

TRADE LAW UPDATE



September 2023

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HIGHLIGHTS FROM SEPTEMBER

[USTR Extends Reinstated Section 301 Exclusions and Covid-Related Section 301 Exclusions](#)

On September 6, 2023, the United States Trade Representative (“USTR”) [announced](#) that it will extend 352 reinstated exclusions and 77 COVID-related exclusions to duties imposed on goods from China pursuant to Section 301 of the Trade Act of 1974. The USTR imposed Section 301 duties in four tranches or “lists,” and it established a process by which importers could request exclusions for particular products on each list. The 352 reinstated exclusions, listed in an annex to a previous [notice](#), cover products from all four lists. The 77 COVID-related exclusions, listed in an annex to another previous [notice](#), cover medical-care products needed to address COVID. Both the reinstated exclusions and the COVID-related exclusions were previously set to expire on September 30, 2023 but are now extended until December 31, 2023.

[The Court of International Trade Rules that Reliquidation is Available as a Remedy in APA Cases Brought Under the Court’s Residual Jurisdiction Provision](#)

In a September 6, 2023 [opinion](#) issued by Judge M. Miller Baker in three cases brought under the Court’s residual jurisdiction provision, 28 U.S.C. § 1581(i), the U.S. Court of International Trade (“CIT”) held that reliquidation is available as a remedy in Administrative Procedure Act (“APA”) cases. At least in the short term, this decision creates additional uncertainty regarding the remedies available in APA cases brought before the CIT. However, if the decision is appealed, the U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) may provide a significant clarification on the scope of the CIT’s remedial powers. Such a clarification may provide litigants long-awaited assurance that they will not lose the ability to recoup unlawfully paid duties while litigating their right to collect those very duties under the Court’s residual jurisdiction provision.

[Petition Summary: Aluminum Lithographic Printing Plates from China and Japan – Petition for Imposition of Antidumping and Countervailing Duties](#)

On September 28, 2023, Eastman Kodak Company (the “Petitioner”) filed a petition for the imposition of antidumping duties on Aluminum Lithographic Printing Plates from China and Japan, as well as the imposition of countervailing duties on Aluminum Lithographic Printing Plates from China.

U.S. DEPARTMENT OF COMMERCE DECISIONS

Investigations

- Certain Freight Rail Couplers and Parts Thereof From Mexico: On September 21, 2023, Commerce issued its final affirmative [determination](#) of sales at less than fair value and final negative determination of critical circumstances.
- Corrosion-Resistant Steel Products From Taiwan: On September 21, 2023, Commerce issued its notice of third amended final [determination](#) of sales at less than fair value pursuant to court decision and partial exclusion from antidumping duty order (correction).
- Brass Rod From India: On September 29, 2023, Commerce issued its preliminary affirmative countervailing duty [determination](#).
- Brass Rod From Israel: On September 29, 2023, Commerce issued its preliminary affirmative countervailing duty [determination](#), and alignment of final determination with final antidumping duty determination.
- Brass Rod From the Republic of Korea: On September 29, 2023, Commerce issued its preliminary affirmative countervailing duty [determination](#) and alignment of final determination with final antidumping duty determination.
- Certain Corrosion-Resistant Steel Products From the Republic of Korea: On September 29, 2023, Commerce issued its notice of [initiation](#) and preliminary results of antidumping duty changed circumstances review.
- Certain Non-Refillable Steel Cylinders From India: On September 29, 2023, Commerce issued its preliminary affirmative countervailing duty [determination](#) and alignment of final determination with final antidumping duty determination.

Administrative Reviews

- Certain Frozen Warmwater Shrimp From India: On September 1, 2023, Commerce issued final [results](#) of antidumping duty administrative review (2021–2022).
- 1,1,1,2-Tetrafluoroethane (R–134a) From the People’s Republic of China: On September 5, 2023, Commerce issued final [results](#) of antidumping duty administrative review and final determination of no shipments (2021–2022).
- Certain Hot-Rolled Steel Flat Products From the Republic of Korea: On September 5, 2023, Commerce issued its notice of court decision not in harmony with the results of countervailing duty administrative review; (notice of amended final [results](#)).
- Certain Cut-To-Length Carbon-Quality Steel Plate From the Republic of Korea: On September 7, 2023, Commerce issued its final [results](#) and rescission, in part, of countervailing duty administrative review (2021).
- Certain Softwood Lumber Products From Canada: On September 7, 2023, Commerce issued its amended final [results](#) of antidumping duty administrative review in part (2021).
- Stainless Steel Bar from India: On September 8, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2021–2022).
- Small Diameter Graphite Electrodes From the People’s Republic of China: On September 11, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2021–2022).
- Wood Mouldings and Millwork Products From the People’s Republic of China: On September 11, 2023, Commerce issued its final [results](#) and partial rescission of countervailing duty administrative review (2020–2021).
- Certain Cold-Drawn Mechanical Tubing of Carbon and Alloy Steel From India: On September 6, 2023, Commerce issued its final [results](#) of countervailing duty administrative review (2021).
- Certain Crystalline Silicon Photovoltaic Products From the People’s Republic of China: On September 13, 2023, Commerce issued its final [results](#) of countervailing duty administrative review (2021).
- Citric Acid and Certain Citrate Salts From Colombia: On September 25, 2023, Commerce issued its final [results](#) of antidumping duty administrative review (2021–2022).

- Passenger Vehicle and Light Truck Tires From the Socialist Republic of Vietnam: On September 29, 2023, Commerce issued its final [results](#) of countervailing duty administrative review (2020–2021).

Changed Circumstances Reviews

- Certain Metal Lockers and Parts Thereof From the People’s Republic of China: On September 14, 2023, Commerce issued its final [results](#) of antidumping duty changed circumstances reviews, and intent to revoke the antidumping and countervailing duty orders, in part.
- Dioctyl Terephthalate From the Republic of Korea: On September 18, 2023, Commerce issued its final [results](#) of antidumping duty changed circumstances review.
- Large Power Transformers From the Republic of Korea: On September 26, Commerce issued its final [results](#) of antidumping duty changed circumstances review.
- Certain Cut-To-Length Carbon-Quality Steel Plate Products From the Republic of Korea: On September 29, 2023, Commerce issued its final [results](#) of antidumping duty changed circumstances review.

Sunset Reviews

- Stainless Steel Flanges From India and the People’s Republic of China: On September 5, 2023, Commerce issued its final [results](#) of the expedited first sunset reviews of the antidumping duty orders.
- Stainless Steel Flanges From the People’s Republic of China: On September 5, 2023, Commerce issued its final [results](#) of the expedited first sunset review of the countervailing duty order.
- Silicon Metal From the People’s Republic of China: On September 18, 2023, Commerce issued its final [results](#) of the expedited fifth sunset review of the antidumping duty order.
- Certain Activated Carbon From the People’s Republic of China: On September 28, 2023, Commerce issued its final [results](#) of expedited third sunset review of the antidumping duty order.
- Citric Acid and Certain Citrate Salts From Thailand and Colombia: On September 29, 2023, Commerce issued its final [results](#) of the expedited first sunset reviews of the antidumping duty orders.

Scope Ruling

- Certain Hardwood Plywood Products From the People’s Republic of China: On September 5, 2023, Commerce issued its notice of court decision not in harmony with the results of antidumping and countervailing duty scope ruling (notice of amended final results).

Circumvention

- None

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

Investigations

- None

U.S. CUSTOMS & BORDER PROTECTION

[EAPA Case 7717: Norca Industrial Company, LLC and International Piping & Procurement Group, LP](#)

On September 6, 2023 the CBP issued a Notice of Covered Merchandise Referral to the Department of Commerce to determine whether rough fittings originating from China and processed in Vietnam by BW Fittings into finished CSBW pipe fittings are covered by AD order A-570-814. This is related to the CBP investigation of whether Norca Industrial Company, LLC (Norca) and International Piping & Procurement Group, LP (IPPG), respectively, entered merchandise into the customs territory of the United States through evasion of the antidumping duty (AD) order on certain carbon steel butt-weld pipe fittings (CSBW pipe fittings) from the People's Republic of China (China).¹ Specifically, the allegations claimed that Norca and IPPG imported CSBW pipe fittings into the United States from China that were transhipped through Vietnam. Norca and IPPG filed such entries as "Type 01" rather than "Type 03."

[EAPA Case 7818: Midwest Livestock Systems, LLC](#)

On September 12, 2023 the CBP commenced a formal investigation into whether Midwest Livestock Systems, LLC aka AMVC-Midwest LLC¹ (Midwest Livestock) evaded antidumping duty (AD) and countervailing duty (CVD) orders A-570-947 and C-570-948,² by entering into the United States Chinese-origin steel grating in the form of "tri-bar flooring" that was not declared as covered merchandise. Based on a review of available information, CBP has determined that there is reasonable suspicion of evasion of AD/CVD duties by Midwest Livestock.

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

On September 12, 2023 the CBP issued a determination stating there is substantial evidence that LTT International Trading Co. ("LTT" or the "Impo1ter") entered merchandise covered by antidumping duty ("AD") and countervailing duty ("CVD") orders A-570-084 and C-570-085¹ on quartz surface products ("QSP") from the People's Republic of China ("China") (covered merchandise) into the customs territory of the United States through evasion. Substantial evidence demonstrates that LTT entered covered merchandise into the United States and evaded the AD/CVD Orders by transshipping the covered merchandise through Taiwan and declaring the entries of Chinese-origin QSP as having a country of origin of Taiwan, resulting in no cash deposits being collected on the merchandise. .

[EAPA Case 7740: LE North America JV, LLC](#)

On September 18, 2023 the CBP issued a determination stating there is not substantial evidence that LE North America JV, LLC (LENA), doing business as (dba) LE Surfaces¹ (Importer) entered merchandise covered by antidumping (AD) and countervailing duty (CVD) orders A-570-084 and C-570-085 (*AD/CVD Orders*)² on quartz surface products (QSP) from the People's Republic of China (China) into the customs territory of the United States through evasion during the period of investigation. Specifically, CBP determined that substantial evidence does not support a conclusion that the Importer imported Chinese-origin QSP through Thailand via Leta Stone Co., Ltd. (LETA).

[EAPA Case 7813: Ebuy Enterprises Limited and Highland USA International, Inc.](#)

On September 27, 2023 the CBP commenced a formal investigation into whether Ebuy and Highland have evaded antidumping duty ("AD") order A-570-985 on xanthan gum from the People's Republic of China ("China").¹ CBP found reasonable suspicion exists that Ebuy and Highland entered covered merchandise for consumption into the customs territory of the United States through evasion by transshipping Chinese-origin xanthan gum through Malaysia.

COURT OF INTERNATIONAL TRADE

Summary of Decisions

[Slip Op 23-128 American Honey Producers Association and Sioux Honey Association v. United States](#)

The Court sustained Commerce's final determination in the antidumping investigation of honey from India. The Court rejected Plaintiff's argument that Commerce should have applied total adverse facts available to Allied Natural Product and Ambrosia Natural Products Pvt. Ltd. for failure to submit an auditor's report with their 2020-2021 financial statements, and for delaying their submission of the financial statements. The Court agreed with Commerce that it had never explicitly requested the audit report and accepted Commerce's finding that the financial statements were not completed until after the submission of all of the supplemental questionnaire responses. The Court also rejected Plaintiff's argument that Commerce erred when it used acquisition costs as a proxy for the cost of production of the subject merchandise finding that Commerce provided adequate reasoning for its decision.

[Slip Op 23-129 AM/NS Calvert LLC v. United States California Steel Indus., Inc. v. United States Valbruna Slater Stainless, Inc. v. United States](#)

The Court granted the Government's motion for voluntary remand in three cases brought under the Court's residual jurisdiction provision, 28 U.S.C. § 1581(i), to contest Commerce's denial of exclusion requests related to duties imposed under Section 232 of the Trade Expansion Act of 1962. The Government moved for voluntary remand, which Plaintiff opposed because it would be futile if the Court accepted the Government's position that the Court lacked authority to reliquidate finally liquidated entries. Discussing *Shinyei Corporation of America v. United States*, 355 F.3d 1297 (Fed. Cir. 2004), the Court held that the Administrative Procedure Act's waiver of sovereign immunity applies unless another statute affords an exclusive remedy for a particular claim. Because properly invoking the Court's residual jurisdiction under 28 U.S.C. § 1581(i) necessarily means that no other statute addresses a particular claim, the Court held that its broad remedial powers authorize reliquidation in these cases. The Court granted the Government's request for voluntary remand, with the condition that Commerce must instruct Customs to reliquidate any affected entries if it grants the challenged exclusion requests.

[Slip Op 23-130 GoPro, Inc. v. United States](#)

In a case challenging the classification of eight camera housing models by Customs, the Court ordered the parties to file supplemental briefing in response to the Court's questions concerning potential outstanding material facts in dispute.

[Slip Op 23-131 Histeel Co, Ltd. v. United States](#)

In a case challenging the final results of administrative review in welded carbon steel pipes and tubes from Korea, the Court dismissed two counts of Plaintiff's complaint and stayed the other count pending the resolution of appellate proceedings in *Stupp Corp. v. United States*, No. 23-1663 (Fed. Cir. Docketed March 27, 2023). The Court dismissed Plaintiff's challenges to 1) Commerce's application of the Transactions Disregarded Rule and 2) Commerce's adjustment of HiSteel's reported scrap offset. The Court explained that these challenges were nonjusticiable because the antidumping margin would remain the same regardless of whether Plaintiff prevailed on these counts. The Court stayed Plaintiff's challenge to Commerce's use of the Cohen's *d* test pending the resolution of the appeal in *Stupp Corp.*

[Slip Op 23-132 Shanghai Tainai Bearing Co., Ltd. And C&U Americas, LLC v. United States](#)

In a case challenging the final results of administrative review in tapered roller bearings from China, the Court held that Commerce failed to consider the necessary factors before applying a partial adverse inference to Shanghai Tainai based on the non-compliance of its suppliers. The Court also held that Commerce failed to justify its decision to deduct certain surcharges Shanghai Tainai included as extra profit when calculating U.S. price. The Court rejected Plaintiff's remaining claims that Commerce's dumping margin defied commercial reality, relied on defective surrogate entity financial statements, wrongly deducted Section 301 duties from U.S. price, and failed to include a byproduct offset.

[Slip Op 23-133 Habas Sinai ve Tibbi Gazlar Istihsal Endustrisi v. United States](#)

The Court ruled that Commerce correctly valued Plaintiff Habas Sinai's home market sales using the Turkish lira. The case stems from the 2018-2019 administrative review of the antidumping duty order on cold-rolled steel flat products from Turkey. Habas presented two primary arguments stating that Commerce's decision was arbitrary based upon past practice and distorts the home market sales price that is used for comparison purposes in calculating the antidumping duty margin. In considering these arguments, the Court determined that Commerce would have deviated from its past practice only "if Habas's home-market sales were negotiated in dollars and the dollar price ultimately controlled the amount paid." The Court also found upon examining the record that there was no proof that the transactions were ultimately paid for in U.S. dollars, even though the initial negotiation documents referenced U.S. dollars. Without proof of distorted sales prices on the record, the Court found that Commerce did not err in valuing Habas' home market sales.

[Slip Op 23-134 The Mosaic Co. v. United States](#)

The Court upheld in part and remanded in part Commerce's final determination in the countervailing duty investigation on phosphate fertilizers from Morocco. The challenge covered six different countervailable programs, including government loan guarantees, the provision of mining rights for less than adequate remuneration, tax incentives related to export operations, reductions in tax fines and penalties for exporter OCT, revenue exclusions for minimum tax contributions and customs duty exemptions. The exporter OCP also challenged the initiation of the investigation for lack of industry support.

As an initial matter, the Court remanded for further explanation Commerce's decision not to use any of OCP's selling, general and administrative (SG&A) expenses and profit calculation as part of the CVD calculation which was based upon a tier three analysis by building up OCP's cost of production to decide if OCP received mining rights for less than adequate remuneration. The Court also remanded the agency's finding of specificity with respect to the reduction of tax fines and penalties for OCP.

The Court then turned to each of the arguments raised by the exporter and affirmed Commerce's decision to initiate the investigation based upon the fact that the issue was not industry support, but rather, the proposed scope of the investigation. However, given that Commerce had analyzed and supported its decision to initiate, the Court affirmed. The Court also affirmed the use of a world price benchmark for phosphate rock, as OCP had not demonstrated that it would be improper to use these prices; affirmed the determination that two VAT tax programs were not countervailable; and found that Commerce properly examined five new alleged subsidy programs.

[Slip Op 23-135 Hitachi Energy USA v. United States](#)

The Court ruled that respondent Hyundai Heavy Industries Co. was properly allowed to supplement its questionnaire responses on remand, as the Federal Circuit instructed that Commerce should give Hyundai this chance, given that Commerce's underlying decision was unsupported by substantial evidence on the record. The Court then upheld the remand results because no party had contested the remand record, leading to a drop in Hyundai's antidumping rate from 16.13% to 4.69%.

[Slip Op 23-136 OCP v. United States](#)

In a parallel case to *The Mosaic Co. v. United States*, the Court found that the International Trade Commission had failed to support its underselling analysis in the original investigation on phosphate fertilizers from Morocco and Russia. The Court remanded the Commission's injury determination to further explain and support its findings. Because of the flawed underselling analysis, the Court concluded that the remainder of the Commission's analysis was "contaminated," calling into question the finding of material injury. A key issue in the case was why import levels remained high despite negative effects in the fertilizer market. According to the Commission, even with lower demand, the fact that imports continued to increase led them to conclude that this oversupply was the cause of "price depression." Several exporters argued at the administrative stage that shipments occurred based upon normal demand projections and continued to be shipped even with the decline in demand, as it was cost-prohibitive to divert the shipments. The Court found unpersuasive the Commission's conclusion that the fertilizer could be reshipped, and not supported by evidence on the record. As a result, the Court remanded the Commission's findings for further explanation of the assumed facts, for which there was insufficient evidence on the record.

[Slip Op 23-137 SMA Surfaces v. United States](#)

The Court upheld Commerce's scope ruling finding that Plaintiff SMA Surfaces' product was within the scope of the antidumping and countervailing duty orders on quartz surfaces from China. The Court stated that SMA Surfaces had waived its right to challenge the remand redetermination, because it had failed to raise the necessary arguments in response to the remand determination. SMA Surfaces had requested exclusions for three of its crushed glass surface products, and part of the criteria for demonstrating that the material is a glass surface product, as opposed to quartz, is demonstrating that some of the individual crushed glass pieces are longer than one centimeter wide, and that the distance between any single glass piece and the closest separate glass piece does not exceed three inches. On remand, Commerce found that SMA Surfaces failed to submit sufficient photographic evidence showing that its products met these requirements. The Court affirmed Commerce's remand on the grounds that SMA Surfaces had failed to meet its burden of proof.

[Slip Op 23-139 Second Nature Designs Ltd. v. United States](#)

The Court granted in part and denied in part cross-motions for summary judgment in a case involving the classification of numerous decorated items of plant parts divided into eight categories of goods. Plaintiff argued that the subject merchandise should be classified as "dried or bleached" botanicals under the Harmonized Tariff Schedule "HTS" subheading 0604.90.30. CBP classified the subject merchandise at entry in HTS subheading 0604.90.60 instead, on the basis that dried natural goods that are decorated beyond bleaching or drying are classifiable as "other." During litigation, however, the Government argued that some categories of goods are properly classified in different HTS provisions.

The Court found that two categories of goods are classifiable under Plaintiff's proffered provision, on the basis that the styles have all been dried. For another category, the Court accepted the Government's proposed alternative classification of the goods as "artificial flowers or fruit" under HTS subheading 6702.90.65. The parties agreed on the proper classification for two categories of goods, and for the remaining categories, the Court found the genuine issues of material fact precluded summary judgment and ordered the case to proceed to a second phase of litigation.

[Slip Op 23-140 Magnum Magnetics Corp. v. United States](#)

The Court sustained Commerce's final scope ruling that certain plastic shelf dividers are excluded from the antidumping and countervailing duty orders on raw flexible magnets from China. The product at issue consisted of a raw flexible magnet bonded with an adhesive to a base of a plastic sheet. Commerce determined that while flexible magnets are in-scope, bonding a flexible magnet to a functionally inflexible component removed the product from the scope of the orders. The Court found that Commerce's consideration of the plain language of the orders, along with the International Trade Commission's underlying report and prior scope decisions was reasonable, and that Commerce's scope determination was supported by substantial evidence.

[Slip Op 23-141 SeAH Steel Corp. v. United States](#)

The Court sustained Commerce's final determination in the countervailing duty investigation of oil country tubular goods from Korea. Plaintiff, a mandatory respondent in the investigation, challenged Commerce's decision to use adverse facts available in determining that a performance guarantee from the Korean Export-Import Bank constituted a countervailable subsidy. Commerce made this finding after rejecting information first provided by Plaintiff at verification regarding its use of the performance guarantee program, because it was new evidence that contradicted information provided by Plaintiff in its initial questionnaire response. The Court held that Commerce reasonably rejected this information, and that its decision to use adverse facts available for the performance guarantee program was supported by substantial evidence and otherwise in accordance with the law.

[Slip Op 23-142 Hyundai Steel Co. v. United States](#)

The Court remanded Commerce's final results in an administrative review of the countervailing duty order on certain steel products from Korea for reconsideration of whether the company's receipt of port-usage rights from the South Korean

government was a countervailable benefit. The Court questioned whether port usage rights provided a “benefit,” as that term is defined in the statute and regulations. The Court also sustained Commerce’s uncontested remand determination that the sewerage fees program was not countervailable.

[Slip Op 23-143 List Indus., Inc. v. United States](#)

The Court sustained Commerce’s remand results in a case challenging its final determination in the antidumping duty investigation of certain metal lockers from China. The Court had previously found that Commerce’s selection of Turkey as the primary surrogate country was supported by substantial evidence, but it remanded for further explanation as to how Commerce determined profits of the Turkish company Ayes Celikhasir VE CT in calculating surrogate financial ratios. On remand, Commerce provided further explanation for its treatment of “shipping revenue, incentive income, interest income and rental income . . . using Ayes audited financial statements.” No party filed comments in opposition, and the Court sustained the remand results as lawful and supported by substantial evidence.

[Slip Op 23-144 Hyundai Steel Co. v. United States](#)

The Court remanded Commerce’s final results in its administrative review of the countervailing duty order on hot-rolled steel flat products from Korea. Mandatory respondent Hyundai Steel Company challenged Commerce’s decision to countervail Korea’s allocation of permits to certain recipients under its emissions trading program. The Court determined that Commerce’s financial contribution determination was not in accordance with law, as it did not account for the statutory requirement that the allocations constitute revenue forgone that “is otherwise due,” and it remanded for further explanation.

COURT OF APPEALS FOR THE FEDERAL CIRCUIT

[Appeal No. 2023-1176 Full Member Subgroup of the American Institute v. United States](#)

The Federal Circuit upheld the trial court’s judgment affirming the International Trade Commission’s negative determination in an antidumping investigation regarding fabricated structural steel (“FSS”) from Canada, China and Mexico. Appellant, an association of U.S. producers and manufacturers of FSS products, argued that the Commission unlawfully failed to resolve an ambiguity in the definition of the domestic-like product. The Federal Circuit determined, however that the decision to include non-load bearing FSS and FSS components of pre-engineered metal building systems (“PEMB”) within the scope, and complete PEMBs as excluded from the scope, was supported by substantial evidence and in accordance with the law. The Federal Circuit also determined that the Commission did not err in determining that the captive production provision in 19 U.S.C. § 1677(7)(C)(iv) did not apply. This provision addresses situations in which U.S. producers internally transfer a significant volume of the domestic like product for further internal processing into a separate, distinct downstream article, whereas the only product that could qualify as a downstream article in this investigation was the complete, out-of-scope PEMBs. Finally, the Federal Circuit determined that the Commission’s determination that it lacked sufficient evidence to support a finding of underselling or price suppression was reasonable and supported by substantial evidence.

EXPORT CONTROLS AND SANCTIONS

No new updates for September.