

TRADE LAW UPDATE

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December 2021

PRESIDENTIAL ACTIONS

[President Biden Issues a Proclamation to Modify the Harmonized Tariff Schedule](#)

On December 23, 2021, the President issued a Proclamation based on recommendations from the International Trade Commission to update the Harmonized Tariff Schedule (HTS). The update will ensure the HTS is in line with the International Convention on the Harmonized Commodity Description and Coding System and the Protocol thereto (Convention). The update to the HTS will include clarifications on certain HTS numbers to ensure equal treatment and continuation of previously proclaimed staged duty reductions.

[President Biden Issues a Proclamation Adjusting Steel and Aluminum Imports as Agreed Upon by the U.S. and the EU in October](#)

On December 27, 2021, the President proclaimed the changes to the Section 232 Aluminum and Steel tariffs that will go into effect on January 1, 2022. In October, the president came to an agreement with the EU to rollback steel and aluminum tariffs that have been in place since 2018. This deal will also reduce high tariffs on U.S. exports of goods to the EU. The agreement will be welcome relief for both the U.S. and the EU and should help to bring down high prices on building materials for homes and vehicles.

U.S. DEPARTMENT OF COMMERCE DECISIONS

Investigations

- Certain Mobile Access Equipment and Subassemblies Thereof from China: On December 10, 2021, Commerce issued its final affirmative [determination](#) in the countervailing duty investigation.

Administrative Reviews

- Multilayered Wood Flooring from China: On December 1, 2021, Commerce issued its amended final [results](#) of the countervailing duty administrative review (2018).
- Certain Softwood Lumber Products from Canada: On December 2, 2021, Commerce issued its final [results](#) of the countervailing duty administrative review (2019).
- Large Diameter Welded Pipe from Korea: On December 3, 2021, Commerce issued its final [results](#) of the antidumping duty administrative review (2018-2020).
- Large Residential Washers from Mexico: On December 8, 2021, Commerce issued its final [results](#) of the antidumping duty administrative review (2019-2020).
- Circular Welded Carbon Steel Pipes and Tubes from Thailand: On December 8, 2021, Commerce issued its final [results](#) of the antidumping duty administrative review (2019-2020).
- Certain Corrosion-Resistant Steel Products from Korea: On December 9, 2021, Commerce issued its final [results](#) of the antidumping duty administrative review (2019-2020).
- Certain Frozen Warmwater Shrimp from India: On December 10, 2021, Commerce issued its final [results](#) of the antidumping duty administrative review (2019-2020).
- Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel from India: On December 10, 2021, Commerce issued its final [results](#) of the countervailing duty administrative review (2019).
- Certain Carbon and Alloy Steel Cut-To-Length Plate from Germany: On December 10, 2021, Commerce issued its final [results](#) of the antidumping duty administrative review (2019-2020).
- Truck and Bus Tires from China: On December 23, 2021, Commerce issued its final [results](#) of the countervailing duty administrative review (2019).
- Common Alloy Aluminum Sheet from China: On December 23, 2021, Commerce issued its final [results](#) of the countervailing duty administrative review (2018-2019).
- Forged Steel Fittings from Taiwan: On December 27, 2021, Commerce issued its final [results](#) of the antidumping duty administrative review (2019-2020).
- Certain Aluminum Foil from China: On December 27, 2021, Commerce issued its final [results](#) of the countervailing duty administrative review (2019).
- Aluminum Wire and Cable from China: On December 27, 2021, Commerce issued its final [results](#) of the antidumping duty administrative review (2019-2020).
- Certain Activated Carbon from China: On December 28, 2021, Commerce issued its final [results](#) of the antidumping duty administrative review (2019-2020).
- Ripe Olives from Spain: On December 28, 2021, Commerce issued its final [results](#) of the antidumping duty administrative review (2019-2020).

Changed Circumstances Reviews

- Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled into Modules from China: On December 17, 2021, Commerce issued its final [results](#) of the antidumping and countervailing duty changed circumstances review.

Sunset Reviews

- Narrow Woven Ribbons with Woven Selvedge from China: On December 3, 2021, Commerce issued its final [results](#) of the second expedited countervailing duty sunset review.
- Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from Turkey : On December 6, 2021, Commerce issued its final [results](#) of the expedited countervailing duty sunset review.
- Certain Hot-Rolled Flat-Rolled Carbon Quality Steel Products from Russia: On December 22, 2021, Commerce issued its final [results](#) of the expedited antidumping duty sunset review.

U.S. INTERNATIONAL TRADE COMMISSION

Section 701/731 Proceedings

Investigations

- Polyester Textured Yarn from Indonesia, Malaysia, Thailand, and Vietnam: On December 13, 2021, the ITC issued its final [determination](#) in the antidumping duty investigation.

Sunset Review Decisions

- There have been no final results of sunset reviews from the ITC during the month of November 2021.

Section 337 Proceedings

- Certain Chemical Mechanical Planarization Slurries and Components Thereof: On December 22, 2021, the ITC issued its final [determination](#) finding a violation of Section 337.
- Certain Light-Emitting Diode Products, Fixtures, and Components Thereof: On December 22, 2021, the ITC issued its final [determination](#) finding a violation of Section 337.



U.S. CUSTOMS & BORDER PROTECTION

- CBP recently announced a new withhold release order that was issued against Brightway Group in Malaysia for suspected forced labor. After 10 of the 11 indicators of forced labor were identified while investigating Brightway's manufacturing operations, disposable gloves produced by the company will now be detained when imported.

COURT OF INTERNATIONAL TRADE

Summary of Decisions

[21-159 Pasta Zara S.p.A. v. United States](#)

Ghigi 1870 S.P.A (“Ghigi”), Pasta Zara S.P.A (“Zara”) challenged Commerce’s administrative review on pasta from Italy asserting that Commerce improperly applied adverse facts and dismissed arguments against Commerce’s protein measuring method. Commerce applied adverse facts available for Ghigi after it submitted a revised document that contained errors. However, the Court determined that the payment dates in the original document were still “perfectly usable” and nothing showed that Ghigi failed to cooperate to the best of its abilities. Additionally, Plaintiffs went against Commerce’s instructions when reporting its percentage of protein in the pasta and when reporting the shape of the pasta. Here, the Court stated that Plaintiff’s arguments supporting its actions were presented outside of the fact-finding time period, ultimately preventing Commerce and the Court from considering them. Therefore, the case was remanded for further explanation with respect to only the adverse facts available decision.

[21-162 NLMK Pennsylvania, LLC v. United States](#)

On December 3, 2021, the CIT denied proposed defendant-intervenor United States Steel Corporation’s (“US Steel”) motion to intervene and motion to stay. Plaintiff, NLMK Pennsylvania (“NLMK”), appealed a decision by Commerce to deny its section 232 exclusion request as to its steel imports. NLMK appealed its denied exclusion request because it contended it cannot source the steel it needs from the US market.

US Steel opposed NLMK’s original exclusion request because it contended that NLMK’s exclusion from section 232 tariffs would harm U.S. Steel’s U.S.-based business. US Steel argued it should be allowed to intervene as a matter of right or, in the alternative, permissively. The court rejected both of these arguments. The court held that US Steel did not have a right to intervene because it does not have a legally protectable interest that will be directly affected by the outcome of this action. The court specifically identified the fact that this case concerns refunds of tariffs already paid. The section 232 tariffs are not to benefit the domestic industry, but rather are for national security purposes, and exclusion requests, by statute, cannot be denied based on potential harm to the domestic industry. The court rejected US Steel’s request to intervene because it will not be aggrieved or adversely affected by the ultimate outcome of this action which is a refund by the Government of already paid tariffs.

The court denied US Steel’s motion to stay because it decided that it does not have a right to intervene in the first place, and therefore does not have a right to stay the proceeding.

[21-163 China Custom Manufacturing, Inc. and Greentec Engineering LLC v. United States and Aluminum Extrusions Fair Trade Committee](#)

On December 6, 2021, the CIT affirmed Commerce’s scope ruling in which Commerce ruled that ROCK-IT 3.0 solar roof mountings (the “solar mounts”) produced by Plaintiffs China Custom Manufacturing, Inc. and Greentec Engineering, LLC (together, “Plaintiffs”) were within the scope of the aluminum extrusions from the People’s Republic of China antidumping and countervailing duty orders of May 26, 2011 (the “Orders”). The Plaintiffs conceded the solar mounts are within the Orders’ scope but argued the solar mounts should be excluded as finished merchandise. Further, Plaintiffs contended that Commerce impermissibly changed its interpretation of the finished merchandise exclusion since the Orders were issued and argued that Commerce’s resulting determination to include the solar mounts within the scope was arbitrary, capricious, and contrary to law. The CIT recognized that Commerce reevaluated its interpretation of the finished merchandise exclusion in 2015 following a series of rulings in *Shenyang Yuanda Aluminum Industry Engineering Co, v. U.S.* However, the CIT found Commerce’s scope ruling was supported by substantial evidence because Commerce permissibly updated its interpretation of the finished merchandise exclusion to ensure conformity with multiple Federal Circuit rulings and therefore Commerce ruled on the Plaintiff’s scope ruling consistent with that updated interpretation. In affirming Commerce’s scope ruling based on its finished merchandise exclusion interpretation, the CIT also denied Plaintiffs’ motion for judgment on the agency record.

[21-164 Aireko Constr., LLC v. United States](#)

Aireko Construction, LLC (“Aireko”) an importer of crystalline silicon photovoltaic (“CSPV”) products from China. Aireko challenged the application of the appropriate AD and CVD duties in Commerce’s May 2016 instructions to Customs and Border Protection (“CBP”). Commerce issued instructions to CBP in May 2016 to liquidate CSPV imports from China at a rate of 42.33% ADD for the period of July 31, 2014- January 25, 2015 and to liquidate without regard to CVD duties for the period of

October 18, 2014- February 9, 2015. However, contrary to these instructions CBP assessed ADDs at 52.13% and CVDs at 26.89%

Aireko timely protested the liquidation of entries with CBP arguing that the assessed retroactive rates were contrary to law. The Court found that while Plaintiff may protest CBP's failure to follow Commerce's instructions, the content of the instructions provided to CBP is "not a protestable event". In this instance, CBP clearly did not follow Commerce's instructions so the Court granted partial summary judgement in favor of Plaintiff in order to address the CVD rate.

[21-165 SolarWorld Americas, Inc. v. United States; 21-166 Canadian Solar Int'l Ltd. v. United States](#)

On December 8, 2021 in two parallel cases, the CIT sustained Commerce's fourth remand redetermination in its third administrative review of the AD order on crystalline silicon photovoltaic cells from China. Under protest, Commerce reconsidered its surrogate country selection and used Mexican import data to value nitrogen, as opposed to Thai import data. Commerce did not use Thai data because the record did not have sufficient evidence to use the Thai data to value Canadian Solar's nitrogen input. The CIT found that the Mexican import data was supported by substantial evidence because Mexico had the highest import volume during the period of review. The CIT also sustained Commerce's decision to use Bulgarian import data to value Trina's nitrogen input because Bulgaria had the highest import volume during the period of review.

[21-167 Dongkuk S&C Co., Ltd. v. United States and Wind Tower Trade Coalition](#)

On December 13, 2021, the CIT remanded Commerce's determination regarding a cost adjustment for steel plates used in the construction of wind towers following Plaintiff Dongkuk S&C Co., Ltd.'s ("DKSC") motion for judgment on the agency record. The action involves Commerce's final affirmative determination in the antidumping duty investigation of utility scale wind towers from the Republic of Korea. DKSC challenged both Commerce's determination that DKSC's normal books and records did not reflect the cost to produce the subject merchandise based on the physical characteristics, and Commerce's subsequent decision to adjust those costs by weight-averaging to "smooth" costs to address distortions attributable to non-physical characteristics. DKSC also asserted that Commerce did not conduct a cost comparison against all eleven enumerated physical characteristics as Commerce said it did in its Decision Memorandum. The CIT agreed with DKSC and rejected

Commerce's argument that the analysis nonetheless supports the determination as *post hoc* rationalization by agency counsel. The CIT remanded the case for further consideration, stating the record failed to demonstrate how Commerce's analysis could lead a reasonable mind to conclude that DKSC's reported costs did not reflect the cost to produce and sell the subject merchandise. The CIT declined to take up the question of whether Commerce's selection of surrogate data for the calculation of constructed value was proper because the CIT's remand on the cost calculation issue could impact the surrogate data issue.

[21-168 Optima Steel International, LLC and Tokyo Steel Manufacturing Co., Ltd. v. United States](#)

On December 17, 2021, the CIT sustained Commerce's Remand Results revising the liquidation instructions in a case challenging those instructions, which were issued pursuant to an administrative review of the antidumping duty order covering hot-rolled steel from Japan. Plaintiffs Optima Steel International, LLC (the importer of record) and Tokyo Steel Manufacturing Co., Ltd. (the producer) had several entries of subject merchandise liquidated at a higher rate, allegedly because Commerce's liquidation instructions failed to correctly list an unaffiliated Japanese trading company that exported the subject merchandise from Japan. After the Government filed a motion consenting to the voluntary remand, which the CIT granted, Commerce revised the liquidation instructions and indicated it would issue those instructions to CBP. With no objections from either side, the CIT sustained Commerce's Remand Results.

[21-169 Xiping Opeck Food Co., Ltd. et al. & Yancheng Hi-King Agriculture Developing Co., Ltd. v. United States](#)

On December 17, 2021, the CIT sustained Commerce's final results of its administrative review of an antidumping duty order on freshwater crawfish tail meat from People's Republic of China. Plaintiffs asked the court to remand Commerce's Final Results with instructions to (1) recalculate the surrogate value for live freshwater crawfish using different import data, (2) recalculate the all-others rate using an average of the mandatory respondent's calculated rates, and (3) provide further guidance on the legality of Commerce's 150 day liquidation policy. Commerce asked the court to (1) maintain that it used the correct import data in its calculations, (2) that assigning the all-others rate was consistent with law, and (3) because Commerce had previously granted a consent motion to reset Hi King's entries to unliquidated status, the challenge against the 15-day liquidation policy is moot. The court found that Commerce's calculation of surrogate values was supported by substantial evidence, that the applied all-

others rate was reasonable and in accordance with law, and that the 15-day liquidation challenge is moot since Commerce no longer employs that policy and it already agreed to not liquidate the products at issue.

[21-170 Productos Laminados de Monterrey S.A. DE C.V. v. United States et. al.](#)

On December 17, 2021 the CIT remanded Commerce’s Final Results “in the second administrative review of an antidumping duty order” of heavy walled rectangular welded carbon steel pipes and tubes from Mexico as not supported by substantial evidence. Plaintiff contended that its products were sold at two different levels of trade (LOT) and Commerce argued that plaintiff’s product only is sold at one LOT. Commerce concluded in its Preliminary Results that plaintiff had sold its products at two different levels of trade and therefore used those two different levels to calculate the dumping margin. However, after the Preliminary Results were published, defendant-intervenor submitted case briefs arguing that plaintiff did not have two LOTs, only one and therefore its rate should be solely based on one category. Commerce agreed and reversed its decision finding that was only one LOT in its Final Results. Plaintiffs appealed the decision to only utilize one LOT and the court found that Commerce’s decision was not supported by substantial evidence. The court remanded with instructions to reconsider Commerce’s decision that all home market sales occurred at a single LOT and rejected plaintiff’s request for a LOT adjustment.

[21-171 Deacero S.A.P.I de C.V. & Deacero USA, Inc. v. United States & Rebar Trade Action Coalition](#)

On December 20, 2021, the CIT sustained Commerce’s decision that the constructed export price (CEP) may be reduced from the export price (EP) under section 232 of the Tariff Act. Plaintiff argued that the duties should not be deducted because they were “special” as similar to section 201 of the Tariff Act, not “United States import duties” as used in section 232. The court agreed with Commerce that the language of the statute did not create a situation in which duties would be double-counted by paying duties under both 201 and 232 and therefore, the calculation was permissible.

[21-172 Mid Continent Steel & Wire, Inc. v. United States](#)

In a December 22nd opinion, the Court of International Trade (CIT) remanded Commerce’s determination once again based on specific instructions from the Federal Circuit that further explanation was needed regarding

Commerce’s reliance on a company’s financial statement. The decision stems from an antidumping duty (ADD) investigation of steel nails from the Sultanate of Oman. Previously, the U.S Court of Appeals determined that Commerce had not sufficiently explained why it relied on Hitech Fastener Manufacturer’s (“Hitech”) financial statements when considering whether Hitech was a recipient of countervailable subsidies.

The constructed value for profit is often calculated when there are insufficient home-market sales and Commerce needs to evaluate whether a company is dumping. Commerce has the option to apply “any other reasonable method” to determine the constructed value and chose to evaluate Hitech’s financial statements versus several other statements that were submitted.

On appeal the Federal Circuit held that Commerce’s reasoning for refusing to consider possible indications of subsidy was unfounded, because subsidies could possibly distort Hitech’s financial statements. This view was confirmed by the CIT, ultimately holding that Commerce did not adequately explain why Hitech’s statements were a better choice given their statements were deemed unsuitable in a separate case because there was evidence of a subsidy.

[21-173 Power Steel Co. v. United States](#)

In 2019, Commerce initiated an administrative review of the ADD order on rebar from Taiwan, resulting in 3.27% dumping margin for Power Steel. With the mandated 25% tariffs on steel under section 232 duties, Commerce treated the 232 duties as import duties, thus deducting the 232 duties from Power Steel’s export price.

Power Steel argued that 232 duties were special duties because they are temporary and remedial and enacted through the president rather than Congress’s exclusive power to enact “normal Customs duties”. However, the CIT determine that 232 duties may in fact be deducted from the United States price, because import duties encompassed “all import duties except antidumping duties” giving deference to Commerce’s interpretation.

Secondly, the Court remanded to Commerce to consider if the sales invoice submitted by Power Steel was sufficient to demonstrate non-payment of 232 duties for the disputed transaction. If so, the 232 duties would not have been part of the sales price used to establish the export price.

COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[21-1748 Hyundai Steel Company v. United States](#)

On December 10, 2021, the CAFC upheld the CIT's reversal of Commerce's determination of a Particular Market Situation in the Korean market for welded pipe. The CAFC agreed with the CIT that the antidumping statute does not give Commerce the authority to use a PMS in order to adjust the costs of production to determine whether home market sales were made below cost.

EXPORT CONTROLS & ECONOMIC SANCTIONS

OFAC Provides Afghanistan Guidance and General Licenses

On December 22, 2021, the Office of Foreign Assets Control ("OFAC") provided a [Fact Sheet](#), General License ("GL") Numbers 17, 18, and 19, and a number of new FAQs to facilitate the flow of humanitarian aid to Afghanistan. International humanitarian organizations have noted rising poverty and hunger throughout the country following the collapse of the central government and the take-over of control by the Taliban. The new guidance, GLs, and FAQs are primarily aimed at apprising the public of the current U.S. sanctions posture and at ensuring critical humanitarian aid channels are open to international and non-governmental organizations.

OFAC and BIS Designate Chinese Tech Firms and Others on the NS-CMIC and Entity Lists, Respectively

On [December 10](#) and [December 16](#), 2021, OFAC designated a total of nine (9) Chinese tech firms on the Non-SDN Chinese Military-Industrial Complex List ("NS-CMIC List") pursuant to Executive Order ("EO") 13959 as amended by EO 14032. According to OFAC, each of these entities is either directly or indirectly through a subsidiary involved in surveillance and oppression of minority populations in China, particularly ethnic Kazakhs, Tibetans, and Uyghurs. Notably, the December 16 press release discusses the deployment of such surveillance technology by several newly designated entities *outside* of China in jurisdictions such as Pakistan, Thailand, and Zimbabwe. The new NS-CMIC designations prohibit the purchase or sale by a U.S. person of "any publicly traded securities, or any securities that are derivative of or are designed to provide investment exposure to such securities" of any of the NS-CMIC List designees.

Eight (8) of the nine (9) firms described above were simultaneously [added by BIS](#) on December 17, 2021 to its Entity List, which prohibits exports, reexports, and in-country transfers to those entities without a license. (The ninth, SenseTime, was already listed on the Entity List pursuant to prior Federal Register notices.) The new BIS Entity List designations also included other mostly Chinese firms, many of which were designated for being part of a global network to supply or attempt to supply Iran with U.S.-origin items.

Export Controls and Human Rights Initiative Launched at the Summit for Democracy

On December 10, 2021, the White House published a [Joint Statement](#) together with the governments of Australia, Denmark, and Norway on the *Export Controls and Human Rights Initiative* (the "Initiative"). The [Fact Sheet](#) explains the Initiative aims "to help stem the tide of authoritarian government misuse of technology and promote a positive vision for technologies anchored by democratic values." The Joint Statement describes the four nations' commitment to "establish a voluntary, nonbinding written code of conduct around which like-minded states could politically pledge, to use export control tools to prevent the proliferation of software and other technologies used to enable serious human rights abuses." The Joint Statement also notes the coming year will be used to consult industry and academia on the nonbinding written code of conduct. The governments of Canada, France, the Netherlands, and the United Kingdom expressed support for the Initiative.

Cambodia Added to U.S. Arms Embargoed Countries List, Military End-User/Use ("MEU") Controls, and Military Intelligence End-User/Use ("MIEU") Controls

In simultaneous Federal Register notices on December 9, 2021, the Directorate of Defense Controls ("DDTC") and BIS implemented new controls against Cambodia. See [here](#) and [here](#). The DDTC added Cambodia to its list of countries subject to a U.S. arms embargo, meaning DDTC will now implement a policy of denial for licenses to export or reexport defense articles, defense services, or defense "technical data" to Cambodia or to Cambodian foreign nationals (non-U.S. persons). BIS also listed Cambodia in Country Group D:5 under the Export Administration Regulations ("EAR"). This designation raises the level

of destination-based controls that apply to Cambodia and limits the availability of certain EAR license exceptions. BIS also added Cambodia to its list of countries that are subject to MEU and MIEU controls. Exporters are prohibited from providing certain items listed in Supplement No. 2 to Part 744 to a military end user or for a military end use without a license. Additionally, all items “subject to the EAR” are ineligible for export with knowledge or reason to know that those items will be provided to a military-intelligence end-user or for a military-intelligence end-use in Cambodia.

Request for Public Comments Regarding Areas and Priorities for U.S. and EU Export Control Cooperation Under the Trade and Technology Council

On November 30, 2021, the Bureau of Industry and Security (“BIS”) issued a [Federal Register notice requesting comments](#) from the public regarding areas and priorities for U.S. and EU export control cooperation to help inform the work of the U.S-EU Trade and Technology Council (“TTC”) Export Control Working Group (“ECWG”). The ECWG is seeking to improve technical consultations in a number of areas including legislative/regulatory developments, convergence of controls on sensitive dual-use technologies, compliance and enforcement approaches, and multilateral and other international cooperation on export controls. The ECWG will also be assessing information exchange on sensitive technology transfers and capacity building assistance to non-U.S./EU jurisdictions. Comments regarding these matters – particularly export controls convergence, transparency, and efficiency – can be submitted to BIS through [regulations.gov](#) by **January 14, 2022**.