

TRADE LAW UPDATE



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February 2023

HIGHLIGHTS FROM FEBRUARY

[Export Control Violations Result in Significant Monetary Penalties and Continuing Compliance Training Obligations](#)

In a recent order, the Department of Commerce’s Bureau of Industry and Security (“BIS”) revoked the export privileges for Obaidullah Sayed, an Illinois resident. Sayed was convicted of conspiring to export computers, computer systems, and other related equipment to the Pakistan Atomic Energy Commission without a license. Sayed was sentenced to one year and one day in prison and was required to forfeit \$247,000. As a result of this conviction, BIS suspended Sayed’s export privileges for 10 years from the date of conviction.

[Possible Forced Labor Enforcement Remedies on Aluminum Products](#)

Recent reports indicate that aluminum is now being targeted for actions against forced labor under the Uyghur Forced Labor Prevention Act (“UFLPA”). Though U.S. Customs and Border Protection (“CBP”) has yet to officially announce aluminum as a targeted product under UFLPA, reports indicate that enforcement efforts against aluminum began as early as December 2022 – January 2023. UFLPA establishes a rebuttable presumption that all goods made in whole or in part in the Xinjiang Uyghur

Autonomous Region (“XUAR”) or having ties to the region, are presumed to be made with forced labor. The Forced Labor Enforcement Task Force (“FLETF”) published a list of high-priority sectors and products which initially included cotton, tomatoes and polysilicon. For reasons stated below, aluminum now appears to be a high risk product on CBP’s radar as well.

[Biden Administration No Longer Approving Export Licenses to Chinese Tech Giant Huawei](#)

According to recent reports, the U.S. Department of Commerce’s Bureau of Industry and Security (“BIS”) has stopped granting export licenses to Huawei Technologies Co. Ltd. (“Huawei”).

U.S. DEPARTMENT OF COMMERCE DECISIONS

Investigations

- There are no investigation updates for the month of February.

Administrative Reviews

- Polyethylene Terephthalate Film, Sheet, and Strip From India: On February 2, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2020-2021).
- Certain Corrosion-Resistant Steel Products From the Republic of Korea: On February 3, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2020-2021).
- Certain Corrosion-Resistant Steel Products From Taiwan: On February 3, 2023, Commerce issued its final [results](#) of antidumping duty administrative review and final determination of no shipments (2020-2021).
- Uncovered Innerspring Units From the People's Republic of China: On February 6, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2021-2022).
- Certain Collated Steel Staples From the People's Republic of China: On February 7, 2023, Commerce issued its final [results](#) of countervailing administrative review (2019-2020).
- Steel Concrete Reinforcing Bar From the Republic of Turkey: On February 7, 2023, Commerce issued its final [results](#) of antidumping duty administrative review and final determination of no shipments (2020-2021).
- Certain Corrosion-Resistant Steel Products From the Republic of Korea: On February 7, 2023, Commerce issued its final [results](#) and partial rescission of countervailing duty administrative review (2020).
- Certain Steel Nails from Malaysia: On February 8, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2020-2021).
- Wooden Bedroom Furniture From the People's Republic of China: On February 9, 2023, Commerce issued its final [results](#) of antidumping duty administrative review; and final determination of no shipments (2021).
- Certain Collated Steel Staples From the People's Republic of China: On February 10, 2023, Commerce issued its final [results](#) of antidumping duty administrative review; final determination of no shipments; and partial rescission (2020-2021).
- Xanthan Gum From the People's Republic of China: On February 15, 2023, Commerce issued its final [results](#) of antidumping duty administrative review and final determination of no shipments (2020-2021).
- Certain Steel Nails From the Republic of Korea: On February 15, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2020-2021).
- Certain Hardwood Plywood Products From the People's Republic of China: On February 17, 2023, Commerce issued its final [results](#) of antidumping duty administrative review and final determination of no shipments (2021).
- Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes From the Republic of Korea: On February 24, 2023, Commerce issued its notice of court decision not in harmony with the final results in the antidumping duty administrative review; notice of amended final [results](#).
- Certain Frozen Warmwater Shrimp From the People's Republic of China: On February 24, 2023, Commerce issued its final [results](#) of antidumping duty administrative review and final determination of no shipments (2021-2022).
- Stainless Steel Butt-Weld Pipe Fittings From the Philippines: On February 24, 2023, Commerce issued its final [results](#) of antidumping duty administrative review and final determination of no shipments (2021-2022).
- Stainless Steel Butt-Weld Pipe Fittings From the Philippines: On February 24, 2023, Commerce issued its final [results](#) of antidumping duty administrative review and final determination of no shipments (2021-2022).

Changed Circumstances Reviews

- Polyethylene Terephthalate Sheet From the Sultanate of Oman: On February 1, 2023, Commerce issued its final [results](#) of changed circumstances review, revocation of the antidumping duty order, and rescission of administrative reviews (2020-2021 and 2021-2022).
- Tapered Roller Bearings and Parts Thereof, Finished and Unfinished, From the People's Republic of China: On February 22, 2023, Commerce issued its final [results](#) of antidumping duty changed circumstances review.

Sunset Reviews

- Fresh Garlic from the People's Republic of China: On February 7, 2023, Commerce issued its final [results](#) of expedited fifth sunset review of the antidumping duty order.

Scope Ruling

- There are no scope ruling updates for the month of February.

Circumvention

- Certain Amorphous Silica Fabric From the People's Republic of China: On February 3, 2023, Commerce issued its final affirmative [determinations](#) of circumvention.
- Certain Vertical Shaft Engines Between 99cc and Up To 225cc, and Parts Thereof, From the People's Republic of China: On February 28, 2023, Commerce issued its affirmative final [determination](#) of circumvention of the antidumping and countervailing duty orders-dual-piston engines.

U.S. INTERNATIONAL TRADE COMMISSION Section 701/731 Proceedings

Investigations

- There are no investigation updates for the month of February.

Section 337 Proceedings

- Certain Radio Frequency Transmission Devices and Components Thereof: On February 17, 2023, Commerce issued its [notice](#) of commission decision to review in part and, on review, to affirm a final initial determination finding no violation of Section 337; termination of proceeding.
- Certain Smart Thermostats, Load Control Switches, and Components Thereof: On February 23, 2023, Commerce issued its [notice](#) of a commission determination to review in part a final initial determination finding no violation of Section 337, and on review, to affirm with certain modifications; termination of the investigation.



U.S. CUSTOMS & BORDER PROTECTION

[CBP Releases New Resources for UFLPA Enforcement & Applicability Reviews](#)

On February 23, 2023, U.S. Customs and Border Protection (“CBP”) released new guidance for importers seeking admissibility of goods under the Uyghur Forced Labor Prevention Act (“UFLPA”). The three guidance documents include an updated Frequently Asked Questions (FAQ), best practices for applicability reviews, and tips on submitting executive summaries and documentation when under an applicability review. As importers continue to navigate the new forced labor enforcement landscape, these resources provide additional insight into what CBP expects when proving compliance with UFLPA.

[EAPA Case 7743: LTT International Trading Co.](#)

On February 13, 2023, CBP commenced a formal EAPA investigation against LTT International Trading Co. (LTT or the importer). CBP is investigating whether the Importer evaded antidumping and countervailing duty orders on quartz surface products (QSP) from the People’s Republic of China (China). CBP has determined that there is reasonable suspicion of evasion of AD/CVD duties by LTT and, therefore, CBP is issuing a formal notice of initiation of investigation.

[EAPA Case 7783: Superior Commercial Solutions LLC](#)

On February 2, 2023, CBP commenced a formal EAPA investigation against Superior Commercial Solutions LLC (SCS). CBP is investigating whether the Importer evaded antidumping and countervailing duty orders on quartz surface products

(QSP) from the People's Republic of China (China). CBP has determined that there is reasonable suspicion of evasion of AD/CVD duties by SCS and, therefore, CBP is issuing a formal notice of initiation of investigation.

[EAPA Consolidated Case 7785: LDL Trading Company](#)

On February 1, 2023, CBP commenced a formal EAPA investigation against LDL Trading Company (LDL Trading). CBP is investigating whether the Importer evaded antidumping and countervailing duty orders on cast iron soil pipe fittings (CISPF) from China. CBP has determined that there is reasonable suspicion of evasion of AD/CVD duties by LDL Trading and, therefore, CBP is issuing a formal notice of initiation of investigation.

COURT OF INTERNATIONAL TRADE

Summary of Decisions

[Slip Op. 23-12, Columbia Aluminum Products v. United States](#)

The court denied defendant-intervenor's motion for a stay in an appeal filed by Columbia Aluminum products pending resolution of an appeal of a scope determination in a parallel proceeding at the court. The court found that the intervenor's motion failed to demonstrate that a stay would satisfy the two goals of "fairness to the litigants and judicial economy." The case stems from an Enforce and Protect Act investigation where Customs found that plaintiff, Columbia, was evading the antidumping and countervailing duty orders on aluminum extrusions from China. The case in the briefing stage and the defendant-intervenors requested a stay given that it has a separate appeal pending in which the court upheld Commerce's determination that Columbia's door thresholds are excluded from the antidumping and countervailing duty orders.

[Slip Op. 23-13, Meyer Corp. v. United States](#)

In a February 9, 2023, decision, the court ruled that plaintiff's imports of cookware do not qualify for first-sale treatment. The court stated that a first-sale analysis was not supported because Meyer had failed to submit its financial information to determine which entity had the ability to influence the price paid for the cookware between the affiliated parties. Under a 1992 Federal Circuit decision a company seeking first-sale treatment must prove the following: (1) the goods were purchased via bona fide sales; (2) are clearly destined for the U.S.; (3) the transaction was at arm's length; and (4) are "absent any distortive non-market influences." The court found that Meyer's imports of cookware passed the first two criteria but disagreed with plaintiff that the merchandise was bought at arm's length and were not affected by non-market influences.

[Slip Op. 23-14, Jilin Forest Industry Jinqiao Flooring Group Co. v. United States](#)

The court in a February 9, 2023, decision found that Commerce had failed to explain its presumption that exporters from non-market economy countries are controlled by the state and therefore are automatically assigned a single country-wide antidumping duty rate. The case stems from the fifth administrative review of the antidumping duty review on multilayered wood flooring from China, where plaintiff Jilin Forest was a mandatory respondent. The court remanded the issue to Commerce for a second time and required it to explain how the presumption of state control comports with Commerce's statutory requirement to calculate individual rates for mandatory respondents using that respondents own data. The court stated that the statute does not provide for the assignment of a country-wide rate simply based upon its relationship to the government and absent a finding of adverse inferences. The court went on to state that that the presumption of control has not been fully explained and there is no determinative case law cited by Commerce authorizing that presumption, especially given the recent decisions from the Supreme Court questioning the government's "wide-ranging claims for deference."

[Slip Op. 23-15, Hyundai Steel Co. v. United States](#)

The Court remanded for further explanation and reconsideration Commerce's decision to countervail port usage rights in the administrative review of the countervailing duty order on hot-rolled steel flat products from South Korea. The court instructed Commerce to explain why it failed to consider Hyundai's non-payment of port usage fees using current market conditions including "price, quality, availability, marketability, transportation, and other conditions of purchase or sale" in determining whether a benefit was conferred with respect to the port usage rights. In the underlying administrative review, Hyundai had explained that it paid for and built a port facility but upon completion the port reverted to the Korean government. Due to the fact that Hyundai had built the port facility it had retained rights to operate and use the port for its own use including charging third-parties for use. Commerce, however, found that the port usage rights themselves constituted a countervailable subsidy and the court stated that this decision was not supported by substantial evidence. The court also granted Commerce's request for voluntary remand on sewerage usage fees which would permit it to cure mistakes.

[Slip Op. 23-16, Cheng Shin Rubber Ind. Co. v. United States](#)

The Court upheld Commerce's determination stating that the tires exported by plaintiff are not excluded from the antidumping duty order on passenger vehicle and light truck tires from China. During the course of the administrative proceeding, plaintiff and petitioner agreed to specific exclusionary language stating that for the tires to be excluded were to be marked as "designed and marketed exclusively" as light truck spare tires for temporary use. The court ruled that since Cheng Shin provided record evidence to indicate that its tires were not marked or identified as light truck tires for temporary use, Commerce's denial of its exclusion was supported by substantial evidence. The court specifically stated that Cheng Shin cannot now claim that its tires met the exclusionary language given that it had affirmed on the record in its response and as part of the verification process that its tires met the standards for passenger tires.

[Slip Op. 22-17, Oman Fasteners v. United States](#)

The Court granted plaintiff Oman Fasteners' motion for preliminary injunction thereby enjoining and preventing the liquidation of entries subject to the sixth antidumping duty administrative review of nails from Oman. In addition, the court barred Customs from collecting antidumping duty cash deposits at the adverse rate of 154.33%. The court effectively considered the motion for preliminary injunction as a dispositive motion and remanded the case back to Commerce and ordered it to place Oman Fasteners responses on the record and recalculate its rate based upon information contained in those responses. During the course of the proceeding, Oman Fasteners was a fully cooperative respondent, however, when filing its supplemental questionnaire response, a portion of the response was filed 16 minutes late which led to Commerce rejecting the entirety of the response and assigning total adverse facts available at a rate of 154.33%.

[Slip Op. 23-18, Siemens Gamesa Renewable Energy v. United States](#)

In its February 16, 2023, opinion the Court ruled that Commerce improperly limited its examination to only a single mandatory respondent in the antidumping duty investigation on wind towers from Spain. The court also found that Commerce in this investigation improperly used the petition rate as adverse facts available for the company that did not participate as well as six other non-selected companies. Siemens Gamesa filed a request to be the mandatory respondent after the initial mandatory respondent pulled out of the case. However, Commerce rejected Siemens Gamesa's request claiming that the request was filed too late, and Siemens had not requested to participate as a voluntary respondent. The court reprimanded Commerce for each decision and remanded the case for reconsideration.

[Slip Op. 23-19, Best Mattresses International Co. v. United States](#)

In the appeal of Commerce's final determination in the antidumping duty investigation of mattresses from Cambodia, the Court affirmed Commerce's use of constructed value as normal value given that the respondent had no viable home market or third country market. Specifically, the court partially affirmed and partially remanded Commerce's final

determination interpretation of the major input rule and permitted the use of third-country surrogate data as a source of information available to use in determining the cost of production of major inputs purchased by a respondent from an affiliated non-market economy supplier. The case concerned a number of issues of first-impression and in summary, the court found the following: (1) Commerce was within its authority to rely on the Major Input Rule; (2) its use of Global Trade Atlas (GTA) data as a source for third country data was reasonable given that it used aggregate data from multiple countries and not just a single country; (3) the phrase “market under consideration” as stated in the Transactions Disregarded Rule is not limited to just the country under investigation as this interpretation is “unreasonably inflexible” and remanded the issue for further explanation from Commerce as to why it used Cambodian data for minor inputs; and (4) Commerce needs to further explain why it presumed that non-market economy data was unreliable with respect to affiliated suppliers but not for unaffiliated suppliers.

[Slip Op. 23-20, SGS Sports v. United States](#)

The Court ruled that a warehousing agreement between two related companies constituted a valid lease for the purposes of 9801 duty-free treatment. CBP initially denied plaintiff SGS Sports Inc. (“SGS”) protest regarding the swimwear merchandise they sought to import duty free, and the Court initially agreed, finding in 2018 that the warehouse operator and SGS were the same entity due to common ownership. To qualify for duty-free treatment under subheading 9801.00.20, the reimported merchandise must 1) have duties paid on it when initially imported; 2) have not been advanced in value while outside of the U.S.; 3) have been exported under a lease or similar use agreement; 4) have been reimported by or for the person who imported and exported it to and from the U.S. After reflecting on corporate law, the Court concluded after trial that the companies are different, and the warehousing agreement ultimately meets the criteria as a lease or similar use agreement under subheading 9801.00.20.

[Slip Op. 23-21, SeAH Steel Corp., et al. v. United States](#)

The court upheld Commerce’s use of the Cohen’s d test to calculate SeAh Steel’s dumping margin in the administrative review of the antidumping duty order on oil country tubular goods from South Korea. By upholding Commerce’s calculation methodology, the court rejected SeAH’s motion for reconsideration. Plaintiff’s motion for reconsideration arose after the Federal Circuit raised concerns regarding the use of the Cohen’s d test given that in the Federal Circuit’s view the use of the test violated key statistical assumptions. The Court in this case, found that because Commerce relied on the entire population of reported sales transactions to run the differential pricing analysis, rather than a subset, the concerns and questions raised in *Stuup Corp., v. U.S.* were sufficiently negated.

[Slip Op. 23-23, Stupp Corp., et al. v. United States](#)

The Court sustained Commerce’s remand redetermination in response to the Federal Circuit’s remand with instructions to justify its use of the Cohen’s d test in its differential pricing analysis. Commerce’s uses the Cohen’s d test as a means to determine if there is “targeted” or “masked” dumping where a respondent has sales which are priced significantly differently from other sales. Identifying these differences then permits Commerce to use either an average-to-average comparison or an average-to-transaction comparison. In a July 2021 decision, the Federal Circuit raised concerns as to whether this test could be used in a situation where the comparison pool is limited as the data normally available to Commerce does not meet key statistical assumptions. Commerce defended its use of the test based upon the fact that it uses the entire universe of reported sales rather than a subset to run its analysis. The court agreed that Commerce’s expertise and methodology supported the reasonableness of that choice.

[Slip Op. 23-24, Cyber Power Systems \(USA\) v. United States](#)

The Court determined that evidence of certain power supplies and surge protectors produced in the Philippines using China- sourced components was not enough to prove that substantial transformation occurred. Importer Cyber Power Systems (“Cyber Power”) offered evidence that confirmed one of its power supply products was substantially transformed, but the Court was not convinced on the other five models. The Court found that the evidence for the four

models was lacking regarding the assembly process and merchandise-specific information, ultimately concluding that the burden of proof was not met for substantial transformation.

COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[Fed. Cir. 21-2066 PrimeSource Building Products v. United States](#)

The Federal Circuit found that former President Trump permissibly expanded the scope of the Section 232 tariffs to include steel and aluminum derivative products. The key issue in the case was whether it was legal to expand the tariffs outside of the temporal deadlines articulated in the statute. Relying on its earlier opinion in *Transpacific Steel v. U.S.*, the court again found that the statute permits the president to adjust national security tariffs outside of the time limits in the statute if those increases relate to the original findings. The court found that even though the Commerce Department had not individually investigated the derivative products, the statutory language permits an adjustment to the stated goals to include additional products. Specifically, the court found that even though the initial 2018 report did not address the effect of the derivative products, this was “immaterial” as the president has the authority to expand the tariffs unless the original intent of the action has become “substantively stale”.

[Fed. Cir. 22-1161, Acquisition 362, d/b/a Strategic Import Supply v. United States](#)

The court upheld the Court of International Trade’s decision that for a protest to be valid, it must be filed within 180 days of the date of liquidation of the entry and the clock does not run from the date on which the Commerce Department issues antidumping or countervailing duty instructions to Customs or the date of denial of an importer’s refund request. The appellant had failed to file a protest challenging the assessment of countervailing duties in order to establish jurisdiction on appeal. The facts of the case hinged on the timing of Commerce’s administrative review process where it initially determined that a rate of 30.61% should be assessed on entries subject to the review. It then found ministerial errors in the calculation and revised the liquidation rate to 15.56% and instructed Customs to liquidate entries at the lower rate, however, several of the appellant’s entries had already liquidated more than 180 days before Commerce’s instructions were issued to Customs. While the importer filed a protest arguing that the protest was filed within 180 days of the date of issuance of the instructions, the Federal Circuit disagreed on the grounds that under 19 U.S.C. §1514(c)(3) the date of liquidation is the date that determines the deadline for filing a protest and that there is no other date as to which a protest is made.

EXPORT CONTROLS & ECONOMIC SANCTIONS

[Biden Administration Increases Tariffs on Russian Aluminum and 100 Other Products on One-Year Anniversary of Russia’s Invasion of Ukraine](#)

On February 24, 2023, the Biden Administration announced the imposition of additional tariffs on Russian imports of aluminum and approximately 100 other individual products. The imposition of these additional tariffs was announced on the one-year anniversary of Russia’s invasion of Ukraine. The White House announced its continued support of Ukraine in a series of actions said to “hold Russia accountable,” and included both new import tariffs as well as additional export control restrictions, Entity List designations and economic sanctions targeting individuals and entities operating in Russia as well as those assisting with Russia’s war efforts in Ukraine.

[BIS Issues New Export Controls and Entity List Additions Targeting Russia on One-Year Anniversary of Invasion](#)

The Department of Commerce’s Bureau of Industry and Security (“BIS”) announced today new export controls and Entity List additions designed to further restrict Russia’s ability to maintain its continued war against Ukraine. The Biden Administration’s measures come on the one-year anniversary of Russia’s invasion of Ukraine and the first announcement by several Western countries, including the U.S., of initial sanctions in response. Notably, the new actions target items destined to Russia, Belarus, Iran, and other countries that are being used to support Russia’s defense industrial base and ongoing war effort.

[OFAC Issues Sweeping Sanctions to Mark One-Year Anniversary of Russia's Invasion of Ukraine](#)

On Friday, February 24, 2023, the US Treasury Department's Office of Foreign Assets Control ("OFAC") issued new sanctions against individuals and entities operating in Russia and against those assisting with Russia's war efforts in Ukraine. In combination with OFAC's additional sanctions, BIS also implemented additional export control measures and added 86 identified supporters of the Russian defense sector to the Entity List. For a full discussion of the export control and Entity List additions see our separate blog post. The White House also issued a statement stating that beginning March 10, there will be a 200% tariff on Russian aluminum entering the US. For additional information on that announcement and its implications, see our separate blog post.