

# U.S. Customs and Border Protection

  
CBP Dec. 22-03

## **TERMINATION OF THE IN-BOND EXPORT CONSOLIDATOR PROGRAM AND ASSOCIATED BOND**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** General notice.

**SUMMARY:** This document announces the termination of the In-Bond Export Consolidator program (IBEC program) and the associated bond, known as the In-Bond Export Consolidation bond (IBEC bond), implemented at Customs District 52 (Miami). Consequently, IBEC program participants who intend to continue their operations must transition their facility status to either a customs bonded warehouse, container freight station, foreign trade zone, or a facility operated as a non-vessel operating common carrier, depending on their business needs, and also obtain the appropriate bond(s). U.S. Customs and Border Protection (CBP) is providing a transition period of one year from the date of this notice for IBEC program participants (including both IBEC program facilities and the operators who manage the facilities) to transition the status of their facilities, as set forth in this notice.

**DATE:** IBEC program participants (including both IBEC program facilities and the operators who manage the facilities) who intend to continue in-bond export consolidation operations have until February 11, 2023 to transition to one of the alternate facility types listed in this notice and obtain the appropriate bond(s). As of February 11, 2022, CBP will no longer accept applications for new IBEC bonds (designated as Activity Code 14 on the CBP Form 301). IBEC bonds executed prior to February 11, 2022, may continue to be used to secure activities until February 11, 2023.

**FOR FURTHER INFORMATION CONTACT:** Christopher Dow, Assistant Port Director, Miami Seaport, Office of Field Operations, U.S. Customs and Border Protection, [IBEC@cbp.dhs.gov](mailto:IBEC@cbp.dhs.gov) (email preferred) or 305-869-2653.

## SUPPLEMENTARY INFORMATION:

### Background

In the 1980s, non-vessel operating common carriers, non-aircraft operating common carriers, exporters, and other freight consolidators (known as “export consolidators”) in Customs District 52 (Miami) established a service that involved the receipt into their facilities of individual exportation shipments for consolidation prior to exportation. Due to conflicts between industry practices and the customs regulations, the U.S. Customs Service (the predecessor agency of U.S. Customs and Border Protection (CBP)) established the In-Bond Export Consolidator program (IBEC program) in 1986<sup>1</sup> as a pilot program to accommodate the growing export consolidation industry.<sup>2</sup> All entities that intended to continue the consolidation for export of merchandise traveling under a customs bond were required to participate and accept the conditions of the IBEC program. In 1998, the U.S. Customs Service created a special bond, known as the In-Bond Export Consolidation bond (IBEC bond), in an effort to maintain procedural and regulatory control over the bonded freight for export.<sup>3</sup> The IBEC bond covered the consolidation, cartage, transportation, and exportation of in-bond merchandise in the custody of the U.S. Customs Service (now CBP).<sup>4</sup> The IBEC bond was required by specific instruction pursuant to section 113.1 of title 19, Code of Federal Regulations (CFR) (19 CFR 113.1). Today, the IBEC bond is also known as the Activity Code 14 bond, as designated on the CBP Form 301 (Customs Bond). Currently, there are 194 active IBEC bond holders, and they operate within the Miami Seaport and Port Everglades ports of entry.

CBP continues to have concerns with maintaining procedural and regulatory control over merchandise destined for export to ensure the protection of the revenue of the United States and compliance with the laws and regulations enforced by CBP. Specifically, the IBEC program has made it more challenging for CBP to ensure that the custody and manipulation of merchandise complies with regulations

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<sup>1</sup> Information Bulletin 86–66 (Miami Customs District, Sept. 12, 1986).

<sup>2</sup> The IBEC program was briefly cancelled beginning May 25, 1991, and then restarted again as early as September 19, 1991, as explained in Information Bulletin No. 91–75 (Miami Customs District, Sept. 19, 1991).

<sup>3</sup> Information Bulletin No. 99–013 (Miami Customs District, Dec. 3, 1998). Information Bulletin No. 99–013, which announced the creation of the IBEC bond, superseded previous statements of the IBEC program’s requirements/status dating back as far as 1988.

<sup>4</sup> The IBEC bond terms can be found in the “Sample Application for In-Bond Export Consolidation (IBEC) Bond,” which can be accessed at <https://www.cbp.gov/sites/default/files/documents/Sample%20Type%2014-%20IBEC%20Bond-final.pdf> (last accessed Jan. 26, 2022).

such as 19 CFR 19.11(e) and 125.41(a). For these reasons, CBP is terminating the IBEC program and IBEC bond. The IBEC program is being terminated pursuant to the broad discretion afforded to the agency under the applicable regulations, including 19 CFR parts 4, 18, 19, 112, 113, 125, 144, and 146. The IBEC bond is being terminated pursuant to 19 U.S.C. 1623 and 19 CFR part 113.

In order to continue their operations, existing IBEC program participants, which include both IBEC program facilities as well as the operators who manage the facilities, must transition their export consolidation activities to a customs bonded warehouse (*see* 19 CFR parts 19 and 144), a container freight station (*see* 19 CFR 19.40–19.49), a foreign trade zone (*see* 19 CFR part 146), or a facility operated as a non-vessel operating common carrier (NVOCC) (*see* 19 CFR 4.7(b)(3))<sup>5</sup>. In addition, IBEC program participants must procure the appropriate bond(s) to operate as one of these alternate facility types (*see* 19 CFR part 113). These transition decisions will need to be made by the IBEC program participants based on their business models and business needs.

CBP has begun working with all IBEC program participants to guide them as they transition into one of the alternate facility types and continues to conduct outreach to IBEC program participants to ensure the trade community's continuity of operations. IBEC program participants with questions about the transition may contact the point of contact listed above in this notice, preferably by email.

CBP recognizes that current IBEC program participants may need a transition period to transition the status of their facilities, as set forth in this notice. Therefore, current IBEC program participants (including both IBEC program facilities and the operators who manage the facilities) who intend to continue in-bond export consolidation operations have until February 11, 2023 to transition to one of the alternate facility types listed in this notice and obtain the appropriate bond(s). As of February 11, 2022, CBP will no longer accept applications for new IBEC bonds (designated as Activity Code 14 on the CBP Form 301). IBEC bonds executed prior to February 11, 2022, may continue to be used to secure activities until February 11, 2023. CBP will continue to work closely with IBEC program participants to ensure the trade community's understanding and compliance with this notice.

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<sup>5</sup> NVOCCs are regulated by the Federal Maritime Commission (FMC). Those IBEC program participants interested in operating as NVOCCs should consult with the FMC to ensure all applicable requirements are met. *See* Ocean Transportation Intermediaries, <https://www.fmc.gov/resources-services/ocean-transportation-intermediaries/> (last accessed Jan. 26, 2022).

PETE FLORES,  
*Executive Assistant Commissioner,  
Office of Field Operations.*

[Published in the Federal Register, February 11, 2022 (85 FR 08025)]



**INSULAR POSSESSION CERTIFICATE OF ORIGIN  
(CBP FORM 3229)**

**AGENCY:** U.S. Customs and Border Protection (CBP), Department of Homeland Security.

**ACTION:** 30-Day notice and request for comments; extension of an existing collection of information.

**SUMMARY:** The Department of Homeland Security, U.S. Customs and Border Protection will be submitting the following information collection request to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act of 1995 (PRA). The information collection is published in the **Federal Register** to obtain comments from the public and affected agencies.

**DATES:** Comments are encouraged and must be submitted (no later than March 17, 2022) to be assured of consideration.

**ADDRESSES:** Written comments and/or suggestions regarding the item(s) contained in this notice should be sent within 30 days of publication of this notice to [www.reginfo.gov/public/do/PRAMain](http://www.reginfo.gov/public/do/PRAMain). Find this particular information collection by selecting “Currently under 30-day Review—Open for Public Comments” or by using the search function.

**FOR FURTHER INFORMATION CONTACT:** Requests for additional PRA information should be directed to Seth Renkema, Chief, Economic Impact Analysis Branch, U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, 90 K Street NE, 10th Floor, Washington, DC 20229-1177, telephone number 202-325-0056, or via email [CBP\\_PRA@cbp.dhs.gov](mailto:CBP_PRA@cbp.dhs.gov). Please note that the contact information provided here is solely for questions regarding this notice. Individuals seeking information about other CBP programs should contact the CBP National Customer Service Center at 877-227-5511, (TTY) 1-800-877-8339, or CBP website at <https://www.cbp.gov/>.

**SUPPLEMENTARY INFORMATION:** CBP invites the general public and other Federal agencies to comment on the proposed and/or continuing information collections pursuant to the

Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*). This proposed information collection was previously published in the **Federal Register** (Volume 86 FR Page 67962) on November 30, 2021, allowing for a 60-day comment period. This notice allows for an additional 30 days for public comments. This process is conducted in accordance with 5 CFR 1320.8. Written comments and suggestions from the public and affected agencies should address one or more of the following four points: (1) Whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information will have practical utility; (2) the accuracy of the agency's estimate of the burden of the proposed collection of information, including the validity of the methodology and assumptions used; (3) suggestions to enhance the quality, utility, and clarity of the information to be collected; and (4) suggestions to minimize the burden of the collection of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, *e.g.*, permitting electronic submission of responses. The comments that are submitted will be summarized and included in the request for approval. All comments will become a matter of public record.

### Overview of This Information Collection

**Title:** Insular Possession Certificate of Origin.

**OMB Number:** 1651-0016.

**Form Number:** CBP Form 3229.

**Current Actions:** Extension without change of an existing information collection.

**Type of Review:** Extension (without change).

**Affected Public:** Businesses.

**Abstract:** CBP Form 3229, Insular Possession Certificate of Origin, is used by shippers and importers to declare that goods being imported into the United States are grown or the product of an insular possession of the United States and/or produced or manufactured in a U.S. insular possession from material grown in or product of such possession. This form includes a list of the foreign materials in the goods, including their description and value. CBP Form 3229 is used as documentation for goods entitled to enter the U.S. free of duty. This form is authorized by General Note 3(a)(iv) of the Harmonized Tariff Schedule of the United States (19 U.S.C. 1202) and is provided for by 19 CFR part 7.3. CBP Form 3229 is accessible at: <https://www.cbp.gov/newsroom/publications/forms?title=3229&=Apply>.

*Type of Information Collection:* Insular Possession Certificate of Origin (CBP Form 3229).

**Estimated Number of Respondents:** 113.

**Estimated Number of Annual Responses per Respondent:** 20.

**Estimated Number of Total Annual Responses:** 2,260.

**Estimated Time per Response:** 20 minutes.

**Estimated Total Annual Burden Hours:** 753.

Dated: February 9, 2022.

SETH D. RENKEMA,  
*Branch Chief,*  
*Economic Impact Analysis Branch,*  
*U.S. Customs and Border Protection.*

[Published in the Federal Register, February 15, 2022 (85 FR 08595)]

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**PROPOSED MODIFICATION OF ONE RULING LETTER  
AND PROPOSED REVOCATION OF TREATMENT  
RELATING TO THE TARIFF CLASSIFICATION OF BELTS**

**AGENCY:** U.S. Customs and Border Protection, Department of Homeland Security.

**ACTION:** Notice of proposed modification of one ruling letter and proposed revocation of treatment relating to the tariff classification of belts.

**SUMMARY:** Pursuant to section 625(c), Tariff Act of 1930 (19 U.S.C. § 1625(c)), as amended by section 623 of title VI (Customs Modernization) of the North American Free Trade Agreement Implementation Act (Pub. L. 103–182, 107 Stat. 2057), this notice advises interested parties that U.S. Customs and Border Protection (CBP) intends to modify one ruling letter concerning tariff classification of belts under the Harmonized Tariff Schedule of the United States (HTSUS). Similarly, CBP intends to revoke any treatment previously accorded by CBP to substantially identical transactions. Comments on the correctness of the proposed actions are invited.

**DATE:** Comments must be received on or before April 1, 2022.

**ADDRESS:** Written comments are to be addressed to U.S. Customs and Border Protection, Office of Trade, Regulations and Rulings, Attention: Erin Frey, Commercial and Trade Facilitation Division, 90 K St., NE, 10th Floor, Washington, DC 20229–1177. Due to the COVID-19 pandemic, CBP is also allowing commenters

to submit electronic comments to the following email address: 1625Comments@cbp.dhs.gov. All comments should reference the title of the proposed notice at issue and the *Customs Bulletin* volume, number and date of publication. Due to the relevant COVID-19-related restrictions, CBP has limited its on-site public inspection of public comments to 1625 notices. Arrangements to inspect submitted comments should be made in advance by calling Ms. Erin Frey at (202) 325-1757.

**FOR FURTHER INFORMATION CONTACT:** Parisa J. Ghazi, Food, Textiles, and Marking Branch, Regulations and Rulings, Office of Trade, at (202) 325-0272.

**SUPPLEMENTARY INFORMATION:**

**BACKGROUND**

Current customs law includes two key concepts: informed compliance and shared responsibility. Accordingly, the law imposes an obligation on CBP to provide the public with information concerning the trade community's responsibilities and rights under the customs and related laws. In addition, both the public and CBP share responsibility in carrying out import requirements. For example, under section 484 of the Tariff Act of 1930, as amended (19 U.S.C. § 1484), the importer of record is responsible for using reasonable care to enter, classify and value imported merchandise, and to provide any other information necessary to enable CBP to properly assess duties, collect accurate statistics, and determine whether any other applicable legal requirement is met.

Pursuant to 19 U.S.C. § 1625(c)(1), this notice advises interested parties that CBP is proposing to modify one ruling letter pertaining to the tariff classification of belts. Although in this notice, CBP is specifically referring to New York Ruling Letter ("NY") N025677, dated May 2, 2008 (Attachment A), this notice also covers any rulings on this merchandise which may exist, but have not been specifically identified. CBP has undertaken reasonable efforts to search existing databases for rulings in addition to the one identified. No further rulings have been found. Any party who has received an interpretive ruling or decision (i.e., a ruling letter, internal advice memorandum or decision, or protest review decision) on the merchandise subject to this notice should advise CBP during the comment period.

Similarly, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions. Any person involved in substantially identical transactions should advise CBP during this comment period. An importer's failure to advise CBP of substantially identical transac-

tions or of a specific ruling not identified in this notice may raise issues of reasonable care on the part of the importer or its agents for importations of merchandise subsequent to the effective date of the final decision on this notice.

In NY N025677, CBP classified two belts in heading 9505, HTSUS, specifically in subheading 9505.90.60, HTSUS, which provides for “Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other.” CBP has reviewed NY N025677 and has determined the ruling letter to be in error. It is now CBP’s position that the two belts are properly classified, in heading 6117, HTSUS, or heading 6217, HTSUS, depending on whether the backing fabric is knit or not knit. If the backing fabric is knit, then the subject belts are classified in subheading 6117.80.95, HTSUS, which provides for “Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Other.” If the backing fabric is not knit, then the subject belts are classified in subheading 6217.10.95, HTSUS, which provides for “Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other.”

Pursuant to 19 U.S.C. § 1625(c)(1), CBP is proposing to modify NY N025677 and to revoke or modify any other ruling not specifically identified to reflect the analysis contained in the proposed Headquarters Ruling Letter (“HQ”) H249992, set forth as Attachment B to this notice. Additionally, pursuant to 19 U.S.C. § 1625(c)(2), CBP is proposing to revoke any treatment previously accorded by CBP to substantially identical transactions.

Before taking this action, consideration will be given to any written comments timely received.

Dated:

CRAIG T. CLARK,  
*Director*  
*Commercial and Trade Facilitation Division*

Attachments



N025677

May 2, 2008

CLA-2-61:OT:RR:NC:3:353

CATEGORY: Classification

TARIFF NO.: 6106.20.2030; 6104.63.2028;

9505.90.6000; 6106.20.2010; 6104.63.2011;

6704.11.0000; 6704.19.0000

Ms. CHERRY LIN

TOM'S TOY INTERNATIONAL (HK) LTD.

ROOM 604-6, CONCORDIA PLAZA

1 SCIENCE MUSEUM ROAD

TST EAST, KOWLOON, HONG KONG

RE: The tariff classification of Santa Claus Costumes from China.

DEAR Ms. LIN:

In your letter received by this office on April 4, 2008, you requested a classification ruling. As requested, the samples will be returned to you.

You have submitted two samples. Item # CL182 is a child's unisex Santa Claus costume constructed of knit 65% acrylic and 35% polyester faux fur fabric. The well-made costume consists of a lined top/jacket and lined pants. The top has a well-made collar, a well-made neckline, reinforced seams, a back opening with a button closure and well-made edges. The pants have a well-made waist with an adjustable drawstring, reinforced seams and finished ankles. The top may be worn as a jacket over other clothing or as a shirt over undergarments. We believe it will be principally used as a shirt worn over an undershirt and a pillow or some other type of stuffing to achieve the Santa Claus image. The costume also includes a same fabric Santa Claus hat, cellular plastic belt and boot covers.

Item # CL181 is an adult unisex Santa Claus costume constructed of knit 74% acrylic and 26% polyester faux fur fabric. The well-made costume consists of a top/jacket and pants. The top has a well-made collar, a well-made neckline, reinforced seams, a full frontal opening with a zipper closure and well-made edges. The pants have a well-made waist, reinforced seams and finished ankles. The top may be worn as a jacket over other clothing or as a shirt over undergarments. We believe it will be principally used as a shirt worn over an undershirt and a pillow or some other type of stuffing to achieve the Santa Claus image. The costume also includes a same fabric Santa Claus hat and cellular plastic belt, boot covers, eyeglasses without lenses, man-made fabric wig and man-made fabric beard.

The Santa Clause suits consist of two or more garments. Note 14 of Section XI, of the HTSUS, requires that textile garments of different headings be separately classified, thus preventing classification of costumes consisting of two or more garments as sets. If a set cannot exist by application of Note 14, the articles that may be packaged with the garments must also be classified separately.

The applicable subheading for Item # CL182 children's top will be 6106.20.2030, Harmonized Tariff Schedule of the United States (HTSUS), which provides for woman's or girls' blouses and shirts, knitted or crocheted: of man-made fibers: other, girl's: other. The duty rate will be 32 percent ad valorem.

The applicable subheading for Item # CL182 children's pants will be 6104.63.2028, Harmonized Tariff Schedule of the United States (HTSUS), which provides for women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts. Divided skirts, trousers, bib and brace overalls, breeches and shorts: trousers, bib and brace overalls, breeches and shorts: of synthetic fibers: other: other, trousers and breeches: girls': other: other. The duty rate will be 28.2 percent ad valorem.

The applicable subheading for belt, both costumes, glasses, adult costume and boot covers, both costumes will be 9505.90.6000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for festive, carnival or other entertainment articles, including magic tricks and practical jokes articles: parts and accessories thereof: other: other. The duty rate will be Free.

The applicable subheading for Item #CL181 adult top will be 6106.20.2010, Harmonized Tariff Schedule of the United States (HTSUS), which provides for woman's or girls' blouses and shirts, knitted or crocheted: of man-made fibers: other, woman's. The duty rate will be 32 percent ad valorem.

The applicable subheading for Item # CL181 adult pants will be 6104.63.2011, Harmonized Tariff Schedule of the United States (HTSUS), which provides for women's or girls' suits, ensembles, suit-type jackets, blazers, dresses, skirts. Divided skirts, trousers, bib and brace overalls, breeches and shorts: trousers, bib and brace overalls, breeches and shorts: of synthetic fibers: other: other, trousers and breeches: women's: other. The duty rate will be 28.2 percent ad valorem.

The applicable subheading for Item # CL181 adult costume wig will be 6704.11.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for wigs, false beards, eyebrows and eyelashes, switches and the like, of human or animal hair or of other textile materials, articles of human hair not elsewhere specified or included: of synthetic textile materials: complete wigs. The duty rate will be Free.

The applicable subheading for Item # CL181 adult costume beard will be 6704.19.0000, Harmonized Tariff Schedule of the United States (HTSUS), which provides for wigs, false beards, eyebrows and eyelashes, switches and the like, of human or animal hair or of other textile materials, articles of human hair not elsewhere specified or included: of synthetic textile materials: other. The duty rate will be Free.

The classification of the Santa Hats involves a consideration of whether the merchandise may be classifiable in Chapter 95 as "festive."

Section 177.7 of the Customs Regulations (19 C.F.R. §177.7) provides that rulings will not be issued in certain circumstances. Specifically, § 177.7(b) reads, in pertinent part:

No ruling letter will be issued with respect to any issue which is pending before the United States Court of International Trade, the United States Court of Appeals for the Federal Circuit or any court of appeal therefrom.

As such, CBP will not issue a classification ruling with regard to the Santa hats at this time. The classification determination may be impacted by court cases currently pending in the Court of International Trade. See *Michael Simons Designs, Inc. v. United States*, Ct. No. 04-00537; *Berwick Industries, Inc. v. United States*, Ct. Nos. 98-12-03189, 96-01-00263, 99-01-000436, 99-03-00121, 99-03-00158, 99-06-00356, 98-09-02897, 97-05-00789, 97-06-00983, 97-08-01400, 96-12-0738, 96-05-01359, and 96-04-01197; *Waterford Wedgwood USA, Inc. v. United States*, Ct. Nos. 00-05-00215,

99-03-00133 and 99-11-00721; Cuthbertson Imports Inc. v. United States, Ct. No. 03-00846; and Wilton Industries, Inc. v. United States, Ct. Nos. 00-11-00528, 00-01-00218, 00-03-00014, 00-03-00015, 00-04-00193, 00-04-00194 and 00-04-00250.

If you wish, you may resubmit your request for a prospective ruling after the appropriate court cases have been resolved. The above referenced file is hereby administratively closed.

Duty rates are provided for your convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on World Wide Web at <http://www.usitc.gov/tata/hts/>.

Items # CL182 and CL81 tops fall within textile category designation 639. Items # CL182 and CL 181 pants fall within textile category designation 648. With the exception of certain products of China, quota/visa requirements are no longer applicable for merchandise which is the product of World Trade Organization (WTO) member countries. Quota and visa requirements are the result of international agreements that are subject to frequent renegotiations and changes. To obtain the most current information on quota and visa requirements applicable to this merchandise, we suggest you check, close to the time of shipment, the "Textile Status Report for Absolute Quotas" which is available on our web site at [www.cbp.gov](http://www.cbp.gov). For current information regarding possible textile safeguard actions on goods from China and related issues, we refer you to the web site of the Office of Textiles and Apparel of the Department of Commerce at [otexa.ita.doc.gov](http://otexa.ita.doc.gov).

Please note that separate Federal Trade Commission marking requirements exist regarding country of origin, fiber content, and other information that must appear on many textile items. You should contact the Federal Trade Commission, Division of Enforcement, 6th and Pennsylvania Avenue, N.W., Washington, D.C., 20580, for information on the applicability of these requirements to this item.

This ruling is being issued under the provisions of Part 177 of the Customs Regulations (19 C.F.R. 177).

A copy of the ruling or the control number indicated above should be provided with the entry documents filed at the time this merchandise is imported. If you have any questions regarding the ruling, contact National Import Specialist Kenneth Reidlinger at 646-733-3053.

*Sincerely,*

ROBERT B. SWIERUPSKI  
*Director,*  
*National Commodity*  
*Specialist Division*

HQ H249992  
OT:RR:CTF:FTM H249992 PJG  
CATEGORY: Classification  
TARIFF NO.: 6117.80.95; 6217.10.95

MS. CHERRY LIN  
TOM'S TOY INTERNATIONAL (HK) LTD.  
ROOM 604-6, CONCORDIA PLAZA  
1 SCIENCE MUSEUM ROAD  
TST EAST, KOWLOON, HONG KONG

RE: Modification of NY N025677; Classification of Belts

DEAR MS. LIN:

This is in reference to New York Ruling Letter (NY) N025677, dated May 2, 2008, issued to you concerning the tariff classification of two Santa Claus Costumes (Item Nos. CL181 and CL182) under the Harmonized Tariff Schedule of the United States (“HTSUS”). Item No. CL181 is an adult unisex Santa Claus costume that consists of a top/jacket, pants, a hat, a belt, leg coverings (referred to as “boot covers” in the ruling)<sup>1</sup>, eyeglasses without lenses, a wig and a beard. Item No. CL182 is a child’s unisex Santa Claus costume that consists of a top/jacket, pants, a hat, a belt and leg coverings (also referred to as “boot covers” in the ruling).<sup>2</sup> This decision only concerns the classification of the belts for Item Nos. CL181 and CL182.

In NY N025677, U.S. Customs and Border Protection (“CBP”) classified the belts for both costumes in subheading 9505.90.60, HTSUS, which provides for “Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof: Other: Other.” We have reviewed NY N025677 and find it to be in error regarding the tariff classification of the belts. Accordingly, for the reasons set forth below, NY N025677 is modified.

#### **FACTS:**

In NY N025677, CBP classified two Santa Claus costumes, specifically, Item Nos. CL181 and CL182. CL181 is an adult unisex Santa Claus costume that consists of a top/jacket, pants, a hat, a belt, leg coverings (referred to as “boot covers” in the ruling), eyeglasses without lenses, a wig and a beard. Item No. CL182 is a child’s unisex Santa Claus costume that consists of a top/jacket, pants, a hat, a belt and leg coverings (also referred to as “boot covers” in the ruling). The belts are composed of polyester fabric that has been coated, covered or laminated on the exterior surface with a polyvinyl chloride (“PVC”) cellular plastic. Each of the belts incorporates a buckle and grommets for adjusting the belt’s fit.

#### **ISSUE:**

Whether the belts for Item Nos. CL181 and CL182 are classified under heading 3926, HTSUS, as “articles of plastics,” heading 6117, HTSUS, as knitted “Other made up clothing accessories,” heading 6217, HTSUS, as not knitted or crocheted “Other made up clothing accessories,” or heading 9505,

<sup>1</sup> The classification of the leg coverings has been modified under separate cover. See Headquarters Ruling Letter (“HQ”) H249079, dated August 25, 2021.

<sup>2</sup> See *supra* note 1.

HTSUS, as “Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof.”

**LAW AND ANALYSIS:**

Classification under the Harmonized Tariff Schedule of the United States (“HTSUS”) is made in accordance with the General Rules of Interpretation (“GRI”). GRI 1 provides that the classification of goods shall be determined according to the terms of the headings of the tariff schedule and any relative Section or Chapter Notes. In the event that the goods cannot be classified solely on the basis of GRI 1, and if the headings and legal notes do not otherwise require, the remaining GRI may then be applied.

The 2021 HTSUS provisions under consideration are as follows:

**3926** Other articles of plastics and articles of other materials of headings 3901 to 3914:

\* \* \*

**6117** Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories:

\* \* \*

**6217** Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212:

\* \* \*

**9505** Festive, carnival or other entertainment articles, including magic tricks and practical joke articles; parts and accessories thereof:

Note 1 to Chapter 61, HTSUS, states that the “chapter only applies to made up knitted or crocheted articles.”

Note 1 to Chapter 62, HTSUS, states that the “chapter applies only to made up articles of any textile fabric other than wadding, excluding knitted or crocheted articles (other than those of heading 6212).”

The Harmonized Commodity Description and Coding System Explanatory Notes (“ENs”) constitute the “official interpretation of the Harmonized System” at the international level. *See* 54 Fed. Reg. 35127, 35128 (Aug. 23, 1989). While neither legally binding nor dispositive, the ENs “provide a commentary on the scope of each heading” of the HTSUS and are “generally indicative of [the] proper interpretation” of these headings. *See id.*

The EN to 61.17 provides, in relevant part, as follows:

The heading covers, *inter alia*:

\* \* \*

**(4) Belts of all kinds (including bandoliers) and sashes (e.g., military or ecclesiastical),** whether or not elastic. These articles are included here even if they incorporate buckles or other fittings of precious metal or are decorated with pearls, precious or semi-precious stones (natural, synthetic or reconstructed).

\* \* \*

The EN to 62.17 provides, in relevant part, as follows:

The heading covers, *inter alia*:

\* \* \*

(3) Belts of all kinds (including bandoliers) and sashes (e.g., military or ecclesiastical), of textile fabric, whether or not elastic or rubberised, or of woven metal thread. These articles are included here even if they incorporate buckles or other fittings of precious metal, or are decorated with pearls, precious or semi-precious stones (natural, synthetic or reconstructed).

\* \* \*

Note 3 to Chapter 95, HTSUS, states that “[s]ubject to [the exclusions to Chapter 95, HTSUS], parts and accessories which are suitable for use solely or principally with articles of this chapter are to be classified with those articles.” We note that neither the top nor the pants in Item Nos. CL181 and CL182 were classified in Chapter 95, HTSUS. Therefore, the belts would also not be classified as an accessory to an article of heading 9505, HTSUS, and are not classifiable in subheading 9505.90.60, HTSUS, as originally determined in NY N025677.

Since the subject belts are composed of a polyester fabric backing that has been coated, covered or laminated on the exterior surface with PVC cellular plastic, we must resolve whether the merchandise is properly classified as knitted “Other made up clothing accessories” of heading 6117, HTSUS, as not knitted or crocheted “Other made up clothing accessories” of heading 6217, HTSUS, or as “articles of plastics” of heading 3926, HTSUS. Heading 5903, HTSUS, provides for the classification of “[t]extile fabrics impregnated, coated, covered or laminated with plastics, other than those of heading 5902.”

Note 2 to Chapter 59, HTSUS, states that heading 5903 applies to “[t]extile fabrics, impregnated, coated, covered or laminated with plastics, whatever the weight per square meter and whatever the nature of the plastic material (compact or cellular).” Note 2(a)(1)-(5) to Chapter 59, HTSUS, provide exceptions to this rule. The relevant exception in this instance is Note 2(a)(5) to Chapter 59, HTSUS, which precludes from classification in heading 5903, HTSUS, “[p]lates, sheets or strip of cellular plastics, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes” and states that these articles are properly classified in Chapter 39, HTSUS. As previously noted, the subject belts are constructed of PVC cellular plastic with a textile fabric backing. Therefore, we must determine whether the fabric is present merely for reinforcing purposes. While the textile fabric on the subject belts provides reinforcement to the plastic exterior, which may otherwise stretch or tear easily, it is also present to make the belt look more aesthetically pleasing than if it was constructed only of a plastic shell. Therefore, the subject belts are not classifiable in heading 5903, HTSUS.

Next, we must determine whether the subject belts are classifiable in Chapter 39, HTSUS. Note 2(p) to Chapter 39, HTSUS, excludes “[g]oods of section XI (textiles and textile articles)” from classification in Chapter 39, HTSUS. Therefore, we must consider whether the subject belts are classifiable as goods of Section XI, HTSUS.

In Section XI, HTSUS, there are two possible headings that are applicable to the subject belts, specifically, heading 6117, HTSUS, which provides for knitted “Other made up clothing accessories,” and heading 6217, HTSUS, which provides for not knitted or crocheted “Other made up clothing accessories.” The classification of the subject belts in heading 6117 or heading 6217, HTSUS, is consistent with the ENs to 61.17 and 62.17, which indicate that these headings cover belts of all kinds, even if they incorporate buckles. Since the subject belts are classifiable in either heading 6117 or 6217,

HTSUS, (depending upon whether they are knit) they are not classifiable in Chapter 39 because they are “[g]oods of section XI (textiles and textile articles).”

Classification of the subject belts under heading 6117 or 6217, HTSUS, will depend on whether the construction of the backing fabric is knit or not knit, which is information that we do not currently possess. If the backing fabric is knit, then the subject belts are classified in subheading 6117.80.95, which provides for “Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Other.” If the backing fabric is not knit, then the subject belts are classified in subheading 6217.10.95, HTSUS, which provides for “Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other.”

**HOLDING:**

By application of GRI 1 and 6, depending on whether the backing fabric is knit or not knit, the belts for Item Nos. CL181 and CL182 are classified under heading 6117, HTSUS, or heading 6217, HTSUS. Specifically, they would be classified in subheading 6117.80.95, HTSUS, which provides for “Other made up clothing accessories, knitted or crocheted; knitted or crocheted parts of garments or of clothing accessories: Other accessories: Other: Other,” or in subheading 6217.10.95, HTSUS, which provides for “Other made up clothing accessories; parts of garments or of clothing accessories, other than those of heading 6212: Accessories: Other: Other.” The 2022 column one, general rate of duty for both of these subheadings is 14.6 percent *ad valorem*.

Duty rates are provided for convenience and are subject to change. The text of the most recent HTSUS and the accompanying duty rates are provided on the internet at [www.usitc.gov/tata/hts/](http://www.usitc.gov/tata/hts/).

**EFFECT ON OTHER RULINGS:**

NY N025677, dated May 2, 2008, is MODIFIED.

*Sincerely,*

CRAIG T. CLARK,

*Director*

*Commercial and Trade Facilitation Division*





# U.S. Court of International Trade

Slip Op. 22–11

BEST MATTRESSES INTERNATIONAL COMPANY LIMITED and ROSE LION FURNITURE INTERNATIONAL COMPANY LIMITED, Plaintiffs and Consolidated Defendant-Intervenors, v. UNITED STATES, Defendant, and BROOKLYN BEDDING, LLC; CORSICANA MATTRESS COMPANY; ELITE COMFORT SOLUTIONS; FXI, INC.; INNOCOR, INC.; KOLCRAFT ENTERPRISES INC.; LEGGETT & PLATT, INCORPORATED; THE INTERNATIONAL BROTHERHOOD OF TEAMSTERS; and UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, Defendant-Intervenors and Consolidated Plaintiffs.

Before: Gary S. Katzmann, Judge  
Consol. Court No. 21–00281

[The court grants Plaintiffs' motion to enjoin liquidation of entries.]

Dated: February 14, 2022

*Jeffrey S. Grimson, Kristin H. Mowry, Sarah M. Wyss, and Wenhui (Flora) Ji, Mowry & Grimson, PLLC, of Washington, D.C., for Plaintiffs and Consolidated Defendant-Intervenors Best Mattresses International Company Limited and Rose Lion Furniture International Company Limited.*

*Kara M. Westercamp, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, D.C., for Defendant United States. With her on the brief were Brian M. Boynton, Acting Assistant Attorney General, Jeanne E. Davidson, Director, and L. Misha Preheim, Assistant Director. Of counsel on the brief was Paul K. Keith, Attorney, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, D.C.*

*Yohai Baisburd, Jack A. Levy, and Chase J. Dunn, Cassidy Levy Kent (USA) LLP, of Washington, D.C., for Defendant Intervenors and Consolidated Plaintiffs Brooklyn Bedding, LLC; Corsicana Mattress Company; Elite Comfort Solutions; FXI, Inc.; Innocor, Inc.; Kolcraft Enterprises Inc.; Leggett & Platt, Incorporated; the International Brotherhood of Teamsters; and United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO.*

## OPINION

### **Katzmann, Judge:**

This case involves an application for statutory injunction on liquidation, contested by the parties on the basis of its proposed length. Plaintiffs Best Mattresses International Company Limited and Rose Lion Furniture International Company Limited (“Plaintiffs”) have requested an extended injunction on the liquidation of any of their merchandise entered on or after November 3, 2020 (excluding a May 2, 2021 through May 13, 2021 “gap period”) for the pendency of the

litigation.<sup>1</sup> Defendant the United States (“The Government”) opposes the extended injunction and instead requests that the injunction on liquidation not extend past April 30, 2022. After consideration of the factors permitting issuance of a statutory injunction, the court now grants Plaintiffs’ motion for a statutory injunction from November 3, 2020 until the resolution of the instant case and any associated appeals, excluding the agreed-upon gap period.

## BACKGROUND

### *I. Legal Background*

Under the Tariff Act of 1930, Commerce is authorized to investigate potential dumping activity and, if dumping is found, levy antidumping duties (“ADs”) on the unfairly priced goods. *Sioux Honey Ass’n v. Hartford Fire Ins. Co.*, 672 F.3d 1041, 1046–47 (Fed. Cir. 2012). Dumping occurs when a foreign company sells a product in the United States for less than its fair value. *See* 19 U.S.C. § 1677b(a). Accordingly, the first step in imposing ADs is for Commerce to determine whether a good is being sold at less than its fair value. *Id.* Next, the International Trade Commission (“ITC”) must determine whether the domestic industry that produces the product under investigation is materially injured, is threatened with material injury, or if the establishment of a domestic industry is materially retarded by the sale of the dumped product. 19 U.S.C. § 1673. If dumping has occurred, and has been found to injure, threaten, or retard domestic industry, Commerce may impose ADs on the dumped product. *Id.*

On a practical level, Commerce’s imposition of duties begins when Commerce first determines the applicable duty rate. If Commerce preliminarily concludes, in the course of its investigation, that duties are appropriate, it then publishes a preliminary determination setting out (among other things) the duty rates calculated for specific merchandise and exporters. *See* 19 U.S.C. 1673b(d)(1). Commerce next orders the posting of security for implicated merchandise, 19 U.S.C. 1673b(d)(1)(B), and the suspension of liquidation<sup>2</sup> “of all entries of merchandise subject to the [preliminary] determination which are entered, or withdrawn from warehouse, for consumption on or

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<sup>1</sup> The “gap period” encompasses those entries entered or withdrawn from warehouse for consumption in the period between the final day of the provisional measures and the publication of the International Trade Commission’s final determination. Pls.’ Mot. for Stat. Inj. at 2, July 30, 2021, ECF No. 18 (“Pls.’ Br.”). This period is uncontested and therefore falls outside the scope of this opinion.

<sup>2</sup> Liquidation is “the final computation or ascertainment of duties on entries for consumption or drawback entries.” 19 C.F.R. § 159.1. In laymen’s terms, liquidation is the final adding-up of duties owed on an imported good; after liquidation, collection of duties may commence.

after the later of” the publication of the preliminary determination or sixty days from the publication of the notice of initiation of investigation. *See* 19 U.S.C. 1673b(d)(2). Both the duty rates set out in the preliminary determination and the suspension of liquidation then remain in place for a maximum of four months, with a potential extension to six. *See* 19 U.S.C. 1673b(d)(3). A final determination of duty rates is then published, *see* 19 U.S.C. 1673d(d), and if Commerce’s determination remains affirmative, suspension of liquidation of the subject merchandise is extended, *see* 19 U.S.C. 1673d(c)(4).

Because the United States “has a ‘retrospective’ assessment system under which final liability for antidumping . . . duties is determined after merchandise is imported,” final duty liability is most frequently determined through the administrative review process. 19 C.F.R. 351.213(a). Review of an AD order may be requested on the first anniversary of its publication, 19 C.F.R. 351.213(b)(1), and the period of review covers either (for the first administrative review) the period from the commencement of suspension of litigation to the month immediately prior to the anniversary month, or (for all other reviews) the 12 months immediately prior to the anniversary month, 19 C.F.R. 351.213(e)(1). At the conclusion of the administrative review process — or upon no request for administrative review — Commerce finalizes the applicable duty rates and instructs CBP to liquidate the relevant entries within six months. 19 U.S.C. § 1504(d); *see generally*, 19 C.F.R. § 351.213.

## ***II. Procedural History***

In the present case, Plaintiffs were selected as mandatory respondents in Commerce’s investigation of the sale of mattresses from Cambodia for less than fair value.<sup>3</sup> Second Am. Compl. at 4, ECF No. 22, Aug. 9, 2021. The investigation resulted in both an affirmative preliminary determination, published on November 3, 2020, and an affirmative final determination, published on March 25, 2021. *Mattresses From Cambodia: Preliminary Affirmative Determination of Sales at Less Than Fair Value, Preliminary Affirmative Determina-*

<sup>3</sup> In AD investigations, Commerce may select mandatory respondents pursuant to 19 U.S.C. § 1677f-1(c)(2), which provides:

If it is not practicable to make individual weighted average dumping margin determinations under paragraph (1) because of the large number of exporters or producers involved in the investigation or review, the administering authority may determine the weighted average dumping margins for a reasonable number of exporters or producers by limiting its examination to—

(A) a sample of exporters, producers, or types of products that is statistically valid based on the information available to the administering authority at the time of selection, or

(B) exporters and producers accounting for the largest volume of the subject merchandise from the exporting country that can be reasonably examined.

*tion of Critical Circumstances, Postponement of Final Determination, and Extension of Provisional Measures*, 85 Fed. Reg. 69,594 (Dep't Commerce Nov. 3, 2020) (“*Preliminary Determination*”); *Mattresses From Cambodia: Final Affirmative Determination of Sales at Less Than Fair Value and Final Negative Determination of Critical Circumstances*, 86 Fed. Reg. 15,894 (Dep't Commerce Mar. 25, 2021) (“*Final Determination*”), and accompanying Issues and Dec. Mem., ECF No. 27–5 (“IDM”). The *Final Determination* imposed an AD rate of 45.34% on Plaintiffs (which was later revised to 52.41% in an amended final determination issued on May 14, 2021) and ordered the suspension of liquidation “until further notice.” *Final Determination* at 15,895–96; *Mattresses From Cambodia, Indonesia, Malaysia, Serbia, Thailand, the Republic of Turkey, and the Socialist Republic of Vietnam: Antidumping Duty Orders and Amended Final Affirmative Antidumping Determination for Cambodia*, 86 Fed. Reg. 26,462 (Dep't Commerce May 14, 2021) (“*Amended Final Determination*”).

Plaintiffs subsequently brought this action to challenge the *Final Determination*, alleging that Commerce’s use of surrogate country data, rather than Plaintiffs’ own reported prices, to value the cost of production of Plaintiffs’ major inputs was unsupported by substantial evidence and not in accordance with law — and further alleging that even if the use of surrogate country data was permitted, Commerce’s inclusion of Romanian data and exclusion of Mexican data was not. Second Am. Compl. at 8–9. Plaintiffs also alleged specific problems with Commerce’s analysis of Plaintiffs’ expenses and expense-to-profit ratios, as well as Commerce’s assessment of Plaintiffs’ U.S. sales. *Id.* at 9–10. Shortly after initiating suit, on July 30, 2021, Plaintiffs filed a motion to enjoin the liquidation of “any unliquidated entries of Mattresses from Cambodia” that were produced or exported by Plaintiffs and were subject to the *Final Determination*. Pls.’ Br. at 1–2. In relevant part, Plaintiffs’ motion requested that the injunction extend to *all* entries, past and future, which were “entered, or withdrawn from warehouse, for consumption on and after November 3, 2020 excluding any merchandise entered or withdrawn from warehouse, for consumption, on May 2, 2021 through May 13, 2021.” *Id.* The proposed injunction would remain in place for the “pendency of [the] litigation, including any appeals.” *Id.*

The Government filed a partial opposition to Plaintiffs’ motion on August 20, 2021. Resp. in Partial Opp. to Mot. for Stat. Inj., ECF No. 25 (“Def.’s Br.”). While not opposing an injunction “covering [Plaintiffs’] unliquidated entries through the end of the first administrative review period,” the Government argued that the proposed “open-ended” injunction, preventing liquidation of all entries for the dura-

tion of the litigation, would be overbroad. *Id.* at 2. The Government requested that the injunction accordingly extend only until April 30, 2022 — the end of the first administrative review period. *Id.* While acknowledging that it “do[es] not intend to oppose” future extensions to the injunction, to the extent “th[e] litigation is not resolved before entries from subsequent periods could potentially become subject to liquidation,” the Government argued that limiting the injunction for the time being would align with court precedent and reflect Plaintiffs’ failure to establish irreparable harm from an injunction extending only until April 30, 2022. *Id.* at 3. In addition, the Government argued that Plaintiffs failed in their motion to “allege[] sufficient facts establishing likely success on the merits, that the balance of equities weigh in [their] favor, or that the public interest would be served through imposition of the injunctive relief sought.” *Id.*

Plaintiffs replied in support of their motion on September 1, 2021, arguing that “[t]here are independent reasons . . . for the [c]ourt to issue an injunction separate from maintaining the status quo” which favor an extended injunction — among them, ensuring that all entries are “properly liquidated” and conserving government resources. Pls.’ Resp. to Def.’s Partial Opp. to Pls’ Mot. for Stat. Inj. at 3–4, ECF No. 28. Plaintiffs further argued that likely success on the merits was established, and that both the balance of equities and the public interest favor an extended injunction. *Id.* at 4–6. The court now grants Plaintiffs’ motion for statutory injunction in full.

### JURISDICTION

The court has jurisdiction over the underlying action pursuant to 28 U.S.C. § 1581(c), and over Plaintiffs’ motion for injunctive relief pursuant to 19 U.S.C. § 1516a(c)(2), which provides that “the United States Court of International Trade may enjoin the liquidation of some or all entries of merchandise . . . upon a request by an interested party for such relief and a proper showing that the requested relief should be granted under the circumstances.” The rules of the court further provide for the filing of a motion for statutory injunction, or a Form 24 proposed order for statutory injunction upon consent, to obtain relief from liquidation. CIT R. 56.2.

### DISCUSSION

The injunctive remedy afforded by 19 U.S.C. § 1516a(c)(2) is intended to “preserve an interested party’s right to challenge final determinations . . . in antidumping and countervailing duty cases while enlarging the opportunities for judicial review of interim decisions made during the course of an investigation.” *Zenith Radio Corp. v. United States*, 710 F.2d 806, 811 (Fed. Cir. 1983) (citing S. Rep. No.

96–249, 96th Cong., 1st Sess. 245, reprinted in 1979 U.S. Code Cong. & Ad. News 381, 630–631). Since the institution of this remedy, “suspension of liquidation of subject entries” has become a “routine procedure in [antidumping duty cases] because liquidation can render the litigation moot.” *Yancheng Baolong Biochemical Prods. Co., Ltd. v. United States*, 406 F.3d 1377, 1380 (Fed. Cir. 2005) (citation omitted); see also *Husteel Co., Ltd. v. United States*, 38 CIT \_\_, \_\_, 34 F. Supp. 3d 1355, 1359 (2014) (“Because of the unique nature of antidumping and countervailing duty challenges, the court routinely enjoins liquidation to prevent irreparable harm to a party challenging the antidumping or countervailing duty rate.” (citing *Wind Tower Trade Coal. v. United States*, 741 F.3d 89, 95 (Fed. Cir. 2014))); *Mosaic Co. v. United States*, 45 CIT \_\_, \_\_, 540 F. Supp. 3d 1330, 1334 (2021) (“Injunctions under this statute are not ‘extraordinary’ and are granted in the ordinary course in cases brought under 19 U.S.C. § 1516a.”).

The court considers four factors when deciding whether to grant or deny a motion for injunction of liquidation under 19 U.S.C. § 1516a(c)(2), namely:

- 1) that the movant is likely to succeed on the merits at trial; 2) that it will suffer irreparable harm if preliminary relief is not granted; 3) that the balance of the hardships tips in the movant’s favor; and 4) that a preliminary injunction will not be contrary to the public interest.

*Ugine & Alz Belg. v. United States*, 452 F.3d 1289, 1292 (Fed. Cir. 2006) (listing factors thereafter applied to assess the merits of plaintiff’s motion for injunction under 19 U.S.C. § 1516a(c)(2), characterized by the court as a preliminary injunction) (quoting *U.S. Ass’n of Imps. of Textiles & Apparel v. U.S. Dep’t of Commerce*, 413 F.3d 1344, 1346 (Fed. Cir. 2005)). When reviewing the factors, “[n]o one factor is dispositive, and ‘the weakness of the showing regarding one factor may be overborne by the strength of the others.’” *Mid Continent Steel & Wire, Inc. v. United States*, 44 CIT \_\_, \_\_, 427 F. Supp. 3d 1375, 1380 (2020) (quoting *FMC Corp. v. United States*, 3 F.3d 424, 427 (Fed. Cir. 1993)). The crucial factor is irreparable injury: indeed, the “greater the potential harm to the plaintiff, the lesser the burden on [p]laintiffs to make the required showing of likelihood of success on the merits.” *Ugine*, 452 F.3d at 1292 (quoting *SKF USA Inc. v. United States*, 28 CIT 170, 176, 316 F. Supp. 2d 1322, 1329 (2004)).

### ***I. Irreparable Harm***

Plaintiffs argue that they “will likely suffer irreparable harm in absence of injunction because Commerce ‘may order liquidation of entries . . . until a contrary court decision is reached.’” Pls.’ Br. at 4 (quoting *Jilin Henghe Pharm. Co. v. United States*, 28 CIT 969, 975–76, 342 F. Supp. 2d. 1301, 1308 (2004), *vacated on other grounds*, 123 Fed. Appx. 402, 403 (Fed. Cir. 2005)). While acknowledging that liquidation is currently suspended, Plaintiffs note that the suspension will terminate and liquidation will occur within six months of the conclusion of the first administrative review period “if Plaintiffs do not participate in [that] administrative review.” *Id.* at 5. In other words, if Plaintiffs decline to request administrative review of the *Final Determination* upon the anniversary of its publication, liquidation of the goods entered on and between November 3, 2020 and April 30, 2022 will commence automatically at the rates now contested before the court. Plaintiffs further note that both this court and the Court of Appeals for the Federal Circuit have recognized that liquidation constitutes irreparable harm “because it deprives a party seeking review of the government’s determinations of meaningful access of relief through judicial review.” Pls.’ Br. at 4 (citations omitted). Accordingly, “once the entries [currently] covered by the provisional measures [suspending liquidation] are liquidated, the court cannot provide any meaningful relief” and a further injunction by the court extending beyond the conclusion of the first administrative review period is necessary to prevent irreparable harm. *Id.* at 6 (citations omitted).

The Government responds that “no injunction is necessary to counter any irreparable or immediate harm” because liquidation is necessarily suspended until the end of the first administrative review period on April 30, 2022. Def.’s Br. at 2. While the Government is willing to consent to an injunction terminating at the end of the review period — in other words, terminating upon the date that automatic suspension would cease — it argues that Plaintiffs have “not alleged sufficient facts demonstrating that [they] will suffer irreparable harm from a statutory injunction that has a specific end date of April 30, 2022” and therefore opposes an injunction extending for the pendency of the litigation. *Id.* at 2–3.

The court has repeatedly found that “[t]he danger of liquidation pending judicial review of an investigation constitutes irreparable harm.” *Mid Continent*, 427 F. Supp. 3d at 1382; *see also Husteel*, 34 F. Supp. 3d at 1359; *Mosaic*, 540 F. Supp. 3d at 1335–36. The same is true here. As the Government notes, irreparable harm is evaluated on the basis of “the magnitude of the injury, the immediacy of the injury,

and the inadequacy of future corrective relief.” *Comm. Overseeing Action for Lumber Int’l Trade Investigations v. United States*, 43 CIT \_\_, \_\_, 393 F. Supp. 3d 1271, 1276 (2019) (quoting *Shree Rama Enter v. Untied States*, 21 CIT 1165, 1167, 983 F. Supp. 192, 194 (1997)). Here, the magnitude of the injury — liquidation of all of Plaintiffs’ entered or withdrawn merchandise spanning a period of eighteen months, as well as of Plaintiffs’ future entries — is substantial. Similarly, future relief is inadequate. “Once liquidation occurs, a subsequent decision by the trial court on the merits of [Best Mattresses’] challenge can have no effect on the dumping duties” because “[t]he statutory scheme has no provision permitting reliquidation.” *Zenith*, 710 F.2d at 810; see also *Am. Signature, Inc. v. United States*, 598 F.3d 816, 829 (Fed. Cir. 2010); *Mid Continent*, 427 F. Supp. 3d at 1382. Finally, the injury is sufficiently immediate. While not *all* of the harm Plaintiffs seek to forestall by their proposed injunction is imminent (insofar as liquidation is both a present threat and a future one) liquidation of Plaintiffs’ entries will necessarily commence at the conclusion of the first review period on April 30, 2022 unless Plaintiffs request an administrative review. Def.’s Br. at 6–7. The court has consistently held that “[s]ecuring the full benefits of judicial review” of a determination “should not require participation in each [administrative review],” and again declines to require such participation here. *Mosaic*, 540 F. Supp. 3d at 1335 (quoting *Mid Continent*, 427 F. Supp. 3d at 1384); see also *Husteel*, 34 F. Supp. 3d at 1360. The Government’s assertion that Plaintiffs’ entries “are not subject to liquidation in the near future” given that liquidation would be suspended in the case of a requested administrative review, Def.’s Br. at 7, is therefore insufficient basis to reject Plaintiffs’ assertion of immediate risk. Accordingly, the court finds that the harm identified by Plaintiffs is sufficiently immediate, of sufficient magnitude, and evades adequate future remedy such that Plaintiffs have met their burden of showing irreparable harm.<sup>4</sup>

## II. Likelihood of Success

With respect to the likelihood of their success on the merits, Plaintiffs argue that they “have raised a number of substantial questions

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<sup>4</sup> The court is also unpersuaded by the Government’s argument that Plaintiffs do not face the risk of irreparable harm because “[r]evocation of [the Final Determination,] which Best Mattresses seeks in this case, certainly constitutes meaningful judicial relief regardless of the liquidation status of any specific set of entries.” Def.’s Br. at 10. Liquidation of entries prior to the conclusion of appeal invariably results in “the loss of meaningful judicial review” because liquidation results in the irreversible loss of duty deposits. *OKI Elec. Indus. Co. Ltd. v. United States*, 11 CIT 624, 633, 669 F. Supp. 480, 486 (1987). The fact that judicial review without remedy is still available does not suffice to counterbalance the risk of harm to Plaintiffs.



in the complaint where, based on such questions, Plaintiffs reasonably believe that a statutory injunction is in order.” Pls.’ Br. at 8. These include allegations of “legal and factual errors” by Commerce as well as Commerce’s failure to exclude and include, respectively, Romanian and Mexican Global Trade Atlas Data; misapplication of the transactions disregarded rule; mis-reliance on unreliable financial data; and unreasonable analysis of Plaintiffs’ U.S. sales. *Id.* at 8–10. The Government responds that “Commerce explained its evaluation of the evidence on the record and the reasons for its final determination,” and further argues that, even if Plaintiffs prevail on the likelihood of success prong, that prong is “not dispositive.” Def.’s Br. at 16.

As the court has found that “the irreparable harm factor tilts decidedly in favor of the movant, the burden of showing likelihood of success is lessened.” *Mid Continent*, 427 F. Supp. 3d at 1384 (citing *Husteel*, 34 F. Supp. 3d at 1362); see also *Qingdao Taifa Grp. Co., Ltd. v. United States*, 581 F.3d 1375, 1378–79 (Fed. Cir. 2009); *Ugine*, 452 F.3d at 1292–93. Furthermore, while the Government has contested Plaintiffs’ likelihood of success, it has made no argument suggesting that Plaintiffs’ claims are meritless. The court therefore concludes that the likelihood of success requirement has been satisfied.

### **III. Balance of Equities**

Plaintiffs further argue that the balance of equities favors granting the proposed injunction. They note that “if the entries are liquidated prematurely, and Plaintiffs ultimately prevail, [they] will effectively lose [their] right to appeal Commerce’s decision” whereas “an injunction will merely postpone the final settlement of the payment of duties to the United States by Plaintiffs” which is “‘at most’ an ‘inconvenience’ to the United States.” Pls.’ Br. at 10–11 (quoting *SKF USA*, 28 CIT at 175, 316 F. Supp. 2d at 1328). The Government responds that, while Plaintiffs’ argument favors the issuance of an injunction, it does not favor an “open-ended” injunction. Def.’s Br. at 16. Rather, the Government argues that “Best Mattresses’s [sic] request for a broader injunction covering future entries is not necessary to maintain the status quo, because the entries at issue remain administratively suspended” and because “Best Mattresses may petition . . . for modification of the injunction” should the status of its entries change. Def.’s Br. at 16–17. Finally, the Government argues that Best Mattresses’ proposed extended injunction risks hampering “Commerce’s ability to perform its statutory mandate” and must therefore be denied. Def.’s Br. at 17.

The court concludes that the balance of equities favors injunction. As previously stated, Plaintiffs face an immediate threat of irreparable harm stemming from the liquidation of their entries. That this harm could potentially be ameliorated by requiring Plaintiffs' participation in subsequent administrative reviews, and concurrent requests for broader injunctive relief, is not sufficient to render the risk of harm moot. *See Mosaic*, 540 F. Supp. 3d at 1335 (quoting *Mid Continent*, 427 F. Supp. 3d at 1384); *see also Husteel*, 34 F. Supp. 3d at 1360. Furthermore, contrary to the Government's characterization and as the court has previously noted, Plaintiffs' proposed injunction is not truly "open-ended." Rather, "[t]he injunction against liquidation would tie to the judicial proceeding, such that the injunction would expire once this proceeding concludes." *Mid Continent*, 427 F. Supp. 3d at 1385. In addition, although the Government argues that the proposed injunction could hamper Commerce's ability to perform its statutory duties and thereby infringe upon the authority of the Executive Branch, it provides no further explanation of how the extended injunction might interfere with or impede Commerce's authority. The court has consistently found that "[s]uspension of liquidation at most inconveniences the Government" by delaying potential collection of duties, and the Government has offered no persuasive evidence that more is at stake here. *SKF USA*, 28 CIT at 175, 316 F. Supp. 2d at 1328. Even so, the Government is not without recourse should a change in circumstances render the injunction as imposed unduly burdensome. It is well established that a party may, upon a "showing that changed circumstances, legal or factual, make the continuation of the injunction inequitable," request that the court discontinue or otherwise modify the injunction." *Aimcor v. United States*, 23 CIT 932, 938, 83 F. Supp. 2d 1293, 1299 (1999); *see also SolarWorld Ams., Inc. v. United States*, 41 CIT \_\_, \_\_, 279 F. Supp. 3d 1343, 1347 (2017). In the absence of such a showing of inequity now, however, the court concludes that the harm posed to Plaintiffs by liquidation outweighs the harm posed to the Government by delay.

#### ***IV. Public Interest***

Finally, Plaintiffs argue that "the public interest is best served by preserving Plaintiffs' statutory right to meaningful judicial review of Commerce's determinations" and "by ensuring the effective enforcement of trade laws" and accurate collection of duties. Pls.' Br. at 11 (citations omitted). Because, absent an injunction, liquidation would deprive Plaintiffs of meaningful review and this court of jurisdiction, Plaintiffs argue that the public interest weighs in favor of enjoining

liquidation for the pendency of litigation. *Id.* The Government responds that an injunction imposed only until April 30, 2022 could be extended to avoid liquidation of future entries as-needed, and that “no valid public interest is served by enjoining the liquidation of future entries that are not subject to liquidation in the first place.” Def.’s Br. at 17.

The court finds that Plaintiffs have adequately demonstrated that an extended injunction is in the public interest. First, as Plaintiffs correctly note, ensuring that they may obtain judicial review of Commerce’s determinations is itself in the public interest. *Husteel*, 34 F. Supp. 3d at 1363. It is important that Plaintiffs here contest not merely a single administrative review of an AD order, but rather the AD order itself. Even allowing that they could indeed seek to extend an injunction constrained to the first administrative review period, to require them to nevertheless repeatedly seek both administrative review of the underlying order and further injunction of liquidation in order to avoid being subject to the contested AD rates imposes a burden without a benefit. Secondly, “[i]t is well settled that the public interest is served by ‘ensuring that [Commerce] complies with the law, and interprets and applies [the] international trade statutes uniformly and fairly.’” *NMB Singapore Ltd. v. United States*, 24 CIT 1239, 1245, 120 F. Supp. 2d 1135, 1141 (2000) (third alteration in original) (quoting *PPG Indus., Inc. v. United States*, 11 CIT 5, 10 (1987)). By enjoining liquidation of entries for the pendency of the litigation, the court can ensure that duties will ultimately be collected on the subject merchandise both accurately and consistently, even in the absence of annual administrative reviews. Finally, the fact that Plaintiffs might forego seeking such administrative reviews in light of the extended injunction is itself in the public interest, as “unnecessary time consuming and costly administrative reviews [would therefore] be avoided by the government.” *OKI Elec. Indus.*, 11 CIT at 632–33, 669 F. Supp. at 486. Accordingly, the court rejects the Government’s assertion that “no valid public interest is served” by Plaintiffs’ proposed injunction and finds that Plaintiffs have met their burden of showing that the injunction sought is in the public interest.

## CONCLUSION

Having applied the traditional test for issuance of an injunction under 19 U.S.C. § 1516a(c)(2), the court concludes that: (1) Plaintiffs will suffer irreparable harm in the absence of an injunction; (2) Plaintiffs have demonstrated “a likelihood of success on the merits” because they have raised serious and substantial questions regarding Commerce’s determination which the Government did not meaning-

fully contest; (3) the balance of equities favors granting the injunction because Plaintiffs are at risk of losing access to judicial review, outweighing any potential burden of delay on the Government; and finally, (4) the public interest is best served by enjoining liquidation to ensure that accurate antidumping duties are assessed. Accordingly, the court grants Plaintiffs' motion for an injunction on the liquidation of any of their merchandise entered on or after November 3, 2020 (excluding the agreed-upon gap period) for the pendency of the litigation.

**SO ORDERED.**

Dated: February 14, 2022  
New York, New York

*/s/ Gary S. Katzmann*  
JUDGE

Slip Op. 22–12

CELIK HALAT VE TEL SANAYI A.S., Plaintiff, v. UNITED STATES, Defendant, and INSTEEL WIRE PRODUCTS COMPANY, SUMIDEN WIRE PRODUCTS CORPORATION, and WIRE MESH CORP., Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge  
Court No. 21–00045

[Granting plaintiff's motion for judgment on the agency record in an action contesting a final determination in an antidumping duty investigation.]

Dated: February 15, 2022

*Irene H. Chen*, Chen Law Group LLC, of Rockville, MD, for plaintiff Celik Halat ve Tel Sanayi A.S.

*Miles K. Karson*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. With him on the submission were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the submission was *Jesus N. Saenz*, Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

*Kathleen W. Cannon*, Kelley Drye & Warren LLP, of Washington, DC, for defendant-intervenors Insteel Wire Products Company, Sumiden Wire Products Corporation, and Wire Mesh Corp. With her on the submission were *Paul C. Rosenthal*, *R. Alan Luberda*, *Brooke M. Ringel*, and *Joshua R. Morey*.

**OPINION AND ORDER**

**Stanceu, Judge:**

Plaintiff Celik Halat ve Tel Sanayi A.S. (“Celik Halat”) contests a final determination that the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”)

issued in an antidumping duty (“AD”) investigation of certain prestressed concrete steel wire strand (“PC strand” or the “subject merchandise”) from the Republic of Turkey (“Turkey”), and the associated antidumping duty order (the “Order”).

As a result of this final determination, imports of Celik Halat’s merchandise are subject under the Order to an estimated dumping margin of 53.65% and an adjusted cash deposit rate of 44.60%. The high dumping margin resulted from a decision by Commerce to reject, in the entirety, Celik Halat’s responses to Sections B and C of the Department’s initial questionnaire because Celik Halat’s representative filed a single exhibit to the Section B response 21 minutes after the 5:00 p.m. Eastern Time (“ET”) filing deadline.

The court sets aside the contested determination as an abuse of agency discretion and remands the decision to Commerce for immediate corrective action.

## I. BACKGROUND

### A. The Contested Agency Determinations

The contested antidumping duty determination (the “Final Determination”) is *Prestressed Concrete Steel Wire Strand From Argentina, Colombia, Egypt, the Netherlands, Saudi Arabia, Taiwan, the Republic of Turkey, and the United Arab Emirates: Final Affirmative Determinations of Sales at Less Than Fair Value and Final Affirmative Critical Circumstances Determinations, in Part*, 85 Fed. Reg. 80,001 (Int’l Trade Admin. Dec. 11, 2020) (“*Final Determination*”). The Final Determination incorporates by reference a “Final Issues and Decision Memorandum” containing explanatory discussion. *Issues and Decision Memorandum for the Final Affirmative Determination in the Less-Than-Fair-Value Investigation of Prestressed Concrete Steel Wire Strand from Turkey* (Int’l Trade Admin. Dec. 7, 2020) (P.R. Doc. 167) (“*Final I&D Mem.*”).<sup>1</sup>

The Order was published on February 1, 2021. *Prestressed Concrete Steel Wire Strand From Argentina, Colombia, Egypt, the Netherlands, Saudi Arabia, Taiwan, the Republic of Turkey, and the United Arab Emirates: Antidumping Duty Orders*, 86 Fed. Reg. 7,703 (Int’l Trade Admin.) (“*Order*”). The Order describes PC strand as “produced from wire of non-stainless, non-galvanized steel, which is suitable for use in prestressed concrete (both pretensioned and post-tensioned) applications.” *Id.* at 7,705. The “product definition encompasses covered and uncovered strand and all types, grades, and diameters of PC strand.” *Id.*

<sup>1</sup> All information disclosed in this Opinion and Order was obtained from the public record. Public documents in the administrative record are cited as “P.R. Doc. \_\_\_.”

## B. The Parties

Plaintiff, a Turkish producer and exporter of PC strand, was a mandatory respondent in the antidumping duty investigation culminating in the Final Determination. *See* Compl. ¶¶ 3, 8 (Feb. 1, 2021), ECF No. 2.

Defendant is the United States. Defendant-intervenors Insteel Wire Products Company, Sumiden Wire Products Corporation, and Wire Mesh Corp. are U.S. domestic manufacturers of PC strand that were the petitioners in the antidumping duty investigation resulting in the contested determinations. Consent Mot. to Intervene as of Right 2 (Feb. 26, 2021), ECF No. 13.

## C. Proceedings Before Commerce

On April 16, 2020, Commerce received from the petitioners an antidumping and countervailing duty petition addressed to imports of PC strand from Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, the Netherlands, Saudi Arabia, South Africa, Spain, Taiwan, Tunisia, Turkey, Ukraine, and the United Arab Emirates. *Prestressed Concrete Steel Wire Strand from Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, the Netherlands, Saudi Arabia, South Africa, Spain, Taiwan, Tunisia, Turkey, Ukraine, and the United Arab Emirates – Petition for the Imposition of Antidumping and Countervailing Duties* (P.R. Docs. 1–9). Commerce subsequently published an initiation notice for an antidumping duty investigation on PC strand from various countries, including, as is relevant here, Turkey. *Prestressed Concrete Steel Wire Strand from Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, the Netherlands, Saudi Arabia, South Africa, Spain, Taiwan, Tunisia, the Republic of Turkey, Ukraine, and the United Arab Emirates: Initiation of Less-Than-Fair-Value Investigations*, 85 Fed. Reg. 28,605 (Int’l Trade Admin. May 13, 2020) (P.R. Doc. 133). The period of investigation for the antidumping duty investigation was April 1, 2019 through March 31, 2020, pursuant to 19 C.F.R. § 351.204(b)(1). *Id.* at 28,606.

On June 18, 2020, Commerce chose Güney Çelik Hasir ve Demir and Celik Halat as the mandatory respondents in the antidumping duty investigation. *Less-Than-Fair-Value Investigation of Prestressed Concrete Steel Wire Strand from the Republic of Turkey: Respondent Selection* 5–6 (Int’l Trade Admin) (P.R. Doc. 66). The following day, Commerce sent Celik Halat its initial questionnaire (the “Initial Questionnaire”), requesting that it respond to Section A (General Information), Section B (Sales in the Home Market or to Third Countries), Section C (Sales to the United States), and Section D (Cost of

Production/Constructed Value). *U.S. Dep't of Commerce Enforcement and Compliance Antidumping and Countervailing Duty Operations Office II Request for Information Antidumping Duty Investigation 2* (June 19, 2020) (P.R. Doc. 67).

On September 30, 2020, Commerce published the Preliminary Less-Than-Fair-Value Determination in its antidumping duty investigation (the “Preliminary Determination”), in which Commerce, invoking its “facts otherwise available” and “adverse inference” authorities under section 776(a) and (b), respectively, of the Tariff Act, 19 U.S.C. § 1677e(a) and (b),<sup>2</sup> preliminarily determined, based on information in the petition, an estimated dumping margin of 53.65% for entries of subject merchandise exported by Celik Halat, with a preliminary affirmative critical circumstances determination. *Prestressed Concrete Steel Wire Strand From Argentina, Colombia, Egypt, the Netherlands, Saudi Arabia, the Republic of Turkey, and the United Arab Emirates: Preliminary Affirmative Determinations of Sales at Less Than Fair Value and Preliminary Affirmative Critical Circumstances Determinations, in Part*, 85 Fed. Reg. 61,722, 61,723–24 (Int’l Trade Admin) (“*Prelim. Determination*”). Incorporated by reference in the Preliminary Determination is an explanatory document, the “Preliminary Decision Memorandum.” *Decision Memorandum for the Preliminary Determination in the Less-Than-Fair-Value Investigation of Prestressed Concrete Steel Wire Strand from the Republic of Turkey* (Sept. 23, 2020) (P.R. Doc. 153). Commerce assigned the same preliminary 53.65% rate to Güney Çelik Hasir ve Demir, also based on 19 U.S.C. § 1677e, and also assigned that preliminary rate to all other Turkish exporters and producers of the subject merchandise. *Prelim. Determination*, 85 Fed. Reg. at 61,723–24.

Commerce stated that it would direct U.S. Customs and Border Protection (“Customs”) to suspend liquidation on all entries of PC strand from Turkey and to collect cash deposits of 53.65%. *Id.* at 61,724–25.

On December 11, 2020, Commerce published its Final Less-than-Fair-Value Determination and, consistent with its Preliminary Determination, assigned estimated dumping margins of 53.65% to Celik Halat, Güney Çelik Hasir ve Demir, and all other Turkish exporters of the subject merchandise but reversed its earlier finding of critical circumstances as to Celik Halat. *Final Determination*, 85 Fed. Reg. at 80,001–02.

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<sup>2</sup> All citations to the United States Code herein are to the 2018 edition and all citations to the Code of Federal Regulations herein are to the 2020 edition.

On January 25, 2021, the U.S. International Trade Commission (“ITC”) notified Commerce that it had reached a final affirmative determination that an industry in the United States was materially injured by reason of the less-than-fair-value imports of PC strand from Turkey. *Order*, 86 Fed. Reg. at 7,703. The ITC published its determination four days later. *Prestressed Concrete Steel Wire Strand From Argentina, Colombia, Egypt, Netherlands, Saudi Arabia, Taiwan, Turkey, and the United Arab Emirates*, 86 Fed. Reg. 7,564 (Int’l Trade Comm’n Jan. 29, 2021). Commerce announced that it would direct Customs, effective on the date of publication in the Federal Register of the ITC’s final affirmative injury determination, to continue to collect cash deposits of 53.65% on PC strand entries from Celik Halat. *Order*, 86 Fed. Reg. at 7,703–04. Commerce published a correction to its Final Determination to reflect “adjusted cash deposit rates for the Turkey [less-than-fair-value] investigation after accounting for export subsidies in the companion countervailing duty investigation.” *Prestressed Concrete Steel Wire Strand From the Republic of Turkey: Notice of Correction to the Final Affirmative Determination of Sales at Less Than Fair Value*, 86 Fed. Reg. 11,724, 11,725 (Int’l Trade Admin. Feb. 26, 2021). Commerce determined an adjusted cash deposit rate of 44.60% for exports of subject merchandise by Celik Halat and other producers of PC strand from Turkey. *Id.*

#### **D. Proceedings Before the Court**

Plaintiff brought this action in February 2021 to contest the Final Determination and the Order. Summons (Feb. 1, 2021), ECF No. 1; Compl. (Feb. 1, 2021), ECF No. 2. On February 26, 2021, the court granted the consent motion to intervene as of right submitted by defendant-intervenors Insteel Wire Products Company, Sumiden Wire Products Corporation, and Wire Mesh Corp. Order, ECF No. 14.

On May 28, 2021, plaintiff filed the instant motion for judgment on the agency record under USCIT Rule 56.2 and accompanying brief. Pl.’s Rule 56.2 Mot. for J. on the Agency R., ECF No. 20 (“Pl.’s Mot.”). Defendant and defendant-intervenors each filed a response on July 27, 2021. Def.’s Resp. to Pl.’s Mot. for J. on the Agency R., ECF No. 22 (“Def.’s Resp.”); Def.-Intervenors’ Resp. in Opp’n to Pl.’s Mot. for J. on the Agency R., ECF No. 21 (“Def.-Intervenor’s Resp.”). Plaintiff filed its reply on August 24, 2021. Reply Br. of Pl. Celik Halat ve Tel Sanayi A.S., ECF No. 23.

On September 13, 2021, plaintiff filed an unopposed motion for oral argument on its Rule 56.2 motion. Mot. for Oral Argument, ECF No. 26.



## II. DISCUSSION

### A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act, *as amended*, 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude an antidumping duty investigation.

In reviewing a final determination, the court “shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law.” 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence refers to “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

Decisions that an agency makes in the enforcement and administration of its regulatory requirements that call for an exercise of discretion are examined according to an abuse of discretion standard. *See, e.g., Brennan v. Dep’t of Health & Human Servs.*, 787 F.2d 1559, 1564 (Fed. Cir.), *cert. denied*, 479 U.S. 985 (1986).

### B. Celik Halat’s Claim in This Litigation

In summary, Celik Halat claims that Commerce abused its discretion in rejecting its responses to Sections B and C of the Initial Questionnaire and acted contrary to law in resorting, on that basis, to its “facts otherwise available” authority under 19 U.S.C. § 1677e(a) and its “adverse inference” authority under section 19 U.S.C. § 1677e(b).<sup>3</sup> Pl.’s Mot. 28 (arguing that “Commerce’s proffered rationale in the *Final Determination* regarding its rejection of Celik Halat’s responses and its imposition of AFA is unreasonable,” *id.* at 28, unsupported by substantial evidence, *id.* at 28–30, contrary to law and its own regulations, *id.* at 30–36, arbitrary and capricious, *id.* at 38–42, and an abuse of discretion, *id.* at 16–25).

Under 19 U.S.C. § 1677e(a), Commerce is directed to use “the facts otherwise available” in specifically defined circumstances. Here, in resorting to the use of the facts otherwise available, Commerce relied upon section 776(a)(1) and (2)(B) of the Tariff Act, which established that if “necessary information is not available on the record” or if an

<sup>3</sup> When invoking its “facts otherwise available” authority under 19 U.S.C. § 1677e(a) together with its adverse inference authority under § 1677e(b), Commerce conflates these separate authorities, referring to “adverse facts available” or “AFA.”

interested party fails to provide the requested “information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,” Commerce “shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.” According to subsection (b) of 19 U.S.C. § 1677e, where Commerce “finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority [i.e., Commerce], the administering authority . . . in reaching the applicable determination under this subtitle—may use an inference that is adverse to the interests of that party in selecting from among the facts otherwise available.” 19 U.S.C. § 1677e(b)(1)(A). In exercising this authority, Commerce must recognize, as the Court of Appeals has stated, that “the purpose of section 1677e(b) is to provide respondents with an incentive to cooperate, not to impose *punitive*, aberrational, or uncorroborated margins.” *Flli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000) (emphasis added).

Section 351.303 of the Department’s regulations provides, generally, for the filing of documents such as questionnaire responses. *See* 19 C.F.R. § 351.303(b). Under the Department’s regulations, Celik Halat was required to file its response to the Initial Questionnaire, electronically on the Department’s automated “ACCESS” system, by “5 p.m. Eastern Time” on the due date, which in this instance was Monday, August 10, 2020. *See id.* § 351.303(b)(1) (“An electronically filed document must be received successfully in its entirety by the Department’s electronic records system, ACCESS, by 5 p.m. Eastern Time on the due date”), (b)(2) (“A person must file all documents and databases electronically using ACCESS . . .”).

The regulations, in 19 C.F.R. § 351.302, address the Department’s extensions of filing requirements. “Unless expressly precluded by statute, the Secretary [of Commerce] may, for good cause, extend any time limit established by this part.” *Id.* § 351.302(b). The time limits at issue in this case are the deadlines for responses to sections of a questionnaire issued by Commerce. The Department’s regulation on time extensions specifically addresses the topic of “untimely” extension requests, i.e., those received after the applicable time period has expired: “An untimely filed extension request *will not be considered* unless the party demonstrates that an extraordinary circumstance exists.” *Id.* § 351.302(c) (emphasis added). “An extraordinary circumstance is an unexpected event that: (i) Could not have been prevented

if reasonable measures had been taken, and (ii) Precludes a party or its representative from timely filing an extension request through all reasonable means.” *Id.* § 351.302(c)(2). In the preamble accompanying the promulgation of this regulation in 2013 (the “Preamble”), Commerce provided additional guidance on what would constitute an “extraordinary circumstance,” which may include “a natural disaster, riot, war, *force majeure*, or medical emergency.” *Extension of Time Limits*, 78 Fed. Reg. 57,790, 57,793 (Sept. 20, 2013) (“Preamble”). Addressing the general topic of filing difficulties, the preamble instructs that “inability . . . to access the internet” is not likely to be seen as an extraordinary circumstance. *Id.*

### **1. The Department’s Rejection of Celik Halat’s Responses to Sections B and C of the Initial Questionnaire**

On August 10, 2020, Celik Halat submitted its Sections B and C Initial Questionnaire responses, but, apparently due to formatting and electronic filing issues, it failed to upload one of its exhibits to its Section B response before the 5:00 p.m. ET deadline. Pl.’s Mot. 2–3; *Commerce Letter Re: Less-Than-Fair-Value Investigation of Prestressed Concrete Steel Wire Strand from the Republic of Turkey* (Aug. 19, 2020) (P.R. Doc. 137) (“*Rejection of Sections B and C Questionnaire*”). The exhibit in question, the Home Market Sales Table, was uploaded 21 minutes late. Celik Halat states that on August 10, 2020, at 4:10 p.m. ET, “after confirming that all information and documents for Celik Halat’s Sections B and C of the AD questionnaire were ready for submission to Commerce,” its counsel “began to file the Section B and C responses through Commerce’s ACCESS electronic records system (‘ACCESS’).” Pl.’s Mot. 2.

Celik Halat further states that “[a]t 4:12 p.m. ET, Celik Halat’s representative received an e-mail from ACCESS with an error message, rejecting a single PDF exhibit of the [business proprietary information (‘BPI’)] version of the Section B response, the Home Market Sales Table, on the ground that it contained ‘no searchable text.’” *Id.* “At this point, Celik Halat’s representative considered but decided not to call the ACCESS help desk or the Commerce analyst for help.” *Id.* at 9. Celik Halat adds that “[t]he representative had previously called the ACCESS help desk or the analyst, but was unable to reach anyone immediately, due to Covid-19 remote working arrangements.” *Id.* According to Celik Halat’s version of events, the representative moved on to other parts of the filing and received confirmation that all BPI narrative files of its Section B and C Initial Questionnaire responses, all PDF versions of its Section B Initial Questionnaire response BPI exhibits, the BPI version of all Section C exhibits, the public version of the Section B response, and Exhibits

C-1, C 2, C-3, and C-4 of the public Section C Initial Questionnaire response had been successfully submitted before the 5:00 p.m. deadline. *Id.* at 2–3. “Remaining exhibits of the public Section C response, Exhibits C-8, C-9, C-10 and C-11, were successfully submitted under the time stamp of 5:06 p.m. ET.” *Id.* at 3. “At 5:21 p.m. ET, after numerous attempts, Celik Halat’s representative gave up trying to submit the PDF version of the Home Market Sales Table, and instead filed the Excel version of the Home Market Sales Table.” *Id.* “With the filing of the Excel version, Celik Halat received ACCESS’ confirmation that the BPI exhibit to Section B response, the Home Market Sales Table, had been successfully submitted under the time stamp of 5:21 p.m. ET.” *Id.* Celik Halat claimed that during filing, the representative “encountered unusually slow ACCESS processing times, with messages of ‘waiting for ACCESS to respond.’” *Id.*

On August 18, 2020, petitioners submitted comments to Commerce on Celik Halat’s Section B and C Initial Questionnaire responses, which included the assertion that “Celik Halat reported incorrect payment dates for its home market sales.” *Prestressed Concrete Steel Wire Strand From Turkey — Petitioners’ Comments on Celik Halat ve Tel Sanayi A.S.’s Section B and C Responses* (Dep’t of Commerce ACCESS Barcode 4017548–01). The following day, on August 19, 2020, petitioners also submitted a request to the Department that it postpone its preliminary determinations in the antidumping investigation. *Prestressed Concrete Steel Wire Strand from Indonesia, Italy, Malaysia, South Africa, Spain, Taiwan, Tunisia, Turkey, and Ukraine – Petitioners’ Request to Postpone Preliminary Determinations* (Dep’t of Commerce ACCESS Barcode 4017412–01).

On August 19, 2020, Commerce sent Celik Halat a letter stating that it had received the responses to Section B and C of the Initial Questionnaire on August 10, 2020, but that it would reject the Section B and C Initial Questionnaire responses in their entirety because Celik Halat did not file a portion of the responses, the Home Market Sales Table, before the 5:00 p.m. deadline as required by 19 C.F.R. § 351.303(b)(1). *Rejection of Sections B and C Questionnaire* at 1.<sup>4</sup> Commerce issued a memorandum to its Central Records Unit directing it to remove the Sections B and C Initial Questionnaire responses, in the entirety, from the administrative record. *Rejection of Celik Halat Submissions* (August 19, 2020) (P.R. Doc. 136).

On August 24, 2020, Celik Halat requested that Commerce reconsider its rejection of the Sections B and C Initial Questionnaire

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<sup>4</sup> Commerce grounded its decision solely in the delayed filing of the Home Market Sales Table filed at 5:21 p.m. Eastern Time (“ET”) and did not reference the fact that Exhibits C-8, C-9, C-10, and C-11 were submitted under the time stamp of 5:06 p.m. ET.

responses. *Pre-Stressed Concrete Steel Wire Strand from Turkey: Request for Reconsideration of the Department's Rejection of the Sections B&C Antidumping Questionnaire Response of Celik Halat 2* (P.R. Doc. 139). Celik Halat acknowledged that a portion of its Section B Initial Questionnaire response was not successfully uploaded to ACCESS within the deadline but argued that, under the circumstances, it did not believe “punishing Celik Halat by rejecting the entire submission would be warranted or justified.” *Id.* Celik Halat argued that the Department should exercise its discretion to accept the filing because “difficulties with the [ACCESS] interface and its repeated rejection of ‘non-conforming’ documents resulted in unavoidable delays that turned a simple process into a difficult and frustrating ordeal, and that ultimately result[ed] in the late filing of part of the response.” *Id.* at 3. Moreover, “balancing of the equities certainly favor[s] accepting the submission.” *Id.* at 12.

On August 27, 2020, Commerce denied Celik Halat’s Request for Reconsideration, in short claiming that “Celik Halat was advised of both the ACCESS document format and Commerce’s timeliness requirements weeks before the [Sections B and C] deadline of 5:00 pm ET on August 10, 2020.” *Commerce Letter Re: Less-Than-Fair-Value Investigation of Prestressed Concrete Steel Wire Strand from the Republic of Turkey 2* (P.R. Doc. 140). Moreover, Commerce found that the “situation described in [Celik Halat’s] August 24 letter does not demonstrate the existence of extraordinary circumstances within the meaning of Commerce’s regulations.” *Id.*

On August 31, 2020, petitioners submitted a letter withdrawing their request to postpone the preliminary determination. *Prestressed Concrete Steel Wire Strand From Turkey — Petitioners’ Withdrawal of Request to Postpone the Preliminary Determination* (Dep’t of Commerce ACCESS Barcode 4021658–01). The letter called for Commerce to assign Güney Çelik Hasir ve Demir and Celik Halat “dumping rates based on total adverse facts available.” *Id.* at 5.

On September 2, 2020, Celik Halat requested a meeting with Commerce to discuss its rejection of Celik Halat’s Section B and C Initial Questionnaire responses. *Pre-Stressed Concrete Steel Wire Strand from Turkey: Request for a Meeting to Regarding the Acceptance of the Sections B and C Responses of Celik Halat ve Tel Sanayi A.S.* (P.R. Doc. 142). Commerce subsequently held a video conference call with Celik Halat to discuss the request on September 4, 2020. *Commerce’s Memorandum on Video Conference with Celik Halat* (Sept. 8, 2020) (P.R. Doc. 149).

On September 8, 2020, in a response to petitioners' August 31, 2020 letter, Celik Halat requested that Commerce accept its Sections B and C Initial Questionnaire responses in full and reject petitioners' demand for imposition of total adverse facts available. *Pre-Stressed Concrete Steel Wire Strand from Turkey: Response of Celik Halat to Petitioners' Demand for Imposition of Total AFA and to the Department's Denial of Reconsideration of the Rejection of its Section B and C Responses 2* (P.R. Doc. 147). As discussed below, Commerce decided that total "adverse facts available" was the appropriate resolution of the issue arising from Celik Halat's untimely filing on August 10, 2020.

## **2. The Department's Use of "the Facts Otherwise Available" under 19 U.S.C. § 1677e(a) and an Adverse Inference under 19 U.S.C. § 1677e(b)**

On September 30, 2020, Commerce published its Preliminary Determination, and, applying what it termed "adverse facts available," or "AFA," invoked both sections 776(a) and (b) of the Tariff Act, 19 U.S.C. § 1677e(a) and (b), and preliminarily assigned an estimated dumping margin of 53.65% to Celik Halat's exports. *Prelim. Determination*, 85 Fed. Reg. at 61,723–24; *Final I&D Mem.* at 4 ("In the *Preliminary Determination*, we found that, because Celik Halat failed to submit all portions of its response to sections B and C of the questionnaire by the established deadline, Celik Halat failed to cooperate to the best of its ability to comply with Commerce's request for information, within the meaning of section 776(b)(1) of the Act.>").

In the Final Issues and Decision Memorandum, Commerce found no "basis to alter our use of AFA pursuant to section 776(b) of the Act, or the AFA rate assigned to Celik Halat in the Preliminary Determination." *Id.* at 5. The Final Issues and Decision Memorandum largely summarized Commerce's discussion in the Preliminary Decision Memorandum, relying on several key findings of fact. Commerce explained that "Commerce's regulations are clear that a submission is not complete until it is filed in its entirety." *Id.* Commerce, citing § 351.301(b) of its regulations, stated that Celik Halat was made aware of this rule in the cover letter of the Initial Questionnaire. *Id.* Thus, Commerce found it "immaterial that portions of Celik Halat's questionnaire response were filed prior to the deadline." *Id.* Commerce stated that "Celik Halat did not file its response to sections B and C of the questionnaire in its entirety by the established deadline of 5:00 p.m. ET on August 10, 2020." *Id.* Thus, "Commerce properly rejected sections B and C of Celik Halat's questionnaire response in its entirety as untimely." *Id.* at 6.

Next, Commerce stated that “Celik Halat failed to request an extension of the deadline to submit its sections B and C questionnaire response when it encountered ‘filing difficulties’” despite having “sufficient time to notify Commerce (i.e., either the official in charge or the ACCESS Help Desk) and request an extension of the deadline to resolve the problem prior to the expiry of the deadline.” *Id.* Separately, Commerce found that “Celik Halat did not promptly submit a letter to Commerce after knowingly filing its untimely response to explain its delay and request an out-of-time extension.” *Id.* In discussing the arguments made in Celik Halat’s August 24, 2020 Request for Reconsideration, Commerce found that “[t]he ACCESS filing issue Celik Halat encountered due to document formatting problems was not an unexpected event.” *Id.* at 7. Commerce also found that “examples of Commerce[’s] previously granting out-of-time extensions are immaterial here” because “Celik Halat’s problem with its questionnaire response filing was not due to ‘unpredictable clerical difficulties’ with ACCESS, as the Handbook provides guidance to ACCESS users on how to avoid the specific filing issue Celik Halat encountered.” *Id.* Celik Halat’s failure to file its response in a timely manner was therefore not “‘an unexpected event that . . . could not have been prevented if reasonable measures had been taken’ under 19 CFR 351.302(c)(2).” *Id.*

In the Final Issues and Decision Memorandum, Commerce also relied for its decision upon certain language in the preamble accompanying the 2013 promulgation of current 19 C.F.R. 351.302. *See id.* at 7 (explaining that the Preamble “elaborates that extraordinary circumstances examples include ‘a natural disaster, ware [sic], *force majeure*, or medical emergency) & n.33 (citing *Preamble*, 78 Fed. Reg. at 57,792). Commerce added that “[t]he *Extension of Time Limits* also states that ‘insufficient resources, inattentiveness, or the inability of a party’s representative to access the Internet on the day on which the submission was due’ are unlikely examples of an extraordinary circumstance.” *Id.* at 7 (citing *Preamble*, 78 Fed. Reg. at 57,792).

### **3. The Underlying Facts and Circumstances Demonstrate that the Department’s Decision Was an Abuse of Discretion**

Plaintiff argues that the Department’s imposition of a bright-line rule rejecting its Section B and C Initial Questionnaire response and its application of 19 U.S.C. § 1677e constituted an abuse of discretion. Pl.’s Mot. 16–25. Upon review of the evidence of record as a whole, this court agrees. “An agency abuses its discretion where, inter alia, ‘the decision . . . represents an unreasonable judgment in weighing relevant factors.’” *Brenner v. Dep’t. of Veteran Affairs*, 990 F.3d 1313,

1324 (Fed. Cir. 2021) (*quoting Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005)). Here, Commerce based its use of the facts otherwise available and an adverse inference on what was no more than a minor incident of non-compliance with an ACCESS filing requirement that had no appreciable effect on the antidumping duty investigation. Commerce reached this decision despite record evidence that Celik Halat timely requested extensions to file the submission in question, which Commerce in large part denied.

Defendant and defendant-intervenors, largely echoing the reasoning outlined in the Final Issues and Decision Memorandum, contend that the Department's rejection of the untimely submission was not an abuse of discretion. Def.'s Resp. at 8–15; Def.-Intervenors Resp. 25–30. Defendant argues that Commerce has broad discretion to establish its own rules governing administrative procedures, including the establishment and enforcement of time limits, Def.'s Resp. at 8, and that “[h]ere, Commerce provided a reasoned explanation for rejecting Celik Halat’s untimely filed response.” *Id.* at 9. Commerce has broad discretion in establishing its own rules governing the administrative procedure, but in applying those rules to an individual circumstance, Commerce lacked the discretion to impose a draconian and punitive sanction in the circumstance presented. The court’s examination of the larger body of record evidence bearing on that circumstance, including Celik Halat’s attempts to comply and the events that occurred on the afternoon of August 10, 2020, supports the court’s conclusion.

Before the date of the filing, Celik Halat anticipated that it would have difficulty meeting the filing deadline for its Sections B, C, and D Initial Questionnaire responses and made repeated extension requests. On July 22, 2020, Celik Halat submitted an extension request of the July 27, 2020 deadline for Sections B, C, and D of the Department’s Initial Questionnaire, requesting an extension to August 17, 2020. *Prestressed Concrete Steel Wire Strand from Turkey (A-489-842): Extension Request of Celik Halat ve Tel Sanayi A.S.* (“*Celik Halat*”) for *SECTION B-C-D in the AD investigation* (P.R. Doc. 103). Celik Halat reiterated the reasons outlined in its prior July 7, 2020 extension request for its Section A Initial Questionnaire response, including the COVID-19 pandemic, the corresponding lockdown of Turkey, Celik Halat’s office closures, and the lack of a robust work-from-home infrastructure. *Id.* at 2. Celik Halat also mentioned that Turkey would be observing a religious holiday starting July 30 and extending until August 4, and that “everywhere is literally closed.” *Id.* at 3. On July 23, 2020, Commerce issued a letter to Celik Halat,



granting the extension request in part, extending Celik Halat's response deadline to Sections B, C, and D of the Initial Questionnaire to August 10, 2020. *Commerce Letter Re: Less-Than-Fair-Value Duty Investigation of Prestressed Concrete Steel Wire Strand from the Republic of Turkey* (P.R. Doc. 106). Commerce, again, claimed that it could not grant the request in its entirety due to the "statutory deadlines in this investigation." *Id.* at 1.

On August 4, 2020, Celik Halat submitted another extension request for its Sections B, C, and D Initial Questionnaire responses. *Prestressed Concrete Steel Wire Strand from Turkey (A-489-842): Extension Request of Celik Halat ve Tel Sanayi A.S.* ("Celik Halat") for supplemental SECTION B-C-D in the AD investigation (P.R. Doc. 113). Specifically, Celik Halat requested an additional four days to respond to each section, explaining that an "unfortunate accident had happened and CELIK HALAT's finance manager had a minor traffic accident on his return to work from his family visit" and "he [was] on sick leave and resting in his home." *Id.* at 2. Celik Halat stated that if Commerce would not grant the four-day extension to August 14, 2020 for its Sections B, C, and D Initial Questionnaire responses, then Celik Halat would appreciate an extension only for the Section D response. *Id.* Later that day, Commerce issued a letter to Celik Halat, denying the extension request entirely, claiming that it could not grant the request due to the "statutory deadlines in this investigation." *Commerce Letter Re: Less-Than-Fair-Value Duty Investigation of Prestressed Concrete Steel Wire Strand from the Republic of Turkey* (Aug. 4, 2020) (P.R. Doc. 114).

The following day, Celik Halat submitted yet another extension request for its Section D Initial Questionnaire response, asking Commerce to extend the deadline three days until August 13, 2020. *Prestressed Concrete Steel Wire Strand from Turkey (A-489-842): Extension Request of Celik Halat ve Tel Sanayi A.S.* ("Celik Halat") for SECTION D in the AD investigation 2 (Aug. 5, 2020) (P.R. Doc. 115). Celik Halat reiterated that its finance manager was on sick leave due to the traffic accident and stated that "[h]is absence is seriously affecting our ability to answer Sections B, C & D questionnaire and in particular Section D response" and that this made it "almost impossible to answer Section D questionnaire by August 10, 2020." *Id.* Commerce issued a letter to Celik Halat granting its extension request, extending the deadline for Section D of the Initial Questionnaire to August 13, 2020. *Commerce Letter Re: Less-Than-Fair-Value Duty Investigation of Prestressed Concrete Steel Wire Strand from the Republic of Turkey* (Aug. 5, 2020) (P.R. Doc. 116) ("*Commerce Letter Granting Section D Extension Request*"). In the letter, Commerce also

stated that it would not be able to “grant *any* further extension of the deadlines for Celik Halat’s initial AD questionnaire response.” *Id.* at 1 (emphasis in original).

The court notes, first, that Celik Halat made repeated, timely extension requests for its Section B and C Initial Questionnaire responses and that Commerce was somewhat parsimonious in granting those requests. The Department’s grounding of its reasoning for denying extension requests in its “statutory deadlines” is open to question. Had Commerce granted the four-day extension requested in the August 4, 2020 extension request, which would have moved the August 10, 2020 deadline to August 14, 2020, it still would have had 47 days to issue timely the Preliminary Determination on September 30, 2020. And there is no record evidence that doing so would have delayed the issuance of the Final Determination.

In its Final Issues and Decision Memorandum, Commerce reasoned that its rejection of Celik Halat’s Section B and C Initial Questionnaire responses was justified because Celik Halat failed to request an extension of the deadline to submit its Sections B and C Initial Questionnaire responses when it encountered filing difficulties despite having “sufficient time to notify Commerce.” *Final I&D Mem.* at 6. Commerce added another justification, noting that Celik Halat did not “promptly submit a letter to Commerce after knowingly filing its untimely response to explain its delay and request an out-of-time extension.” *Id.* While this court agrees that it would have been prudent for Celik Halat’s representative to file an extension request, timely or otherwise, the court also notes the existence of record evidence to support a reasonable belief on the part of the submitter that both of these efforts would have been futile.

In its August 5, 2020 letter granting the Section D extension request, Commerce also addressed the matter of the timing for the filing of responses to Sections B and C of the Initial Questionnaire. As noted above, Celik Halat had sought an extension until August 17, 2020 to file these responses but had been allowed only an extension to August 10, 2020. The letter stated, as to these responses, that “[w]e remind you that Celik Halat’s response to sections B and C of Commerce’s initial AD questionnaire remains due no later than 5:00 p.m. Eastern Time (ET) on Monday, August 10, 2020.” *Commerce Letter Granting Section D Extension Request* at 1. While this sentence was appropriate, the sentence that followed was not. The sentence read, “Please note that we will not be able to grant *any* further extension of the deadlines for Celik Halat’s initial AD questionnaire response.” *Id.* (emphasis in original). This emphatic and unambiguous statement in the August 5 letter was itself an abuse of discretion on the part of

Commerce. It foreclosed any future extension whatsoever (whether or not upon a timely request, even a brief one on an emergency basis) and even one necessitated by what Commerce might consider an “extraordinary circumstance” as described by 19 C.F.R. § 351.302(c). This intimidating language reasonably could be expected to cause Celik Halat’s representative, taking Commerce at its word, to conclude five days later that Celik Halat would not be granted even a brief extension on the afternoon of August 10, 2020, that attempting to obtain one would only delay things further, and that the best course of action instead was continuing the effort to file before the 5:00 p.m. deadline all of the Section B and C Initial Questionnaire responses with all associated exhibits in a form that would be successfully uploaded in the ACCESS system. The court, therefore, rejects the Department’s rationale that Celik Halat’s representative should have made a timely extension request on the filing date or should have submitted an “untimely” extension request at the earliest opportunity.<sup>5</sup>

Had Celik Halat’s representative filed an extension request when the difficulty encountered with the filing of the Home Market Sales Table exhibit appeared (which plaintiff states, and defendant does not contest, was at 4:12 p.m. ET), one of three events would have occurred. If Commerce, consistent with the language in the Department’s August 5, 2020 letter, rejected the emergency extension request, then the representative may have lost additional time seeking the request, and the filing of the exhibit may have occurred even later than 5:21 p.m. A second possibility is that Commerce, despite the language in the August 5 letter, would have granted a brief extension, in which case the need for this litigation would not have arisen. The court notes a third possibility: Celik Halat’s representative would not have received an answer from Commerce in the short time remaining before the 5:00 p.m. deadline. As the court explains below, the result of that event also would have been that the need for this litigation never would have arisen.

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<sup>5</sup> The language of 19 C.F.R. § 351.302(c) was a further discouragement for Celik Halat’s filing, as soon as possible, what Commerce terms an “untimely” extension request. This regulation warns, in unambiguous language, that “[a]n untimely filed extension request *will not be considered* unless the party demonstrates that an extraordinary circumstance exists.” 19 C.F.R. § 351.302(c) (emphasis added). The regulation set forth a standard that, as applied to the situation confronting Celik Halat’s representative on the afternoon of August 10, 2020, was unforgiving: the regulation expressly confined an “extraordinary circumstance” to one that “could not have been prevented if reasonable measures had been taken” and that “[p]recludes a party or its representative from timely filing an extension request through all reasonable means.” *Id.* § 351.302(c)(2). In light of the language of the regulation, Celik Halat’s representative reasonably could conclude that Commerce would not consider the technical filing issues encountered on August 10, 2020 to constitute an extraordinary circumstance.

The Preamble to the 2013 regulatory amendment states that “[f]or submissions that are due at 5:00 p.m., if the Department is not able to notify the party requesting the extension of the disposition of the request by 5:00 p.m., then the submission would be due by the opening of business (8:30 a.m.) on the next work day.” *Preamble*, 78 Fed. Reg. at 57,792 (citing 19 C.F.R. § 351.103(b), which sets forth general information, including office hours, but does not address the time at which submissions are due). Notably, Commerce made no mention of this Preamble language in its Final Issues and Decision Memorandum, and none of the parties identified it in briefing in this case. Considering it *sua sponte*, the court declines to apply it to plaintiff’s prejudice. While litigants are presumed to be on notice of preamble language that interprets a regulation being promulgated, the “8:30 a.m.” preamble language is not interpretive but a substantive provision that Commerce should have included in the codified regulation. Had Commerce done so, it is possible that Celik Halat’s representative would have been aware of it. But it is not reasonable for the court to expect a filer to be on notice of, or to allow a litigant to be prejudiced by, a substantive regulatory provision buried within preamble language, especially a provision that was published in the Federal Register nearly seven years before the due date of a filing and never issued as a regulation or rule.

Nevertheless, the Preamble language is relevant to this dispute in a certain respect. Under the rule it states, a filer encountering technical difficulty filing on ACCESS could obtain an automatic extension until 8:30 a.m. the next business day simply by submitting a request for a brief extension close to a 5:00 p.m. filing deadline. The “8:30 a.m.” regulatory provision hidden in the Preamble indicates to the court that in this situation, Commerce made far too much of the filing of an exhibit that occurred 21 minutes after the 5:00 p.m. deadline but more than 15 hours before 8:30 a.m. on the next business day. This uncodified regulatory provision is another reason the court concludes that the Department’s severely penalizing the 21-minute delay in Celik Halat’s filing of the exhibit was an abuse of its discretion.

Defendant-intervenors argue that “to the extent [Celik] Halat’s post-rejection request is deemed an ‘untimely filed’ extension request, [Celik] Halat failed to demonstrate that an extraordinary circumstance existed, as Commerce properly concluded.” Def.-Intervenors’ Resp. 19. But even were the court to presume, *arguendo*, that Celik Halat’s representative had not described what Commerce would consider an “extraordinary circumstance”—and on these particular facts the court need not decide that issue—Commerce imposed a grossly disproportionate penalty for what essentially was a minor technical

violation that had no discernible effect on the investigation. While Commerce has the authority to establish and enforce its own regulations, it is not free to apply its “extraordinary circumstance” rule in so harsh a way as to produce an unjust and punitive result. *See F.lli De Cecco Di Filippo Fara S. Martino S.p.A.*, 216 F.3d at 1032 (cautioning against a punitive, as opposed to remedial, use of 19 U.S.C. § 1677e(b)).

Plaintiff cites a series of decisions to support the proposition that “[a]s confirmed by court precedent, the antidumping duty statute prohibits Commerce from taking an inflexible approach to all submissions for deadlines not dictated by statute.” Pl.’s Mot. 18. Defendant counters that “the cases referenced are inapposite,” Def.’s Resp. 11, and claims that, given Celik Halat’s knowledge of the established deadlines in this case and the importance of submitting its documents in a timely manner, “[f]airness and accuracy concerns . . . do not require this Court to set aside Commerce’s application and enforcement of the deadline in this case.” *Id.* at 15. The court disagrees.

The Department’s procedures as applied in this case insisted on technical perfection in the filing of documents on its ACCESS system. In that regard, plaintiff explains, and defendant does not dispute, that Celik Halat’s representative first attempted to file the exhibit at issue at 4:12 p.m. on the filing due date and that ACCESS rejected it “on the ground that it contained ‘no searchable text.’” Pl.’s Mot. 2. Also, there seems to be no dispute that the representative’s difficulty in correcting this formatting issue caused, or at least contributed to, the 21-minute time period following the 5:00 p.m. filing deadline that elapsed before the filing of the exhibit was completed. *Id.* at 3 (“At 5:21 p.m. ET, after numerous attempts, Celik Halat’s representative gave up trying to submit the PDF version of the Home Market Sales Table, and instead filed the Excel version of the Home Market Sales Table.”). Commerce even acknowledged that it has allowed for out-of-time extensions due to technical filing issues in the past despite the language in its regulations. *Final I&D Mem.* at 7 (finding “examples of Commerce[’s] previously granting out-of-time extensions [] immaterial here”). No one who has confronted issues in using automated filing systems would dispute that unanticipated technical difficulties do sometimes occur. While Commerce insisted on technical perfection, on this record the court will not do so.

The court does not suggest that Commerce could not have taken some action in response to the missed deadline, such as a warning. But, as this Court states in *Celik Halat ve Tel Sanayi A.S. v. United States*, 46 CIT \_\_, Slip. Op. 22–13 (Feb. 15, 2022) (which arose from

the concurrent countervailing duty investigation),<sup>6</sup> at this point in the litigation the court's concern is to remedy the damage done by the Department's unfair treatment of Celik Halat. Therefore, the court is ordering Commerce to determine a new estimated dumping margin for Celik Halat that does not resort to 19 U.S.C. § 1677e with respect to the filing of the Sections B and C questionnaire response. The court is requiring Commerce to submit a remand redetermination within 45 days so that the court may fashion an appropriate remedy on an expedited basis.

### III. CONCLUSION AND ORDER

The facts and circumstances considered on the whole demonstrate that Commerce abused its discretion to impose a draconian penalty upon plaintiff for a minor and inadvertent technical error by its counsel that had no appreciable effect on the antidumping duty investigation. The court will allow only a limited period of time for Commerce to correct the serious, prejudicial consequences of its error.

Therefore, upon consideration of all papers and proceedings herein, and upon due deliberation, it is hereby

**ORDERED** that plaintiff's Rule 56.2 Motion for Judgment on the Agency Record, ECF No. 20 (May 28, 2021), be, and hereby is, granted; it is further

**ORDERED** that Commerce, within 45 days from the date of issuance of this Opinion and Order, shall submit a redetermination upon remand ("Remand Redetermination") that complies with this Opinion and Order; it is further

**ORDERED** that plaintiff and defendant-intervenors shall have 20 days from the filing of the Remand Redetermination in which to submit comments to the court; it is further

**ORDERED** that should plaintiff or defendant-intervenors submit comments, defendant shall have 10 days from the date of filing of the last comment to submit a response; and it is further

**ORDERED** that plaintiff's Motion for Oral Argument (Sept. 13, 2021), ECF No. 26, is denied.

Dated: February 15, 2022

New York, New York

*/s/ Timothy C. Stanceu*  
TIMOTHY C. STANCEU, JUDGE

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<sup>6</sup> Celik Halat was confronted with the need to comply, simultaneously, with the Department's questionnaires in the parallel antidumping and countervailing duty investigations.

## Slip Op. 22–13

CELIK HALAT VE TEL SANAYI A.S., Plaintiff, v. UNITED STATES, Defendant, and INSTEEL WIRE PRODUCTS COMPANY, SUMIDEN WIRE PRODUCTS CORPORATION, and WIRE MESH CORP., Defendant-Intervenors.

Before: Timothy C. Stanceu, Judge  
Court No. 21–00050

[Granting plaintiff's motion for judgment on the agency record in an action contesting a final determination in a countervailing duty investigation.]

Dated: February 15, 2022

*Irene H. Chen*, Chen Law Group LLC, of Rockville, MD, for plaintiff Celik Halat ve Tel Sanayi A.S.

*Miles K. Karson*, Trial Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, for defendant United States. With him on the submission were *Brian M. Boynton*, Acting Assistant Attorney General, *Jeanne E. Davidson*, Director, and *Tara K. Hogan*, Assistant Director. Of counsel on the submission was *Reza Karamloo*, Senior Counsel, Office of the Chief Counsel for Trade Enforcement and Compliance, U.S. Department of Commerce, of Washington, DC.

*Kathleen W. Cannon*, Kelley Drye & Warren LLP, of Washington, DC, for defendant-intervenors Insteel Wire Products Company, Sumiden Wire Products Corporation, and Wire Mesh Corp. With her on the submission were *Paul C. Rosenthal*, *R. Alan Luberda*, *Brooke M. Ringel*, and *Joshua R. Morey*.

## OPINION AND ORDER

### Stanceu, Judge:

Plaintiff Celik Halat ve Tel Sanayi A.S. (“Celik Halat”) contests a final determination by the International Trade Administration, U.S. Department of Commerce (“Commerce” or the “Department”) in a countervailing duty (“CVD”) investigation of certain prestressed concrete steel wire strand (“PC strand”) from the Republic of Turkey (“Turkey”), and the associated countervailing duty order. Commerce determined an estimated net CVD subsidy rate of 158.44%, and imports of Celik Halat’s merchandise are now subject to cash deposits at this *ad valorem* rate.

The high countervailing duty rate resulted from the Department’s decision to reject, as untimely filed, Celik Halat’s response to “Section III” of the Department’s initial questionnaire (“Initial Questionnaire”), for an inadvertent filing error by Celik Halat’s counsel. Although a version of the Initial Questionnaire response was timely filed on the due date, Celik Halat’s counsel electronically filed the “final” business proprietary version, and the public version, of the document on the following business day, as the Department’s regula-

tions allowed, but counsel erroneously made the filing 87 minutes after the 5:00 p.m. filing deadline.

The court sets the contested determination aside because certain findings of fact on which Commerce relied, and which were essential to that determination, are not supported by substantial evidence on the record and also because Commerce abused its discretion when imposing a drastic and disproportionate penalty for a technical error by plaintiff's counsel that had no appreciable effect on the investigation. The court remands the decision to Commerce for corrective action.

## I. BACKGROUND

### A. The Contested Decision and the Countervailing Duty Order

The contested countervailing duty determination (the “Final Determination”) is *Prestressed Concrete Steel Wire Strand From the Republic of Turkey: Final Affirmative Countervailing Duty Determination and Final Negative Critical Circumstances Determination*, 85 Fed. Reg. 80,005 (Int'l Trade Admin. Dec. 11, 2020) (“*Final Determination*”). The Final Determination incorporates by reference an “Issues and Decision Memorandum” containing explanatory discussion. *Decision Memorandum for the Final Determination of the Countervailing Duty Investigation of Prestressed Concrete Steel Wire Strand from the Republic of Turkey* (Dec. 7, 2020) (P.R. Docs. 370–72) (“*Final I&D Mem.*”).<sup>1</sup>

Commerce published the countervailing duty order (the “Order”) on February 3, 2021. *Prestressed Concrete Steel Wire Strand From the Republic of Turkey: Countervailing Duty Order*, 86 Fed. Reg. 7,990 (Int'l Trade Admin.) (“*Order*”). The Order applies to PC strand that is “produced from wire of non-stainless, non-galvanized steel.” *Id.* at 7,991. PC strand “consists of multiple steel wires (non-stainless and non-galvanized) wound together to produce a strong, flexible product that is used to strengthen prestressed concrete structures.” *Prestressed Concrete Steel Wire Strand from Argentina, Colombia, Egypt, Indonesia, Italy, Malaysia, Netherlands, Saudi Arabia, South Africa, Spain, Taiwan, Tunisia, Turkey, Ukraine, and United Arab Emirates – Petition for the Imposition of Antidumping and Countervailing Duties* 12 (Apr. 16, 2020) (P.R. Docs. 1–10).

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<sup>1</sup> All information disclosed in this Opinion and Order was obtained from the public record. Public documents in the administrative record are cited as “P.R. Doc. \_\_\_.”



## B. The Parties

Plaintiff is a Turkish producer and exporter of PC strand and was a mandatory respondent in the investigation that resulted in the Final Determination. *See* Compl. ¶¶ 1, 3, 7 (Feb. 3, 2021), ECF No. 2.

Defendant is the United States. Defendant-intervenors Insteel Wire Products Company, Sumiden Wire Products Corporation, and Wire Mesh Corp. are U.S. domestic producers of PC strand that were the petitioners in the countervailing duty investigation. Consent Mot. to Intervene as of Right 2 (Feb. 25, 2021), ECF No. 8.

## C. Proceedings Before Commerce and the International Trade Commission

On May 13, 2020, Commerce published an initiation notice for a countervailing duty investigation “to determine whether imports of PC strand from Turkey benefit from countervailable subsidies” conferred by the government of Turkey. *Prestressed Concrete Steel Wire Strand From the Republic of Turkey: Initiation of Countervailing Duty Investigation*, 85 Fed. Reg. 28,610, 28,612 (Int’l Trade Admin.).

On June 4, 2020, Commerce selected Güney Çelik Hasir ve Demir and Haşçelik Halat Sanayi Ticaret A.S. (“Haşçelik”) as mandatory respondents for the countervailing duty investigation. *Countervailing Duty Investigation of Prestressed Concrete Steel Wire Strand from the Republic of Turkey: Respondent Selection 2* (June 25, 2020) (P.R. Doc. 58) (“*Respondent Selection*”). Commerce sent an Initial Questionnaire to the Turkish government on June 9, 2020, and requested that the government forward copies of the Initial Questionnaire to the mandatory respondents. *Investigation of Prestressed Concrete Steel Wire from the Republic of Turkey: Countervailing Duty Questionnaire 1* (P.R. Doc. 49). On June 25, 2020, Commerce revised its selection of mandatory respondents, determining that Celik Halat would be the second mandatory respondent in the investigation and suspending Haşçelik’s obligation to participate. *Respondent Selection* at 2, 5.

On August 5, 2020, the three petitioners submitted to Commerce “allegations of possible new subsidies” alleged to have been provided by the government of Turkey to Turkish producers of PC strand. *Prestressed Concrete Steel Wire Strand from the Republic of Turkey—Petitioners’ New Subsidy Allegations 1* (P.R. Doc. 180). On September 1, 2020, Commerce initiated a supplemental investigation of two programs (Exemption of Exchange Tax for Foreign Exchange Transactions and Provision of Steel Wire Rod for Less Than Adequate Remuneration (“LTAR”)) that were identified in the petitioners’ alle-

gations. *Countervailing Duty Investigation of Prestressed Concrete Steel Wire Strand from the Republic of Turkey: Post-Preliminary Analysis 1* (Nov. 19, 2020) (P.R. Doc. 352).

On September 21, 2020, Commerce published its Preliminary Determination, in which it preliminarily determined an estimated net countervailable subsidy rate of 135.06% for Celik Halat. *Prestressed Concrete Steel Wire From the Republic of Turkey: Preliminary Affirmative Countervailing Duty Determination, Preliminary Affirmative Critical Circumstances Determination, in Part*, 85 Fed. Reg. 59,287, 59,288 (Int'l Trade Admin.). In the Preliminary Determination, Commerce announced that it would instruct U.S. Customs and Border Protection ("Customs") to collect cash deposits at the rate of 135.06% on entries of subject merchandise exported by Celik Halat, on and after the September 21, 2020 date of publication of the Preliminary Determination. *Id.* The Preliminary Determination incorporated by reference the "Preliminary Decision Memorandum." *Decision Memorandum for the Preliminary Determination of the Countervailing Duty Investigation of Prestressed Concrete Steel Wire from the Republic of Turkey* (Int'l Trade Admin. Sept. 14, 2020) (P.R. Doc. 253) ("*Prelim. Decision Mem.*"). For purposes of the Preliminary Determination, Commerce deferred examination of five programs (Investment Incentive Scheme Program—Value-Added Tax ("VAT") programs, Natural Gas for LTAR, Güney Çelik Hasir ve Demir's Unknown Tax Program, Export Buyer's Credits, and Renewable Energy Mechanism) in addition to the two programs identified in the petitioners' new subsidy allegations. *Id.* at 33. The Final Determination was published on December 11, 2020, establishing the final estimated net countervailable subsidy rate of 158.44% for Celik Halat. *Final Determination*, 85 Fed. Reg. at 80,006.

On January 25, 2021, the U.S. International Trade Commission ("ITC") notified Commerce that it had reached an affirmative final determination that an industry in the United States was materially injured by reason of imports of PC strand from Turkey. *Order*, 86 Fed. Reg. at 7,991. Commerce announced that it would direct Customs to collect cash deposits at the increased rate of 158.44% for each entry of subject merchandise exported by Celik Halat made on or after the date of publication of the ITC's affirmative final injury determination. *Id.* The ITC published its determination four days later. *Prestressed Concrete Steel Wire Strand From Argentina, Colombia, Egypt, Netherlands, Saudi Arabia, Taiwan, Turkey, and the United Arab Emirates*, 86 Fed. Reg. 7,564 (Int'l Trade Comm'n Jan. 29, 2021). Publication of the Order followed thereafter. *Order*, 86 Fed. Reg. at 7,990.

### D. Proceedings Before the Court

Plaintiff brought this action to contest the Final Determination on February 3, 2021. Summons, ECF No. 1; Compl., ECF No. 2. On February 25, 2021, Insteel Wire Products Company, Sumiden Wire Products Corporation, and Wire Mesh Corp. filed a consent motion to intervene as defendant-intervenors. Consent Mot. to Intervene as of Right, ECF No. 8. The court granted defendant-intervenors' motion on February 26, 2021. Order, ECF No. 13.

Pending for decision by the court is plaintiff's Rule 56.2 Motion for Judgment on the Agency Record, with accompanying memorandum. Pl.'s Rule 56.2 Mot. for J. on the Agency R. (May 28, 2021), ECF Nos. 19 (conf.), 20 (public) ("Pl.'s Mot"). Defendant responded on July 27, 2021. Def.'s Resp. to Pl.'s Mot. for J. on the Agency R., ECF No. 22 ("Def.'s Resp."). Defendant-intervenors responded on July 27, 2021. Def.-Intervenors' Resp. in Opp'n to Pl.'s Mot. for J. on the Agency R., ECF Nos. 21 (conf.), 23 (public) ("Def.-Intervenors' Resp."). Plaintiff replied on August 24, 2021. Reply Br. of Pl. Celik Halat ve Tel Sanayi A.S., ECF Nos. 24 (conf.), 25 (public).

On September 13, 2021, plaintiff filed an unopposed motion for oral argument on their Rule 56.2 motion. Mot. for Oral Argument, ECF No. 28.

## II. DISCUSSION

### A. Jurisdiction and Standard of Review

The court exercises jurisdiction under section 201 of the Customs Courts Act of 1980, 28 U.S.C. § 1581(c), pursuant to which the court reviews actions commenced under section 516A of the Tariff Act of 1930 (the "Tariff Act"), *as amended*, 19 U.S.C. § 1516a, including an action contesting a final determination that Commerce issues to conclude a CVD investigation.<sup>2</sup>

In reviewing a final determination, the court "shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). Substantial evidence refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *SKF USA, Inc. v. United States*, 537 F.3d 1373, 1378 (Fed. Cir. 2008) (quoting *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

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<sup>2</sup> All citations to the United States Code herein are to the 2018 edition and all citations to the Code of Federal Regulations herein are to the 2020 edition.

Decisions that an agency makes in the enforcement and administration of its regulatory requirements that call for an exercise of discretion are examined according to an abuse of discretion standard. *See, e.g., Brennan v. Dept of Health & Human Servs.*, 787 F.2d 1559, 1564 (Fed. Cir.), *cert. denied*, 479 U.S. 985 (1986).

### **B. Prior Related Litigation Between the Parties**

Celik Halat initiated an action in this Court in November 2020, after Commerce issued the Preliminary Determination and before it issued the Final Determination. *See Celik Halat ve Tel Sanayi A.S. v. United States*, 44 CIT \_\_, \_\_, 483 F. Supp. 3d 1370, 1376 (Dec. 6, 2020). Celik Halat brought this action pursuant to 28 U.S.C. § 1581(i), which provides residual jurisdiction over matters not otherwise covered by 28 U.S.C. § 1581(a)–(h), arguing that “[j]urisdiction is proper under 28 U.S.C. § 1581(i) because Commerce’s decision to reject Celik Halat’s submissions at this stage of the investigation will result in immediate injury and irreparable harm, making relief under 28 U.S.C. § 1581(c) manifestly inadequate” when Celik Halat would need to wait until the completion of the CVD investigation to bring an action under 28 U.S.C. § 1581(c). Compl. ¶¶ 24, 26 (Nov. 19, 2020), Ct. No. 20–03848, ECF No. 2.

Celik Halat moved for a temporary restraining order and a preliminary injunction to enjoin Commerce from continuing to reject its Section III responses to the Department’s Initial Questionnaire in the CVD investigation of PC strand from Turkey. *Celik Halat ve Tel Sanayi A.S.*, 44 CIT at \_\_, 483 F. Supp. 3d at 1374–76. The government argued that Celik Halat lacked subject matter jurisdiction, that the claim was not ripe, that it intended to file a motion to dismiss, and that Celik Halat therefore was unlikely to succeed on the merits. *Id.*, 44 CIT at \_\_, 483 F. Supp. 3d at 1377–78. This Court agreed with the government’s argument and explained that, although Celik Halat had “styled” the action as one under 28 U.S.C. § 1581(i), the “true nature” of Celik Halat’s claim arose under 28 U.S.C. § 1581(c) because the ultimate relief Celik Halat sought—a remand order directing Commerce to reconsider its rejection of Celik Halat’s Section III Initial Questionnaire responses—is available under 28 U.S.C. § 1581(c). *Id.* Concluding that plaintiff would not succeed in establishing jurisdiction, this Court denied Celik Halat’s motion for a temporary restraining order and preliminary injunction. *Id.*, 44 CIT at \_\_, 483 F. Supp. 3d at 1381. While denying Celik Halat’s motion, this Court, in *dicta*, expressed concerns regarding the Department’s actions in the underlying investigation:

Plaintiff submits that Commerce abused its discretion in rejecting its questionnaire responses because Commerce has granted extensions for reasons less severe than the circumstances surrounding the alleged 87-minute delay that gives rise to this action. Plaintiff's allegations raise serious concerns regarding Commerce's justification for rejecting Plaintiff's requests for reconsideration; however, these concerns are insufficient to establish that Plaintiff is likely to succeed in light of the jurisdictional and ripeness concerns.

*Id.*, 44 CIT at \_\_, 483 F. Supp. 3d at 1379 (citation omitted).

Shortly thereafter, the government filed a motion to dismiss for lack of jurisdiction, Def.'s Mot. to Dismiss the Compls. (Dec. 10, 2020), Ct. No. 20-03848, ECF No. 22, which was granted by this Court on March 24, 2021. Order, Ct. No. 20-03848, ECF No. 26; Judgment, Ct. No. 20-03848, ECF No. 27.

### **C. Celik Halat's Claims in This Litigation**

In applying the 158.44% subsidy rate to exports of Celik Halat's subject merchandise, Commerce invoked its authority under section 776(a) of the Tariff Act, 19 U.S.C. § 1677e(a), to use "the facts otherwise available" and its authority under section 776(b) of the Tariff Act, 19 U.S.C. § 1677e(b), to use an "adverse inference," to reject as untimely Celik Halat's response to Section III of the Department's Initial Questionnaire in the investigation. Plaintiff claims that this determination was unlawful because it was "a severe abuse of discretion," Pl.'s Mot. 15-24, was unreasonable, *id.* at 27-28, and was unsupported by substantial evidence on the record, *id.* at 28-30.

#### **1. The Department's Use of "the Facts Otherwise Available" under 19 U.S.C. § 1677e(a)**

In the Preliminary Decision Memorandum, Commerce preliminarily found as a fact that "Celik Halat filed an untimely response to Commerce's initial CVD questionnaire." *Prelim. Decision Mem.* at 9. As a second preliminary finding, Commerce added that "[t]herefore, we preliminarily find that, by not timely responding to Commerce's questionnaire, Celik Halat withheld information that had been requested and failed to provide information within the deadlines established." *Id.* The Department's third preliminary finding was that "[b]y not responding to the initial CVD questionnaire, Celik Halat significantly impeded this proceeding." *Id.* Based on these three findings of fact, Commerce stated that "[t]hus, in reaching a preliminary determination, pursuant to sections 776(a)(2)(A), (B), and (C) of the [Tariff]

Act [19 U.S.C. § 1677e(a)(2)(A), (B), and (C), respectively, which apply to use of “the facts otherwise available”], we based the CVD rates for Celik Halat on facts available.” *Id.*

Commerce then reached a preliminary finding based on section 776(b) of the Tariff Act, 19 U.S.C. § 1677e(b), which provides for Commerce to use an inference adverse to a non-cooperating party when selecting from among the facts otherwise available: “Moreover, we preliminarily determine that an adverse inference is warranted, pursuant to section 776(b) of the Act [19 U.S.C. § 1677e(b)] because, by not timely responding to the initial CVD questionnaire, Celik Halat failed to cooperate to the best of its ability to comply with the requests for information in this investigation.” *Id.* When invoking both sections 776(a) and (b) of the Tariff Act, Commerce applies what it terms “adverse facts available,” or “AFA.” The Preliminary Decision Memorandum states that “as AFA, Commerce preliminarily finds that Celik Halat and its cross-owned affiliates from which we would attribute subsidies received to Celik Halat under our attribution rules, pursuant to 19 CFR 351.525, received and benefited from certain subsidies.” *Id.* (footnote omitted).

After summarizing and citing its discussion in the Preliminary Decision Memorandum, *Final I&D Mem.* at 34, Commerce adopted, without change, its analysis for its use of facts otherwise available and an adverse inference, *id.* at 35 (“For the purposes of this final determination, we find no basis to alter our use of AFA pursuant to section 776(b) of the [Tariff] Act [19 U.S.C. § 1677e(b)] . . .”). In so doing, Commerce implicitly adopted its four preliminary findings as final findings of fact upon reaching the Final Determination. The court examines, first, the three findings upon which Commerce based its decision to reject Celik Halat’s Initial Questionnaire response and substitute for it “the facts otherwise available.”

Under 19 U.S.C. § 1677e(a), Commerce is directed to use “the facts otherwise available” in specifically defined circumstances. Here, in resorting to the use of the facts otherwise available, Commerce relied upon the three circumstances defined in subparagraphs (2)(A), (2)(B), and (2)(C) of § 1677e(a), respectively. Under subparagraph (2)(A), Commerce is directed to use the facts otherwise available “[i]f . . . an interested party . . . withholds information that has been requested by the administering authority . . . [i.e., Commerce] under this subtitle.” The record does not support a finding of fact that Celik Halat withheld “information that has been requested” by Commerce.

Section 351.303 of the Department’s regulations provides, generally, for the filing of documents such as questionnaire responses in at

least two versions, “business proprietary” and “public.” *See* 19 C.F.R. §§ 351.303(b), 351.304. A document in the former category contains within single brackets business proprietary information that may be released only to persons authorized to receive submissions under an administrative protective order.<sup>3</sup> *See id.* The public version of a business proprietary document is a document from which the bracketed information has been redacted. *See id.* §§ 351.303(b)(4)(iv), 351.304(c).

Under the Department’s regulations, Celik Halat was required to file its response to the Initial Questionnaire electronically on the Department’s automated “ACCESS” system, by “5 p.m. Eastern Time” on the due date, which in this instance was Friday, August 7, 2020. *See id.* § 351.303(b)(1) (“An electronically filed document must be received successfully in its entirety by the Department’s electronic records system, ACCESS, by 5 p.m. Eastern Time on the due date”), (b)(2)(i) (“A person must file all documents and databases electronically using ACCESS . . .”). In submitting its response, Celik Halat had the option of filing both a business proprietary version and a public version of its Initial Questionnaire response on the due date. Alternatively, Celik Halat could choose to avail itself of an optional procedure in the Department’s regulations (the “one-day lag rule”), under which it could file only a business proprietary version and take an extra business day to refile its business proprietary version, making any changes it found necessary in its bracketing of business proprietary information, and the public version of the document, with redactions consistent with the final bracketing. *See id.* § 351.303(c). The regulations specify that “the public version” must be filed “[s]imultaneously with the filing of the final business proprietary document.” *Id.* § 351.303(c)(2)(iii).

Celik Halat chose the option of using the one-day lag rule, which required that the document it was to file on Friday, August 7, 2020 include on each page containing business proprietary information the notation “Business Proprietary Treatment Requested” and the warning “Bracketing of Business Proprietary Information Is Not Final for One Business Day After Date of Filing.” *See id.* § 351.303(d)(2)(v). The regulations setting forth the one-day lag rule require that “[a] person must file a business proprietary document with the Department within the applicable time limit.” *Id.* § 351.303(c)(2)(i). As to the initial filing, Celik Halat complied with this requirement: it is uncon-

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<sup>3</sup> The regulations also provide for submissions to contain another category of proprietary information, set forth in double brackets, that may not be released under an administrative protective order. *See* 19 C.F.R. § 351.303(b)(4)(ii).

tested that Celik Halat timely filed, on ACCESS, a business proprietary document responding to the Initial Questionnaire on Friday, August 7, 2020.

The regulations setting forth the one-day lag rule require that “[b]y the close of business one business day after the date the business proprietary document is filed . . . a person must file the complete final business proprietary document with the Department.” *Id.* § 351.303(c)(2)(ii). The regulations require, further, that:

The final business proprietary document must be *identical in all respects* to the business proprietary document filed on the previous day except for any bracketing corrections and the omission of the warning “Bracketing of Business Proprietary Information Is Not Final for One Business Day After Date of Filing” in accordance with paragraph (d)(2)(v) of this section.

*Id.* (emphasis added).

The Department’s regulations did not permit Celik Halat to make any changes to the business proprietary document it filed on Friday, August 7, 2020, other than to add or delete any brackets it considered necessary to its compliance with the procedures for protection from public disclosure of business proprietary information under the applicable administrative protective order and the deletion of the “warning.” The regulations required that the version Celik Halat timely filed on August 7, 2020, be final in almost every respect and that the *only* aspect of Celik Halat’s response to Section III of the Initial Questionnaire that was *not* final was the “Bracketing of Business Proprietary Information.” *Id.* In other words, it was only the “bracketing” of business proprietary information—not the information itself—that Celik Halat could alter when it later filed the final version of the business proprietary version, and the public version, of the August 7, 2020 document. Because Celik Halat was not permitted to alter the business proprietary information itself, or any other information, that had been contained in the August 7, 2020 document when it later filed the “one-day lag” versions, the “information” that document provided in response to the Department’s Initial Questionnaire could not be expanded upon, reduced, or modified in any way.

Based on the Department’s regulations, the court disallows the Department’s factual finding that Celik Halat “withheld requested information.” Under the ordinary meaning of subparagraph (2)(A) of § 1677e(a), Celik Halat did not withhold information. By 5:00 p.m. on August 7, 2020, the Department possessed all the information Celik Halat was permitted to provide in response to the Initial Questionnaire. The technical fact that the bracketing of the proprietary information in that document was subject to change by the close of the



next business day was not evidence supporting a finding that Celik Halat “withheld” from Commerce any “information” Commerce requested, and no other evidence is available on the record to support such a finding. Commerce reasoned, nevertheless, that “[t]he missing information in this case is not the [*sic*] minor or incidental to Commerce’s subsidy rate calculation; instead, [it was] the section III initial questionnaire response that would have established benefit and usage information for all of the initiated programs in an investigation.” *Final I&D Mem.* at 37. This finding was impermissible and nonsensical: the information Commerce characterized as “missing” is information Commerce itself removed from the record, i.e., Celik Halat’s timely-filed submission of August 7, 2020.

The purpose of the one-day lag rule is not to provide a mechanism for a party to file, or for Commerce to obtain, information in addition to the information presented in the original submission. Instead, as practitioners before the Department are well aware, the purpose of the procedure is to allow counsel to review their bracketing so as to ensure that business proprietary information is not inadvertently released to the public when the public version (which must correspond precisely to the final business proprietary version, except for the redaction of the bracketed information) is released. Counsel are subject to serious sanction should a bracketing error be made that results in disclosure of business proprietary information. Thus, the one-day lag rule serves a valid purpose. It is unrelated to, and cannot justify, the action Commerce took to punish Celik Halat for a technical violation of the filing requirement for the final business proprietary and public versions of its timely-filed August 7, 2020 submission.

The Department’s factual finding under subparagraph (2)(B) of 19 U.S.C. § 1677e(a) that “[b]y not responding to the initial CVD questionnaire, Celik Halat significantly impeded this proceeding,” *Prelim. Decision Mem.* at 9, also lacked any support in the record evidence. Plaintiff asserts that its counsel accomplished the electronic filing at 6:27 p.m. Eastern Time (“ET”) on August 10, 2020. Pl.’s Mot. 3–4. Defendant does not dispute this assertion. The only consequence of the missed deadline was that Commerce was delayed by 87 minutes from knowing the final bracketing treatment Celik Halat would apply to its claim of business proprietary treatment for the business proprietary information in its response to the Initial Questionnaire. This technical violation could not conceivably have impeded the investigation. Nothing prevented Commerce from beginning to use the information contained in the August 7, 2020 version of Celik Halat’s Initial Questionnaire response (which could not permissibly be modified by

the later submission), even had Commerce chosen to do so between 5:00 p.m. ET and 6:27 p.m. ET on the evening of Monday, August 10, 2020. Therefore, the record evidence does not support a finding that Celik Halat “significantly impeded” the proceeding, and the court must disallow this finding as well.

Because two of the three critical findings of fact upon which Commerce based its decision to use “the facts otherwise available” in place of Celik Halat’s response to the Initial Questionnaire lack any support in the evidentiary record, the court must remand the Final Determination for reconsideration and redetermination. Nevertheless, the court also examines the remaining finding. While the issue presented by this finding is not as straightforward, the Department’s resolution of it is also unsatisfactory.

Subparagraph (2)(B) of 19 U.S.C. § 1677e(a) provides that if an interested party fails to provide the requested “information by the deadlines for submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 1677m of this title,” Commerce “shall, subject to section 1677m(d) of this title, use the facts otherwise available in reaching the applicable determination under this subtitle.” As discussed above, the evidence does not establish that Celik Halat failed to provide the information Commerce requested in the Initial Questionnaire. Moreover, that information, which was contained in the August 7, 2020 submission, was provided “by the deadlines for submission of the information,” the August 7, 2020 submission having been timely filed. 19 U.S.C. § 1677e(a)(2)(B). The authority provided by subparagraph (2)(B), therefore, was availing only if there was information that was not timely submitted or not submitted “in the form and manner requested,” and only if the Department’s refusal to use that information, and its resort to the facts otherwise available, were not contrary to 19 U.S.C. § 1677m(c)(1), (d), or (e).

The information in the August 7, 2020 submission is not within the scope of 19 U.S.C. § 1677e(a)(2)(B) because it was timely submitted on that date and because the record evidence does not show that it failed to meet any of the Department’s requirements as submitted on that date. As the court discussed previously, the information itself, as distinct from the final bracketing along which that information was presented in the text, must be deemed to have been submitted in full on August 7, 2020, because the final business proprietary and public versions of the August 7, 2020 document were not permitted to make any changes to that information.

The only “information” that conceivably could be considered to be described by § 1677e(a)(2)(B) was the final location of the brackets

surrounding business proprietary information in the Initial Questionnaire response. To be sure, Celik Halat was required by 19 C.F.R. § 351.303 of the Department's regulations to inform Commerce of the final location of its brackets by 5:00 p.m. on Monday, August 10, 2020, by means of filing the final business proprietary and public versions of the August 7, 2020 document, and the final location of the brackets serves an important purpose in the protection of business proprietary information. The uncontested fact is that Celik Halat, through its counsel's inadvertence, did not inform Commerce of the final location of its brackets until 6:27 p.m. on that date. But the court is seriously troubled by an interpretation of § 1677e(a)(2)(B) under which Commerce could reject Celik Halat's response to the Initial Questionnaire on the facts and circumstances presented by this case. Here, the only "information" that was untimely, or was not submitted "in the form and manner requested," 19 U.S.C. § 1677e(a)(2)(B), was not the information requested in the Initial Questionnaire *per se* but instead was the final location of the brackets in the text of the Initial Questionnaire response, and even this deficiency went unremedied for only an insignificant period of time. Commerce was not in a position, legally or practically, to use "the facts otherwise available" as a remedy for this minor error. The Department's decision to invoke § 1677e(a)(2)(B) as a basis to reject the entire Initial Questionnaire response for this deficiency imposed a drastic and disproportionate penalty upon Celik Halat for what was, essentially, noncompliance with a technical filing requirement under 19 C.F.R. § 351.303 that had no appreciable effect on the Department's investigation.<sup>4</sup> The Department's action elevated "form over substance" and, in light of all the relevant circumstances, constituted a misuse and misinterpretation of the "facts otherwise available" procedure as it related to § 1677e(a)(2)(B).

## **2. The Department's Use of an Adverse Inference under 19 U.S.C. § 1677e(b)**

Based on the untimeliness of the filings on August 10, 2020, Commerce found that "Celik Halat failed to submit its response to section III of the questionnaire by the established deadline" and on that basis

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<sup>4</sup> Commerce notified Celik Halat of the error on August 19, 2020, nine days after it occurred. *Commerce Letter Re: Countervailing Duty Investigation of Prestressed Concrete Steel Wire Strand from the Republic of Turkey 1* (P.R. Doc. 198). It appears that by the time anyone discovered the error, it had been corrected within 87 minutes of the untimely filing on the evening of August 10, 2020. From all indications in the record, no one could have been prejudiced by this error.

further found that “Celik Halat failed to cooperate to the best of its ability to comply with Commerce’s request for information, within the meaning of section 776(b)(1) of the Act [19 U.S.C. § 1677e(b)(1)].” *Final I&D Mem.* at 34.

Commerce published its Final Determination on December 11, 2020, and, as it had in the Preliminary Determination, resorted to facts otherwise available and an adverse inference, determining a final estimated net countervailable subsidy rate of 158.44% for exports of Celik Halat’s subject merchandise. *Final Determination*, 85 Fed. Reg. at 8,006. Explaining how its decision differed from the Preliminary Determination, which preliminary found a subsidy rate of 135.06%, Commerce stated that “we preliminarily determined to use an adverse inference when selecting from among the facts otherwise available to assign subsidy rates to Celik Halat, in accordance with section 776(b) of the Act [19 U.S.C. § 1677e(b)].” *Final I&D Mem.* at 34 (citing *Prelim. Decision Mem.* at 9). Commerce added that “[w]e included all programs upon which Commerce initiated an investigation to determine the AFA rate, other than those programs we deferred to our post-preliminary analysis.” *Id.* (footnote omitted). “In our post-preliminary analysis, we applied AFA to assign subsidy rates to Celik Halat for those programs we deferred from our *Preliminary Determination*, other than those we found did not provide a countervailable benefit.” *Id.* at 35 (footnote omitted). “For the programs on which we initiated based on the New Subsidy Allegations (NSA programs), we calculated Celik Halat’s subsidy rates based on Celik Halat’s timely response to our NSA questionnaire.” *Id.* (footnote omitted).

There is no dispute that Celik Halat, through the inadvertence of its counsel, missed a filing deadline for the final business proprietary and public versions of its response to the Initial Questionnaire. As a general matter, an attorney’s inadvertently missing a filing deadline can be described as a failure to cooperate that is attributed to the client. But in this circumstance, the fact of the missed deadline, standing alone, did not justify the Department’s use of an adverse inference when determining the subsidy rate for Celik Halat’s exports of subject merchandise. Not every failure to comply with a filing deadline will result in authority to use an adverse inference against an interested party.

If Commerce finds that “an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information from the administering authority,” then “the administering authority . . . may use an inference that is adverse to the interests

of that party *in selecting from among the facts otherwise available.*” 19 U.S.C. § 1677e(b)(1) (emphasis added). As the court has concluded, Commerce erred in making the decision under § 1677e(a) to remove timely-submitted information from the record and substitute for it “the facts otherwise available.” Under § 1677e, a valid finding under § 1677e(a) is a statutory prerequisite for the use of an adverse inference under § 1677e(b). Here, no such valid finding was made. On this record, the Department’s use of an adverse inference to determine the subsidy rate for Celik Halat was, therefore, beyond the Department’s statutory authority.

Defendant argues that Celik Halat’s missing the 5:00 p.m. filing deadline constituted a “failure to cooperate” that justified the Department’s use of what it describes as “adverse facts available.” Def.’s Resp. 17–21. In making this argument, defendant asserts that “Commerce’s decision was in accordance with law and supported by substantial evidence.” *Id.* at 17. Defendant-intervenors make essentially the same argument. Def.-Intervenors’ Resp. 13–18. The court disagrees. Commerce erroneously decided, based on unsupported findings and a misuse of its authority, that it had a valid basis to use “the facts otherwise available” under 19 U.S.C. § 1677e(a). Defendant-intervenors assert that “[i]t is not disputed that [Celik] Halat’s Section III questionnaire response—containing virtually all information necessary for Commerce to calculate a subsidy rate—was not filed by the applicable 5:00 p.m. Eastern Time deadline.” *Id.* at 1. Defendant-intervenors’ assertion, if not false, is at best misleading. Commerce was provided, in a timely manner, the substantive information necessary to calculate a subsidy rate on the previous Friday, August 7, 2020. The 87-minute delay in the Department’s knowing Celik Halat’s final bracketing had no conceivable effect on that calculation. Defendant-intervenors argue, further, that “the courts have repeatedly affirmed Commerce’s authority to enforce its own deadlines and rules requiring the rejection of untimely factual information.” *Id.* at 2. This argument is also misleading. The “factual information” contained within Celik Halat’s Initial Questionnaire response was timely filed in its August 7, 2020 submission.

#### **D. The Department’s Reliance on Certain Filing and Filing Extension Procedures in its Regulations**

In addition to its reliance on 19 U.S.C. § 1677e (which was misplaced for the reasons the court discussed above), Commerce based its decision to reject the Initial Questionnaire response on 19 C.F.R. § 351.302(c), under which it will grant “untimely” requests for extensions of filing deadlines only in “an extraordinary circumstance.” Commerce further relied upon other, related regulatory provisions.

The court concludes that the regulatory provisions upon which Commerce relied do not suffice to sustain the Department's Final Determination given all the circumstances presented by this case. Below, the court presents in detail the circumstances surrounding Celik Halat's extension requests, its submissions of Initial Questionnaire response documents, and the actions Commerce took under its regulations.

Celik Halat's response to Section III of the Initial Questionnaire originally was to be submitted to Commerce by Monday, August 3, 2020. *Investigation of Prestressed Concrete Steel Wire from the Republic of Turkey: Countervailing Duty Respondent Selection 2* (June 26, 2020) (P.R. Doc. 60). On the previous Monday, July 27, 2020, Celik Halat requested that Commerce grant a two-week extension of the filing date, to Monday, August 17, 2020. *Prestressed Concrete Steel Wire Strand from Turkey (C-489-843): Extension Request of Celik Halat ve Tel Sanayi A.S.* ("Celik Halat") for Section III Response in the CVD investigation 2 (P.R. Doc. 88). The request mentioned four circumstances. "First . . . the global COVID-19 pandemic has impacted Turkey particularly hard. The entire country has been under near-total lockdown for nearly three months." *Id.* "Second, Celik Halat's offices are closed, with only minimal essential exceptions made for certain essential workers. The accounting and sales staff that are required to respond to the Department's questionnaires are required to work from home" and "[s]ince few of the company's staff can access the office, identification of the essential documents and databases that are required to respond to the questionnaire has been almost completely impossible." *Id.* "Third, unlike many offices in the United States, Celik Halat does not have a robust work from home infrastructure." *Id.* "Not all of the company's staff has the necessary home computers and home internet connections that make work from home viable, so that only some of the staff have been able to work remotely." *Id.* As the fourth circumstance, the request stated that "[f]inally, starting July 30th (Thursday) half day, until August 4th (Tuesday), it is [a] religious holiday (Sacrifice Feast) in Turkey and everywhere is literally closed," adding that "[m]ost people take the week of August 3rd off and go to visit their families" and that "[t]his is the fact for some of the Celik Halat staff who works on CVD." *Id.* at 3.

Commerce responded to Celik Halat's request for a two-week extension by letter dated July 27, 2020. *Investigation of Prestressed Concrete Steel Wire from the Republic of Turkey: Partial Extension for Initial Questionnaire Response* (P.R. Doc. 121). In it, Commerce allowed Celik Halat only a four-day extension, to 5:00 p.m. ET on Friday, August 7, 2020, for the submission of the response to Section

III. *Id.* at 1. Commerce gave as the reason for limiting the extension the “statutory deadlines, which are mandatory, not optional, in nature,” adding that “[t]herefore, we may not be able to grant further extension of this deadline.” *Id.*

Celik Halat submitted another extension request on Tuesday, August 4, 2020, this time requesting an extension of the then-looming August 7, 2020 deadline until the following Friday, August 14, 2020. *Pre-stressed Concrete Steel Wire Strand from Turkey (C-489-843): Extension Request of Celik Halat ve Tel Sanayi A.S.* (“*Celik Halat*”) for Section III Response in the CVD investigation 2 (Aug. 4, 2020) (P.R. Doc. 176). Celik Halat’s representative again mentioned the religious holiday but added that “CELİK HALAT’s finance manager had a minor traffic accident on his return to work from his family visit” and that “[n]ow, he is on sick leave and resting at his home.” *Id.* Mentioning also that “the counsel for CELİK HALAT in this investigation[] had a knee surgery in the U.S.A. and he is still at the hospital to recover,” *id.*, the request stated that “[o]bviously, these two incidents have affected the ability of CELİK HALAT in preparing the responses to the Section III of [the] CVD questionnaire.” *Id.* On the same day, Commerce denied this request in the entirety, again citing “statutory deadlines.” *Investigation of Prestressed Concrete Steel Wire from the Republic of Turkey: Denial of Extension for Initial Questionnaire Response 1* (Aug. 4, 2020) (P.R. Doc. 177).<sup>5</sup>

On Wednesday, August 19, 2020—nine days after Celik Halat filed the final business proprietary and public versions of its Initial Questionnaire response—Commerce notified Celik Halat’s counsel by letter of its finding that “[o]n August 10, 2020, you filed the final business proprietary and public versions of the initial questionnaire response on behalf of your client . . . after the 5:00 p.m. deadline.” *Commerce Letter Re: Countervailing Duty Investigation of Prestressed Concrete Steel Wire Strand from the Republic of Turkey 1* (P.R. Doc. 198) (footnote omitted). After reciting the reasons why these submissions were required to be filed by 5:00 p.m. on August 10, 2020, the letter concludes by stating that “[t]herefore, because your request

<sup>5</sup> Although stressing its statutory deadlines in communicating with Celik Halat, Commerce appears to have been more lenient when ruling on petitioners’ extension requests during the CVD investigation. Commerce granted petitioners’ extension requests in connection with its new subsidy allegations three times during this period. See *Investigation of Prestressed Concrete Steel Wire from the Republic of Turkey: Partial Extension for New Countervailable Subsidy Allegation* (July 31, 2020) (Dep’t of Commerce ACCESS Barcode 4008665-01); *Investigation of Prestressed Concrete Steel Wire from the Republic of Turkey: Second Extension for New Countervailable Subsidy Allegations* (Aug. 11, 2020) (Dep’t of Commerce ACCESS Barcode 4014739-01); *Investigation of Prestressed Concrete Steel Wire from the Republic of Turkey: Third Extension for New Countervailable Subsidy Allegations* (Aug. 14, 2020) (Dep’t of Commerce ACCESS Barcode 4015711-01).

[sic] was submitted after 5:00 p.m. on August 10, 2020, it was untimely filed. As such, consistent with 19 CFR 351.302(d)(1), Commerce is rejecting your initial questionnaire response based on your untimely submission.” *Id.* at 2. Commerce added that “[m]oreover, pursuant to 19 CFR 104(a)(2)(iii), we will not retain a copy of the rejected response on the record of this investigation.” *Id.*

The Department’s August 19, 2020 letter, by referring to “your initial questionnaire response,” did not clearly state that Commerce was rejecting *all* versions of Celik Halat’s Initial Questionnaire response including, in particular, the timely-filed August 7, 2020 submission. *Id.* If that was the Department’s intent, the August 19, 2020 letter did not explain why Celik Halat’s August 7, 2020 Initial Questionnaire submission was being rejected even though the only untimely filings referenced in the letter were the August 10, 2020 filings of “the final business proprietary and public versions of the initial questionnaire.” *Id.* at 1. Commerce cited two provisions of its regulations, 19 C.F.R. §§ 351.302(d)(1) and 351.104(a)(2)(iii), but neither addresses the issue of whether the regulations required, or authorized, Commerce to reject the August 7, 2020 submission. Section 351.302(d)(1) provides, in pertinent part, that “the Secretary will not consider or retain in the official record of the proceeding . . . [u]ntimely filed factual information, written argument, or other material that the Secretary rejects, except as provided under § 351.104(a)(2).” The provision does not speak to the issue of whether Commerce will reject a timely-filed document, such as a questionnaire response, in response to an untimely filing of the final business proprietary and public versions of the same document. Nor does § 351.104(a)(2)(iii) resolve this issue; it merely clarifies that “in no case will the official record include any document that the Secretary rejects as untimely filed.”

On August 20, 2020, the day following the Department’s rejection of the Initial Questionnaire response, Celik Halat requested, by means of a letter from the attorney who had made the filing, that Commerce reconsider the action taken in the Department’s August 19, 2020 letter. *Pre-Stressed Concrete Steel Wire Strand from Turkey: Request for Reconsideration of the Department’s Rejection of the CVD Response of Celik Halat* (P.R. Doc. 202) (“*Request for Reconsideration*”). The request informed Commerce, *inter alia*, that counsel had set two alarm clocks to awaken him at 4:00 p.m., had awoken then and uploaded the documents onto the Department’s ACCESS system, believing the filing was timely, that he had received on his email a notice that the filing had been accomplished, and that the email was



“time stamped at 4:27 pm.” *Id.* at 4. The letter identified as “the fatal flaw in the plan” the “fact that he was recuperating at his home in Utah, and that the Mountain Daylight Time Zone is two hours behind Eastern Daylight Time,” adding that “[t]hus, what appeared to be a timely filing at 4:27 pm in Utah was actually a late filing at 6:27 pm in Washington, D.C.” *Id.*

Commerce rejected Celik Halat’s August 20, 2020 request for reconsideration on September 4, 2020. *Commerce Letter Re: Countervailing Duty Investigation of Prestressed Concrete Steel Wire Strand from the Republic of Turkey* (P.R. Doc. 245) (“*Rejection of Reconsideration Request*”). In its rejection letter, Commerce told Celik Halat’s counsel that “[a]s noted in Commerce’s August 19 Letter, Commerce requires strict adherence to deadlines and it is important that our procedures be as dependable, predictable, and timely as possible.” *Id.* at 3.

The September 4, 2020 letter treated Celik Halat’s August 20, 2020 request for reconsideration as an “untimely” request for an extension of the August 10, 2020 filing deadline. *Id.* Commerce reiterated its earlier finding, stating that “[a]s noted in Commerce’s August 19 Letter, your final business proprietary and public versions of your questionnaire response were submitted after the August 10, 2020 5:00 p.m. Eastern Daylight Time deadline.” *Id.* at 1. It then gave two reasons for its denial of the request for reconsideration: (1) “We also note that a timely request to extend that deadline was not submitted,” and (2) “While we are sympathetic to your circumstances as described in your letter, we do not find that them [*sic*] to be extraordinary circumstances as described by Commerce’s regulations at 19 CFR 351.302(c).” *Id.* at 1–2.

The regulation Commerce cited provides that “[a]n extension request will be considered untimely if it is received after the applicable time limit expires or as otherwise specified by the Secretary [of Commerce].” 19 C.F.R. § 351.302(c)(1). “An untimely filed extension request will not be considered unless the party demonstrates that an extraordinary circumstance exists.” *Id.* § 351.302(c). “An extraordinary circumstance is an unexpected event that: (i) Could not have been prevented if reasonable measures had been taken, and (ii) Precludes a party or its representative from timely filing an extension request through all reasonable means.” *Id.* § 351.302(c)(2). In the preamble accompanying the promulgation of this regulation in 2013, Commerce provided additional guidance on what would constitute an “extraordinary circumstance,” stating that it may include “a natural disaster, riot, war, *force majeure*, or medical emergency.” See *Extension of Time Limits*, 78 Fed. Reg. 57,790, 57,793 (Sept. 20, 2013). In

denying the request for reconsideration, Commerce stated that “the cause of the late filing was not a medical emergency or counsel’s medical situation. Rather, counsel set an alarm reminding him to file a submission to Commerce, but the alarm was set at the wrong time—after the deadline had already expired.” *Rejection of Reconsideration Request* at 2.

Commerce denied the request for reconsideration after finding that “a timely request to extend that deadline was not submitted.” *Id.* at 1. The request for reconsideration, which Commerce treated as an “untimely request” for an extension, indeed was submitted after the time limit expired on August 10, 2020. But in its rejection of that request, Commerce made no mention of the record fact that Celik Halat had submitted not one, but two requests to extend the deadline for submission of its response to Section III of the Initial Questionnaire.<sup>6</sup>

Although Celik Halat’s counsel theoretically could have submitted a third extension request on Monday, August 10, 2020, for a brief extension for the filing of the final business proprietary and public versions of the Initial Questionnaire response, the circumstances counsel described in the request for reconsideration demonstrate why, as a practical matter, he did not have the opportunity to do so after overlooking the consequence of making his filing from a different time zone. Specifically, the request for reconsideration noted that “[o]n August 19, 2020, the Department posted a notice on Access rejecting Celik Halat’s CVD response, because the public version and the final BPI version were filed after the deadline, i.e., 5:00 pm on August 10, 2020, the next business day after the initial BPI version was timely filed.” *Request for Reconsideration* at 1. Counsel for plaintiff explained that while he was “routinely checking the docket in this investigation for updates via Access in the morning of August 19, 2020, counsel discovered the notice posted on Access that Celik Halat’s CVD response had been rejected because the public and final BPI versions were filed late.” *Id.* at 2. Counsel submitted that he “immediately contacted the Department’s case analysts and sought to un-

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<sup>6</sup> As the court recounted earlier in this Opinion and Order, Celik Halat requested that Commerce extend the original, August 3, 2020 filing deadline to August 17, 2020, and in response Commerce allowed only a four-day extension, to August 7, 2020. On August 4, 2020, i.e., before that deadline had passed, Celik Halat, anticipating that it would have difficulty meeting the filing deadline due to certain unusual circumstances, filed a second request, this time for a one-week extension to August 14, 2020. Commerce denied this request in its entirety, leaving intact the deadline of Friday, August 7, 2020, for the filing of the Initial Questionnaire response and the consequent deadline of August 10, 2020, for the follow-up submissions of the final business proprietary and public versions of the document filed on August 7, 2020.

derstand how a late filing could have happened.” *Id.* Counsel stated that he was “surprised and distressed to learn of the late filing, since he had personally taken specific measures to ensure a timely filing.” *Id.* Counsel claimed that he only realized the circumstance of his having missed the filing deadline after his conversation with one of the Department’s case analysts. *Id.*

The Department’s September 4, 2020 letter concludes by stating that “[a]ccordingly, Commerce finds no basis to reconsider its rejection of your untimely-filed August 10, 2020 final business proprietary and public versions of your initial questionnaire response.” *Rejection of Reconsideration Request* at 3. Significantly, the letter made no mention of rejecting Celik Halat’s timely submission of August 7, 2020. Thus, it implied that Commerce, both in its August 19, 2020 and September 4, 2020 letters to Celik Halat’s counsel, was *not* rejecting or removing that submission from the record of the investigation.

In contrast to the Department’s letter dated September 4, 2020, the Preliminary Determination and the Final Determination describe Celik Halat’s Initial Questionnaire response as having been excluded from the record in the entirety, including the timely-filed version. As to both the Preliminary and Final Determinations, Commerce found that “Celik Halat failed to submit its response to section III of the questionnaire by the established deadline” and on that basis further found that “Celik Halat failed to cooperate to the best of its ability to comply with Commerce’s request for information, within the meaning of section 776(b)(1) of the Act [19 U.S.C. § 1677e(b)(1)].” *Final I&D Mem.* at 34. As the record demonstrates, and defendant does not dispute, it was only the final business proprietary and public versions of the Initial Questionnaire response that were untimely filed.

The Department’s regulation addressing “untimely” requests for filing extensions, 19 C.F.R. § 351.302(c), is not a basis upon which the court may sustain the Department’s decision. Even if Commerce were justified in concluding that Celik Halat’s counsel had not described what Commerce would consider an “extraordinary circumstance”—and the court need not decide that issue—nothing in that regulation justified the Department’s misuse of 19 U.S.C. § 1677e. In exercising that authority, Commerce abused its discretion when it made several findings of fact that were unsupported by record evidence and imposing a draconian sanction for what essentially was a minor and technical violation that had no discernible effect on the investigation. Commerce is not free to apply its regulations in a way that exceeds its statutory authority. Nor is it justifiable to do what it has done here, which is to apply its “extraordinary circumstance” rule in such a way

as to produce a manifestly unwarranted and unjust result. In applying that rule and related regulations on the filing of, and rejection of, responses to requested information, Commerce must be mindful of the limitations on the exercise of its statutory and regulatory powers. Moreover, in viewing in the entirety the facts and circumstances surrounding the filings of the three versions of the Initial Questionnaire response, the court concludes that Commerce abused its discretion when applying such an extreme sanction for an inconsequential violation of a technical filing requirement.<sup>7</sup>

The court does not imply that Commerce could not have taken some action in response to a missed deadline, such as a warning. However, at this point in the litigation, as this Court states in *Celik Halat ve Tel Sanayi A.S. v. United States*, 46 CIT \_\_, Slip. Op. 22–12 (Feb. 15, 2022) (which arose from the concurrent antidumping duty investigation),<sup>8</sup> the court's concern is to remedy the damage done by the Department's unfair treatment of Celik Halat, particularly in light of the record fact that Celik Halat continued to participate and fully cooperated throughout the remainder of the investigation. Further, given that Commerce had instructed Customs to collect unwarranted cash deposits from Celik Halat, Commerce should not be given the opportunity here to levy another type of sanction. Therefore, the court is ordering Commerce to determine, expeditiously, a new estimated net CVD subsidy rate for Celik Halat that does not resort to 19 U.S.C. § 1677e with respect to the filing of the response to the Initial Questionnaire, so that the court may fashion an appropriate remedy on an expedited basis.

### III. CONCLUSION AND ORDER

The contested Final Determination rests upon invalid findings of fact and constitutes a misuse of the Department's statutory authority under 19 U.S.C. § 1677e. The facts and circumstances considered on the whole constitute an abuse of agency discretion that imposed an unjust and draconian penalty upon Celik Halat for an inadvertent technical error by its counsel that had no appreciable effect on the countervailing duty investigation. The court will allow only a limited period of time for Commerce to correct the serious and prejudicial consequences of its error.

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<sup>7</sup> "An agency abuses its discretion where, inter alia, 'the decision . . . represents an unreasonable judgment in weighing relevant factors.'" *Brenner v. Dep't. of Veteran Affairs*, 990 F.3d 1313, 1324 (Fed. Cir. 2021) (quoting *Star Fruits S.N.C. v. United States*, 393 F.3d 1277, 1281 (Fed. Cir. 2005)).

<sup>8</sup> Celik Halat was confronted with the need to comply, simultaneously, with the Department's questionnaires in the parallel antidumping and countervailing duty investigations.

Therefore, upon consideration of all papers and proceedings herein, and upon due deliberation, it is hereby

**ORDERED** that plaintiff's Rule 56.2 Motion for Judgment on the Agency Record (May 28, 2021), ECF Nos. 19 (conf.), 20 (public), be, and hereby is, granted; it is further

**ORDERED** that Commerce, within 45 days from the date of issuance of this Opinion and Order, shall submit a redetermination upon remand ("Remand Redetermination") that complies with this Opinion and Order; it is further

**ORDERED** that plaintiff and defendant-intervenors shall have 20 days from the filing of the Remand Redetermination in which to submit comments to the court; it is further

**ORDERED** that should plaintiff or defendant-intervenors submit comments, defendant shall have 10 days from the date of filing of the last comment to submit a response; and it is further

**ORDERED** that plaintiff's Motion for Oral Argument (Sept. 13, 2021), ECF No. 28, is denied.

Dated: February 15, 2022

New York, New York

*/s/ Timothy C. Stanceu*

TIMOTHY C. STANCEU, JUDGE



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