results of Antidumping Duty Administrative Review: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 72 Fed. Reg. 23,800, 23,801 (May 1, 2007).

extend to Mekonimex. *See* Preliminary Determination, 68 Fed. Reg. at 4,996; Amended Preliminary Determination, 68 Fed. Reg. at 10,444; Notice of Affirmative Preliminary Determination of Critical Circumstances for Voluntary Section A Respondents: Certain Frozen Fish Fillets From the Socialist Republic of Vietnam, 68 Fed. Reg. 31,681, 31,682 (May 28, 2003). A finding of critical circumstances could have triggered the retroactive imposition of antidumping duties on merchandise imported in the 90 days prior to January 31, 2003. *See* 19 C.F.R. § 351.206(a); Preliminary Determination, 68 Fed. Reg. at 4,985.

In August 2003, Commerce announced that it would direct Customs to assess antidumping duties on "all unliquidated entries of certain frozen fish fillets from Vietnam entered . . . for consumption on or after January 31, 2003." Notice of Antidumping Duty Order: Certain Frozen Fish Fillets from the Socialist Republic of Vietnam, 68 Fed. Reg. 47,909, 47,909 (August 12, 2003) ("AD Order"). The estimated weighted-average margin for Mekonimex was 45.55 percent. *Id*. at 47,910. Because of a negative critical circumstances determination by the U.S. International Trade Commission, Commerce also announced that it would "instruct Customs to lift suspension and to release any bond or other security, and refund any cash deposit made, to secure the payment of antidumping duties with respect to entries of the merchandise entered . . . for consumption on or after November 2, 2002, but before January 31, 2003." *Id*. at 47,909.

One year after the AD Order, Commerce announced the opportunity to request an antidumping duty administrative review for the period "1/31/03–7/31/04." Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review, 69 Fed. Reg. 46,496, 46,497 (August 3, 2004). The following month, Commerce announced that administrative review requests for several suppliers, including Mekonimex, had been received for that period. Initiation of Antidumping and Countervailing Duty Administrative Reviews and Request for Revocation in Part, 69 Fed. Reg. 56,745, 56,745 (September 22, 2004).

In January 2005, Commerce announced that it was rescinding its administrative review of four suppliers, including Mekonimex, "for the period January 1, 2003, through July 31, 2004." Certain Frozen Fish Fillets From the Socialist Republic of Vietnam: Rescission, in Part, of Antidumping Duty Administrative Review, 70 Fed. Reg. 4,092, 4,092 (January 28, 2005). Accordingly, Commerce would "direct [Customs] to assess antidumping duties for these companies at the cash deposit rate in effect on the date of entry for entries during the

period. . . .” *Id.* Commerce also reminded “importers of their responsibility under [19 C.F.R. § 351.402(f)] to file a certificate regarding the reimbursement of antidumping duties prior to liquidation of the relevant entries during this period of time. Failure to comply with this requirement could result in the [Commerce] Secretary’s presumption that reimbursement of antidumping duties occurred and subsequent assessment of double antidumping duties.” *Id.* [3]

Commerce transmitted liquidation instructions to Customs in February 2005. *See* U.S. Department of Commerce, Message 5038203 (February 7, 2005) (“Liquidation Instructions”). These instructions directed Customs to liquidate “all shipments of certain frozen fish fillets from . . . Vietnam” that had been produced or exported by one of the four suppliers and “entered . . . for consumption during the period 01/01/2003 through 07/31/2004.” *Id.* at 1 (capitalization modified). The following month, Commerce issued an administrative message stating that the “correct period should be 01/31/03 through 07/31/04.” U.S. Department of Commerce, Admin Msg. 05–0328 (March 24, 2008) (capitalization modified).

The liquidation instructions further directed Customs to “assess an antidumping liability equal to the amount of the bond or cash deposit required at the time of entry.” Liquidation Instructions at 1 (capitalization modified). Finally, the instructions provided that:

> [u]pon assessment of antidumping duties, Customs should require that the importer provide a reimbursement statement as described in [19 C.F.R. § 351.402(f)]. The importer should provide the reimbursement statement prior to liquidation of the entry. If the importer has been reimbursed antidumping duties, Customs should double the antidumping duties due in accordance with the above-referenced regulation. Additionally, if the importer fails to respond to your formal request (via CF 28 or 29) for the reimbursement statement prior to liquidation, Customs should presume reimbursement and double the antidumping duties due.
>
> *Id.* (capitalization modified).

Customs issued a CF 29 Notice of Action to Nereida in April 2005

[3] 19 C.F.R. § 351.402(f), which was promulgated by Commerce, has three parts relevant to this action. First, importers “must” certify to Customs prior to liquidation whether an exporter or producer has agreed to pay or reimburse the relevant antidumping duties. 19 C.F.R. § 351.402(f)(2). Second, Commerce “may” presume from the failure to file such a certification that the exporter or producer has paid or reimbursed those duties. *Id.* § 351.402(f)(3). Third, Commerce “will” reduce the export price by the amount that the exporter or producer has paid or reimbursed. *Id.* § 351.402(f)(1)(i).

("Notice of Action"). *See* Complaint ¶ 16; Answer ¶ 16. The Notice of Action indicated that the subject entry was entered on February 2, 2003 and was covered by the AD Order. *See* Complaint ¶ 16; Answer ¶ 16. It also proposed an antidumping duty margin of 49.16 percent. *See* Complaint ¶ 16; Answer ¶ 16. Customs liquidated the subject entry in June 2005. *See* Complaint ¶ 17; Answer ¶ 17. Because Nereida had not filed a certificate of non-reimbursement prior to that time, Customs doubled the assessed duty margin to 98.32 percent. *See* Complaint ¶¶ 17–18; Answer ¶¶ 17–18.

Nereida subsequently filed a certificate of non-reimbursement and a timely protest challenging three aspects of the liquidation process. *See* Complaint ¶ 20, Answer ¶ 20. First, Nereida argued that the assessment of antidumping duties was erroneous because the subject entry "arrived in the Los Angeles Port limits on or before . . . January 30, 2003 and was released . . . by Customs that same day." Complaint ¶¶ 11, 26, 37. Second, Nereida argued that even if the assessment of duties was correct, the proper margin was 45.55 percent rather than 49.16 percent. *See id*. ¶¶ 17, 26. Third, Nereida argued that both the presumption of reimbursement and the resulting doubling of duties were no longer proper because Nereida filed a certificate of non-reimbursement within the protest period and was never actually reimbursed for the duties that it paid. *See id*. ¶¶ 17, 18, 37. Customs denied Nereida's protest at the end of 2005. *See id.* ¶ 4; Answer ¶ 4.

Nereida thereafter commenced this action under 28 U.S.C. § 1581(a) and asserted four "causes of action" in its Complaint, each of which encompasses one or more specific claims involving determinations attributed to Customs. *See* Complaint ¶¶ 3, 23–62. The first cause of action ("incorrect liquidation") challenges the assessment of antidumping duties and the selection of the antidumping duty margin. *See id*. at 4, ¶¶ 31–33. The second cause of action ("incorrect duty assessment") and the third cause of action ("due process violation") both challenge the presumption of reimbursement and the doubling of antidumping duties. *See id*. at 5, 7, ¶¶ 42, 52. The fourth cause of action ("APA violation") challenges the assessment of antidumping duties, the selection of the antidumping duty margin, the presumption of reimbursement, and the doubling of antidumping duties. *See id*. at 8, ¶¶ 57–61.

Defendant admitted jurisdiction under 28 U.S.C. § 1581(a), *see* Answer ¶ 3, and moved to dismiss the third and fourth causes of action "for failure to state a claim upon which relief can be granted," Defendant's Memo at 1.

III.
Standard Of Review

In deciding a motion to dismiss, "the Court assumes that 'all well-pled factual allegations are true,' construing 'all reasonable inferences in favor of the nonmovant.'" *United States v. Islip*, 22 CIT 852, 854, 18 F. Supp. 2d 1047 (1998) (quoting *Gould, Inc. v. United States*, 935 F.2d 1271, 1274 (Fed. Cir. 1991)). "Dismissal for failure to state a claim upon which relief can be granted is proper if the plaintiff's factual allegations are not 'enough to raise the right to relief above the speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact).'" *Int'l Custom Prods. v. United States*, 549 F. Supp. 2d 1384, 1389 (CIT 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)); *cf. Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950, 173 L. Ed. 2d 868 (2009) ("[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'") (quoting Fed. R. Civ. P. 8(a)(2)).

IV.
Discussion

Nereida and Defendant agree that 28 U.S.C. § 1581(a) provides jurisdiction over Nereida's claims. *See* Complaint ¶ 3; Answer ¶ 3. [4] Because Nereida has not pled facts that show a deprivation of constitutional due process, its third cause of action fails to state a claim for which relief can be granted. *See infra* Part IV.A. Because Nereida has not demonstrated that its facts support an independent APA right of action, its fourth cause of action also fails to state a claim for which relief can be granted. *See infra* Part IV.B.

A
Nereida's Third Cause Of Action Fails To State A Claim For Which Relief Can Be Granted

Nereida's third cause of action alleges that the presumption of reimbursement, which it attributes to Customs, worked a deprivation of property unaccompanied by the procedural protections required by the due process clause of the Fifth Amendment to the U.S. Constitution. *See* Complaint ¶¶ 43–52. Defendant challenges this cause of action with an expansive reading of Federal Circuit precedent that would erect a firewall between foreign trade and Fifth Amendment

[4] At oral argument, the court directed the parties to review whether 28 U.S.C. § 1581(a) is the appropriate jurisdictional basis for each of the specific claims encompassed by Nereida's four causes of action. February 8, 2010 Oral Argument at 11:02:03–11:02:47.

due process. *See* Defendant's Memo at 4–5 ("Because Nereida's claims are based upon the imposition of tariffs . . . there can be no taking of property without due process of law.").

Federal Circuit precedent reflects a more nuanced approach to questions of constitutional due process. "Indisputably, engaging in foreign commerce is not a fundamental right protected by notions of substantive due process. . . . Nonetheless, an importer may be entitled to procedural due process regarding the resolution of disputed facts involved in a case of foreign commerce when the importer faces a deprivation of 'life, liberty, or property' by the Federal Government." *NEC Corp. v. United States*, 151 F.3d 1361, 1369–70 (Fed. Cir. 1998); *cf. Transcom, Inc. v. United States*, 24 CIT 1253, 1272, 121 F. Supp. 2d 690 (2000) ("It is impossible to comprehend how an importer's lack of vested right to import merchandise in the future negates the obligation to provide the importer with notice prior to imposing an anti-dumping duty for the merchandise already imported. The Court shares [the importer's] bewilderment [and] shall not entertain [the government's] argument since it fails to differentiate between substantive and procedural Due Process claims and lacks any merit."), *aff'd*, 294 F.3d 1371 (Fed. Cir. 2002).

"It is well established that when considering a procedural due process issue, 'the court must first determine whether a protected property or liberty interest exists, and if such an interest exists, then determine what procedures are necessary to protect that interest.'" *Int'l Trading Co. v. United States*, 24 CIT 596, 609, 110 F. Supp. 2d 977 (2000) (quoting *Techsnabexport, Ltd. v. United States*, 16 CIT 420, 426, 795 F. Supp. 428 (1992) (citing *Am. Ass'n of Exporters & Importers v. United States*, 751 F.2d 1239, 1250 (Fed. Cir. 1985)) (additional citation omitted)), *aff'd*, 281 F.3d 1268 (Fed. Cir. 2008). This court has previously recognized that trade statutes give rise to protected interests in some circumstances. *See, e.g., Int'l Custom Prods.*, 549 F. Supp. 2d at 1396; *Int'l Trading*, 24 CIT at 610; *Techsnabexport*, 16 CIT at 427 (citing examples). Like the Federal Circuit in *NEC Corp.*, 151 F.3d at 1371, this court has also declined to determine whether a protected interest exists in other circumstances, *see Techsnabexport*, 16 CIT at 427–28.

Gilda Industries v. United States, 446 F.3d 1271 (Fed. Cir. 2006), does not compel a departure from this careful approach to procedural due process. In that case, the Federal Circuit held that the U.S. Trade Representative's continuation of a retaliatory tariff on toasted breads from the European Community "did not deprive [the importer] of a property interest as to which it was entitled to additional procedural

protections as a matter of constitutional due process." *Gilda Indus.*, 446 F.3d at 1284. This holding is consistent with the longstanding recognition that importers lack a protected interest in the future importation of goods at a particular tariff rate, *see Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 297, 318–19, 53 S. Ct. 350, 77 L. Ed. 796 (1933) (upholding a new tariff rate on goods subsequently imported), and does not preclude a protected interest in the proper assessment of tariffs on goods already imported.

On the assumption that Nereida has such an interest, "the question that remains . . . is what process is due." *NEC Corp.*, 151 F.3d at 1371. "Procedural due process is not an inflexible, absolute standard." *Techsnabexport*, 16 CIT at 427 (citing *Board of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86, 98 S. Ct. 948, 55 L. Ed. 2d 124 (1978)). "[T]he essential elements of due process are notice and the opportunity to be heard. The test is one of fundamental fairness in light of the total circumstances." *Id.* at 427–28 (citations and quotations omitted).

Nereida has not pled facts that show any deprivation of either notice or the opportunity to be heard. To the contrary, Nereida concedes facts that show both of these elements. The Notice of Action put Nereida on notice that Customs intended to liquidate the subject entry pursuant to the AD Order. *See* Complaint ¶ 16. Nereida subsequently failed to take advantage of its opportunity to be heard when it "inadvertently neglected to file" the required certificate of non-reimbursement prior to liquidation. Complaint ¶ 18.

The additional facts pled by Nereida do not change this analysis. Nereida alleges that, two months after liquidation, Customs directed it to file a certificate of non-reimbursement. *See id.* ¶ 19. However, a directive that Customs issued after liquidation could not have affected the process that Customs provided prior to liquidation. Moreover, Nereida does not allege, and the court cannot reasonably infer, that Customs issued a similar directive prior to liquidation. *See id.* ¶¶ 1–62.

Nereida also alleges that it "*was never reimbursed* its [antidumping duty] assessment by Mekonimex or any other party." *Id.* ¶ 18. However, its asserted property interest does not here excuse its noncompliance with a deadline of which it had notice. In decisions involving a different Commerce regulation, this court has held that procedural due process does not require the acceptance of an untimely submission. *See Seattle Marine Fishing Supply Co. v. United States*, 12 CIT 60, 74–77, 679 F. Supp. 1119 (1988) (upholding Commerce's rejection

of untimely responses to a questionnaire); *Kerr-McGee Chem. Corp. v. United States*, 21 CIT 11, 20, 955 F. Supp. 1466 (1997) (describing decisions upholding the rejection of untimely information from the administrative record); *cf.* Charles Alan Wright & Charles H. Koch, Jr., 33 Federal Practice and Procedure: Judicial Review § 8303 (1st Ed. 2009) ("Only the most extreme excuse will justify missing a deadline" to seek judicial review of agency action.). Because Nereida has not pled facts that show a deprivation of constitutional due process, its third cause of action fails to state a claim for which relief can be granted.

B

Nereida's Fourth Cause Of Action Fails To State A Claim For Which Relief Can Be Granted

Nereida's fourth cause of action challenges the assessment of antidumping duties, the selection of the antidumping duty margin, the presumption of reimbursement, and the doubling of antidumping duties. *See* Complaint ¶¶ 57–61. Like the corresponding portions of the other causes of action, the fourth cause attributes these determinations to Customs and alleges that they were factually or legally erroneous. *See id.* Unlike the corresponding portions of the other causes, the fourth cause explicitly relies on the APA's judicial review provisions. *See id*. ¶¶ 55–56.

The APA's judicial review provisions recognize that specific statutes may govern the review of particular agency actions. The APA provisions apply "except to the extent that—(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law." 5 U.S.C. § 701(a). "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *Id*. § 702. "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review." *Id*. § 704. "The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute. . . ." *Id*. § 703.

These provisions are consistent with actions under this court's 28 U.S.C. § 1581(a) jurisdiction. The denial of a valid protest by Customs is "made reviewable by statute." *Id*. § 704; *see* 19 U.S.C. § 1514(a). In turn, 28 U.S.C. §§ 2631–2646 establish the "special statutory review proceeding" for an action seeking such a review. 5 U.S.C. § 703; *see, e.g.*, 28 U.S.C. §§ 2631, 2632, 2636, 2640, 2643 (specifying, respectively, persons entitled to commence an action, procedures to commence an action, time limitations, standards of review, and forms of

relief). Accordingly, when jurisdiction is invoked under 28 U.S.C. § 1581(a), a generalized right of action under the APA would appear to be dependent on and coterminous with a more specific right of action under 19 U.S.C. § 1514(a).

Defendant argues that 19 U.S.C. § 1514 displaces the APA's judicial review provisions and that the fourth cause of action's reliance on these provisions is therefore fatal. *See* Defendant's Memo at 5–6; Defendant's Reply in Support of Its Motion to Dismiss ("Defendant's Reply") at 6–7. *Volkswagen of America, Inc. v. United States*, 532 F.3d 1365 (Fed. Cir. 2008), on which Defendant bases its argument, addressed a different circumstance under this court's 28 U.S.C. § 1581(i) jurisdiction. The plaintiff in that case "invoke[d] a Customs regulation, 19 C.F.R. § 158.12, as a cause of action independent from the protest procedures in 19 U.S.C. § 1514." *Volkswagen*, 532 F.3d at 1367. The Federal Circuit determined that jurisdiction under 28 U.S.C. § 1581(i) was appropriate, in part because the plaintiff "could not have filed a valid protest under" 28 U.S.C. § 1581(a). *Id*. at 1369 (describing this court's holding), 1374. It then determined that the plaintiff's right of action actually fell under the APA but that, pursuant to 5 U.S.C. § 701(a)(1), 19 U.S.C. § 1514 precluded such an "independent cause of action." *Id*. at 1369, 1373, 1374; *see also Volkswagen of Am., Inc. v. United States*, 540 F.3d 1324, 1331 n.2 (Fed. Cir. 2008) ("[*Volkswagen*, 532 F.3d at 1369,] held that 19 C.F.R. § 158.12 does not create a separate cause of action for [the allowance sought by the plaintiff], and that the only cause of action for such an allowance must be made pursuant to the procedures set forth in 19 U.S.C. § 1514."). The Federal Circuit explained that recognition of that "independent cause of action" would "frustrate" 19 U.S.C. § 1514's "'single, continuous procedure for deciding all issues in any entry of merchandise.'" *Volkswagen*, 532 F.3d at 1373 (quoting S. Rep. No. 91–576 at 11 (1969)).

In contrast, the fourth cause of action would appear to be dependent on and consistent with the single procedure specified by 19 U.S.C. § 1514. Pursuant to that procedure, Nereida protested the liquidation of the subject entry along with "[f]indings related to liquidation." *Volkswagen*, 532 F.3d at 1370. After Customs denied its protest, Nereida invoked this court's 28 U.S.C. § 1581(a) jurisdiction in order to obtain the "special statutory review proceeding relevant to" decisions of Customs. 5 U.S.C. § 703. On this view, the fourth cause would be merely a redundant reference to that proceeding. *See* Complaint at 4–5, ¶¶ 23–33 ("First Cause of Action: Incorrect Liquidation"), 5–6, ¶¶ 34–42 ("Second Cause of Action: Incorrect Duty Assessment").

However, Nereida has implied that its fourth cause of action is distinct from rather than duplicative of its other causes of action. In its Complaint, Nereida asserted this cause separately, labeled it "violation" of the APA, and described it through exclusive reference to the APA's general judicial review provisions. *See* Complaint at 8, ¶¶ 53–61. Moreover, at oral argument, Nereida characterized the cause as an "alternative" basis for relief. *See* February 8, 2010 Oral Argument at 11:22:40–11:23:19.

Since the fourth cause of action accordingly asserts an independent APA right of action, it must fail for two reasons. First, Nereida has not demonstrated that the actions it attributes to Customs fall beyond 5 U.S.C. § 704's first prong ("[a]gency action made reviewable by statute") and under U.S.C. § 704's second prong ("final agency action for which there is no other adequate remedy in a court"). *See* Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss for Failure to State a Claim Under U.S. CIT R. 12(b)5 ("Nereida's Opposition") at 7–9. Second, even if Nereida had situated those actions under the second prong, it has not demonstrated that recognition of an "independent cause of action" would not "frustrate" 19 U.S.C. § 1514. *Volkswagen*, 532 F.3d at 1373; *see* Nereida's Opposition at 7–9. In short, Nereida has distinguished the fourth cause of action too much from its other causes of action and too little from *Volkswagen*, 532 F.3d 1365. Because Nereida has not demonstrated that its facts support an independent APA right of action, its fourth cause of action fails to state a claim for which relief can be granted.

V.
Conclusion

For the reasons stated above, Defendant's Motion is GRANTED and Nereida's third and fourth causes of action are DISMISSED.

Dated: March 12, 2010
New York, New York

Evan J. Wallach, Judge
__/S/ EVAN J. WALLACH____