

HUSCH BLACKWELL

International Trade Law

2023 Year-in-Review & Outlook for 2024

DECEMBER 2023



Introduction

This past year brought increasing enforcement efforts from each of the U.S. government agencies regulating international trade.

Whether through allegations of potential evasion relating to antidumping and countervailing duty orders in place, forced labor violations, circumvention of U.S. export controls and sanctions on Russia, Belarus, Iran, and others, or lack of proper compliance procedures and records, U.S. importers and exporters are navigating a new enforcement frontier where government officials are working collectively across agencies and increasingly leveraging new technologies (like artificial intelligence) for targeting purposes.

This year's report provides a detailed look at the most critical developments in international trade regulation and enforcement in 2023 and how these developments impact U.S. importers and exporters. As we look to 2024, with additional requests for funding and resources at both Customs and Commerce, we see more aggressive enforcement on the horizon. Our hope is that the developments and trends presented here will assist you in minimizing risk and maximizing cost savings by taking a proactive approach as enforcement activity continues to rise amid increasing strategic deglobalization.



Cortney Morgan

Head of Husch Blackwell's International Trade & Supply Chain practice

Customs and Border Protection Developments

U.S. Customs and Border Protection (CBP) continued its focus on enforcement, with a steady uptick in enforcement actions in 2023, including Enforce and Protect Act (EAPA) and Risk Analysis and Survey Assessment (RASA) investigations. CBP also pursued strategic initiatives this past year aimed at combating climate change and modernizing the agency's statutory framework.

EAPA Investigations

EAPA enhances the U.S. government's ability to enforce antidumping and countervailing duty (AD/CVD) laws and provides a powerful tool for CBP to investigate allegedly transshipped goods in the U.S. marketplace and other practices constituting evasion of AD/CVD orders. Since EAPA's enactment in 2015, CBP has initiated more EAPA investigations each year. The agency's *CBP Trade and Travel Report* noted that for the latest data available, FY2022, CBP issued final determinations of evasion for 53 investigations, a 20 percent increase from FY2021.

An important procedural development in 2023 was the U.S. Court of Appeals for the Federal Circuit ruling in *Royal Brush Manufacturing, Inc. v. United States et. al.*, Appeal No. 2022-1226, which held that even though EAPA does not explicitly provide for administrative protective orders (APOs), CBP has inherent authority in EAPA proceedings to release business confidential information to importers under an APO, and that withholding such information is a clear violation of an importer's constitutionally protected due process rights. This decision marks a victory for importers and foreign producers accused of transshipment and other forms of evasion and we believe has significant implications for enforcement actions brought by CBP under EAPA and other statutory regimes, such as the Uyghur Forced Labor Protection Act (UFLPA).

EAPA REVERSALS RARE BUT POSSIBLE

This past year saw numerous new EAPA investigations, but also some reversals. The EAPA statute and CBP's implementing regulations provide for an administrative review by CBP's Office of Regulations and Rulings (OR&R) of affirmative evasion determinations made by the agency's Trade Remedy & Law Enforcement Directorate (TRLED).

Recent reversals demonstrate OR&R's willingness to scrutinize factual conclusions and inferences made by TRLED in rendering affirmative determinations; however, reversals remain unusual, with OR&R [confirming approximately 80 percent of TRLED's affirmative determinations](#). The best option for importers remains to avoid EAPA investigations altogether. Ensuring compliance with AD/CVD orders and being prepared to take proactive measures that enable quick, comprehensive, and detailed responses to EAPA allegations and CBP's questionnaires is the best defense. Examples of documentation that importers should maintain include:

- raw material purchase orders;
- inventory records;
- documentation demonstrating due diligence conducted with respect to foreign suppliers, including any onsite visits; and
- stamped and dated certificates of origin

Risk Analysis and Survey Assessments

In 2023, CBP pursued numerous RASAs, a tool used under the authority of 19 U.S.C. §1509(a) as precursor investigations to full-blown CBP audits. Essentially, RASAs are narrowly tailored investigations that focus on particular areas of interest or concern for specific importers, such as determining whether a certain type of imported good may be subject to AD/CVD duties. RASAs allow CBP to evaluate more quickly whether an entity requires a comprehensive audit.

RASAs may arise in several ways, including from an e-allegation (an allegation of wrongdoing submitted to CBP online) or from information shared by partner government agencies. Once CBP initiates a RASA, it issues questionnaires focused on a company's policies and procedures as well as a sample of recent and representative entries. Like other CBP investigations, a company is best placed to respond to a RASA if it maintains complete and accurate purchase records and shipping documents—including signed copies of certificates of origin—records payments for additional freight, and conducts due diligence prior to engaging foreign suppliers.

Once the company completes the CBP RASA questionnaire and submits all requested documents, CBP may issue follow-up questions or proceed directly to an entrance conference that includes agency officials and company representatives. At this conference, CBP typically outlines the goals of its investigation and clarifies any questions or discrepancies that arose from questionnaire responses. CBP then sends a letter informing the company of the RASA's outcome. A company may "pass" the RASA, which means that CBP did not identify significant risk factors and no further action will follow as a result. Alternatively, if risk factors are identified, CBP may proceed to a full audit.

Green Trade Strategy

CBP increased its focus on its [Green Trade Strategy](#) this year, an agency-wide strategic initiative launched in June 2022. CBP cites as support for this strategy larger government initiatives, including Presidential Executive Order 14008 ("Tackling the Climate Crisis at Home and Abroad"), provisions in the

Inflation Reduction Act and Bipartisan Infrastructure Law, and the Department of Homeland Security's Strategic Framework for Addressing Climate Change.

CBP held its inaugural Green Trade Innovation and Incentives Forum in Washington, D.C. in July 2023, where it convened key government officials and industry leaders to address a variety of topics—including climate mitigation, supply chain resilience, and environmentally beneficial innovation—and to inform the trade community on implementation of CBP's Green Trade Strategy. Specific initiatives discussed at the forum included digitizing manual compliance processes, adding certain breakouts to the Harmonized Tariff Schedule of the United States for goods made with environmentally preferred materials, adding environmental criteria to trusted trader programs, working with interagency partners to prevent crimes such as illegal deforestation, logging, and fishing, and updating CBP's vehicle fleet to include 50 percent electric vehicles by the year 2030.

FOUR PILLARS OF CBP'S GREEN TRADE STRATEGY



INCENTIVIZE GREEN TRADE



STRENGTHEN ENVIRONMENTAL ENFORCEMENT POSTURE



ACCELERATE GREEN INNOVATION



IMPROVE CLIMATE RESILIENCY AND RESOURCE EFFICIENCY

Customs Modernization Act

This past year also saw renewed focus on modernizing U.S. customs law in accordance with CBP's strategic initiative entitled "21st Century Customs Framework," a joint government-industry approach to refining to the agency's statutory framework. The five goals of the framework are:

- enhanced facilitation,
- seamless data sharing,
- increased visibility & accountability,
- timely and effective enforcement, and
- secure funding.

In 2021, Senator Bill Cassidy (R-LA) released draft legislation to amend the U.S. customs laws with proposals to (a) clarify and modernize data submission, usage, and transmission requirements, including requiring the use of e-commerce platforms and electronically filed documentation; (b) expand the authority of CBP to demand certain records relating to trade enforcement and the importation of goods; (c) allow CBP to examine, share information about, and seize counterfeit or infringing goods; (d) strengthen CBP's authority to prevent suspended and debarred actors from importing goods; and (e) provide for the streamlined disposition of detained de minimis imports. Following hearings in February and May 2023, a bipartisan group on the Senate Finance Committee released an open letter in June requesting input from the trade community on the modernization of U.S. customs laws.

Based on all the above initiatives and increased focus areas, 2024 looks to be another year in which CBP will actively exercise its revenue protection and aggressively ensure that importers comply with existing and evolving import requirements.

Trade Remedies

In 2023, antidumping and countervailing duty enforcement continued on the upward trend witnessed over the course of the past several years. The U.S. Department of Commerce’s enforcement trends in 2023 reflected an increasingly uncertain environment, particularly for importers and foreign exporters that have attempted to shift supply chains away from China or may contemplate doing so in the future.

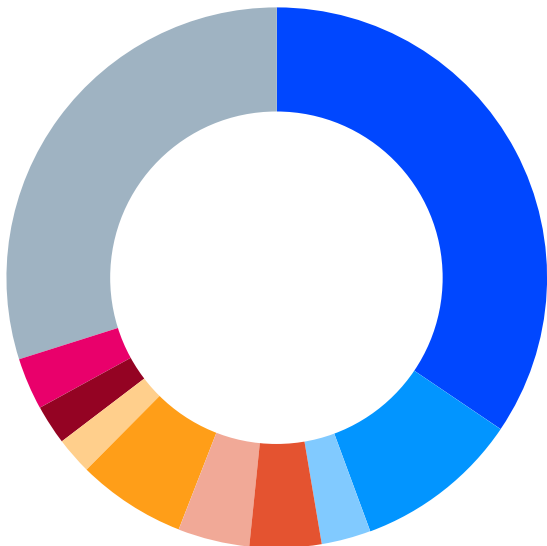
As supply chains shift due to prohibitively high AD/CVD rates on imports from China, U.S. businesses sought alternative sourcing from other U.S. trading partners, including India, Indonesia, Japan, South Korea, Thailand, and Vietnam. This shift in sourcing has led to an increase in both original investigations as well as circumvention cases on products manufactured in a multitude of countries.

While such enforcement actions are not new, the intensity with which the Department of Commerce investigated imports from countries other than China in 2023 in response to these arguments was unprecedented. The legal theories pursued by the government in its investigations of non-Chinese imports are aggressive and in many cases break with longstanding practice. Indeed, in May 2023, Commerce proposed changes to its regulations that likely will create controversial new enforcement tools to pursue imports alleged to be frustrating existing AD/CVD measures in the near future.

New AD/CVD Actions

The pace and intensity of AD/CVD enforcement in 2023 increased as compared to prior years and shows no signs of abating in 2024. In 2023, Commerce administered approximately 680 AD and CVD orders, imposed 14 new AD/CVD orders, and is currently conducting over 80 new AD/CVD investigations that are set to conclude in 2024. The scopes of these new investigations include a wide array of products, some of which were previously found to have been unfairly traded when sourced from China. New allegations of circumvention of AD/CVD orders also have increased, with six new anti-circumvention investigations initiated in 2023.

TITLE ORDERS/SUSPENSION AGREEMENTS PER COUNTRY



■ CHINA	233	■ SOUTH KOREA	44
■ INDIA	67	■ RUSSIA	15
■ INDONESIA	20	■ THAILAND	16
■ TURKEY	29	■ JAPAN	21
■ TAIWAN	29	■ OTHER	202
		TOTAL	676

Source: U.S. Department of Commerce, International Trade Administration, “ADCVD Proceedings.” www.trade.gov/data-visualization/adcvd-proceedings

INVESTIGATIONS BY COUNTRY



■ CHINA	12	■ TURKEY	4
■ INDIA	10	■ ECUADOR	3
■ INDONESIA	5	■ THAILAND	2
■ MEXICO	4	■ ISRAEL	2
■ SOUTH KOREA	4	■ COLOMBIA	2
■ TAIWAN	5	■ OTHER	27
		TOTAL	80

Source: U.S. Department of Commerce, International Trade Administration, “ADCVD Proceedings.” www.trade.gov/data-visualization/adcvd-proceedings

Notably, on October 4, 2023, U.S. producers of aluminum extrusions and the United Steelworkers labor union filed new AD/CVD petitions on imports of aluminum extrusions from 15 countries. The alleged dumping rates range from 33.79% to 256.58%. These investigations, which are subsequent to the 2011 AD/CVD orders on aluminum extrusions from China, are proving to be the largest AD/CVD investigations in recent years.

The scope of the new investigations on aluminum extrusions is unprecedented, purporting to reach nearly \$56 billion in downstream products that incorporate aluminum extrusions as inputs. The scope has created significant uncertainty for a host of U.S. importers. If the investigations were to result in AD/

CVD orders, compliance would require a level of supply-chain tracing for downstream products incorporating aluminum extrusions never before imagined. Notably, the country in which the aluminum was extruded is going to govern whether or not the goods are subject to AD/CVD measures. Commerce itself has signaled concern for the administrability of the scope but has not yet addressed importers’ concerns despite numerous requests from interested parties to do so. Commerce’s CVD and AD preliminary determinations are expected in March and May 2024, respectively. The outcome of Commerce’s decision on the scope may be indicative of the enforcement trends that are expected in 2024 and beyond.

Commerce’s Proposed Regulations Aimed at Targeting Alternatives to China

On May 9, 2023, Commerce issued proposed regulations that would substantially enhance its ability to aggressively enforce U.S. AD/CVD laws, particularly as it relates to Commerce’s ability to pursue allegations of Chinese influence in third-country markets. These changes are likely to go into effect in 2024, either as proposed or with some minor variations, as they are currently under interagency review. The following key areas are those that will likely impact foreign exporters and U.S. importers in the coming year.

Particular Market Situation

In enforcing AD laws, Commerce normally compares the U.S. sale price of some merchandise to the price of the same or similar merchandise in the foreign market. A higher foreign-market price will result in higher dumping margins. In some cases, Commerce has determined that it must adjust the foreign price to account for an alleged so-called “particular market situation,” or PMS, causing distortions in the cost of production. Commerce previously has found a PMS to exist, for example, where low-cost Chinese inputs allegedly distorted the cost of a product manufactured in a market economy with that input. The U.S. Court of International Trade and the U.S. Court of Appeals for the Federal Circuit have previously rejected Commerce’s findings of a PMS as unsupported by the record.

The proposed regulations aim to address concerns noted in prior court decisions and to codify Commerce’s methodology for analyzing alleged market distortions for inputs.

Implementation of this proposal likely would result in higher dumping margins in a host of countries based on alleged market distortions caused by Chinese influence on an input for a particular product.

Foreign Government Inaction Benefiting Foreign Producers

For many years, U.S. industries have complained that China’s inaction with respect to environmental protections have served as a government subsidy for Chinese manufactures, which have made it difficult for U.S. industries to compete as they were subject to stringent environmental laws. With the proposed rules, Commerce aims to address these and other “non-collection of payment for fees, fines, or penalties, or deferring such payments.” The proposal would also allow Commerce to consider a foreign government’s failure to enforce its property rights (including intellectual property), human rights, and labor laws. The provision also might be interpreted to allow Commerce to take action against a market economy trading partner’s failure to enact regulations aimed at curbing Chinese environmental or labor practices that influence the third-country market. Currently, Commerce’s regulations do not identify these “inactions” as countervailable subsidies per U.S. CVD laws.

Transnational Subsidies

Commerce’s current regulations limit the agency’s remedial reach of so-called “transnational subsidies.” Commerce defines these as subsidies provided by a government “other than the country in which the recipient is located.” A primary aim of this new regulatory provision is China’s Belt and Road Initiative by which China aims to develop new trading routes by investing in a multitude of countries. If implemented, Commerce’s proposal would be a significant departure from its current approach and will most likely result in a significant number of legal and appellate challenges.

Scope Inquiries

Commerce’s proposed regulations attempt to memorialize its existing practice that for a scope ruling to be issued a product

must be “commercial[ly] produced but not yet imported” into the United States. Commerce included this clarification in its proposed regulations as a supplement to its revision in 2021 on the processes and procedures used to conduct scope rulings. The proposed regulations still state that the agency would not consider “sample, prototypes, or mere models” when conducting its scope analysis.

Policy Initiatives and Cooperation with Trading Partners in Southeast Asia

Not every action taken by the U.S. government in 2023 was adverse to parties sourcing from alternatives to China, particularly as it relates to imports from Southeast Asia. For example, on May 16, 2023, President Biden vetoed a bill that would have revoked the moratorium on the imposition of a Commerce finding that certain imports of solar cells and modules from Cambodia, Malaysia, Thailand, and Vietnam were circumventing the AD and CVD orders on those products from China. Also of note, Commerce is considering a proposal to re-designate Vietnam as a “market economy,” which, if implemented, would result in change in methodology governing AD/CVD proceedings covering imports from Vietnam that would create a more favorable enforcement environment for Vietnamese producers.

While generally in line with macro-level policy efforts to promote the strategic move of supply chains away from China, both of these actions have met with significant opposition from U.S. industries and aligned stakeholders. With this in mind, the Biden Administration may be very reluctant to further extend the solar moratorium beyond the current June 6, 2024, expiration date and it is far from clear that Commerce ultimately will determine to “graduate” Vietnam to market-economy status at the end of the ongoing review. Moving into the 2024 U.S. presidential election cycle, the Biden administration may also be hesitant to expend political capital through any further actions that might be characterized as weak on trade enforcement, even if such actions promote the administration’s stated intent to encourage what the Biden administration has termed “friend-shoring,” i.e., reinforcing existing strategic partnerships via trade.

Uyghur Forced Labor Prevention Act

CBP enforcement under the Uyghur Forced Labor Prevention Act of detaining and preventing importation of goods allegedly made with forced labor has steadily increased since its enactment of the UFLPA in 2021.

Since June 21, 2022, CBP has vigorously enforced UFLPA's rebuttable presumption that goods made in whole or in part in the Xinjiang Uyghur Autonomous Region are made with forced labor and prohibited from importation into the United States, unless the importer can provide "clear and convincing evidence" that the goods were not produced with forced labor. Notably, CBP's enforcement efforts this year have expanded beyond goods shipped directly from China, and the range of products and sectors under scrutiny have been continually evolving.

In FY2023, CBP detained no fewer than 4,033 total shipments valued at \$1.4 billion for UFLPA purposes. Of those shipments, 1,687 were denied entry, 1,802 were released, and 544 shipments are pending review; however, we believe this statistic does not reflect detained shipments that were simply reexported.

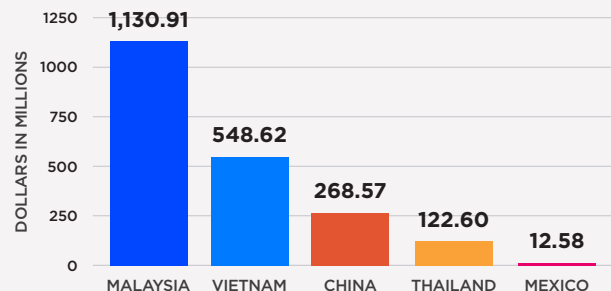
Enforcement for the fourth quarter of 2023 has been consistent with the increasing enforcement efforts generally this year, as CBP reports stopping 259 shipments in September for further examination and 504 shipments in October.

In addition, though China remains UFLPA's focus, CBP has detained goods shipped from other countries in light of the prohibition against raw materials/intermediate components made in Xinjiang and the risk of transshipment. As such, numerous detained shipments this year have been from Malaysia or Vietnam rather than from China directly. This trend confirms that CBP is just as focused on the upstream materials used to make a final product as it is with the final product itself.

We expect UFLPA enforcement in 2024 to continue in an upward trend, particularly as lawmakers continue to address

concerns for increased enforcement, and new leadership at the Department of Homeland Security seeks to spearhead continued efforts.

UFLPA ENFORCEMENT: VALUE OF DETAINED SHIPMENTS BY COUNTRY OF ORIGIN*



*From June FY2022 to November 8, 2023.

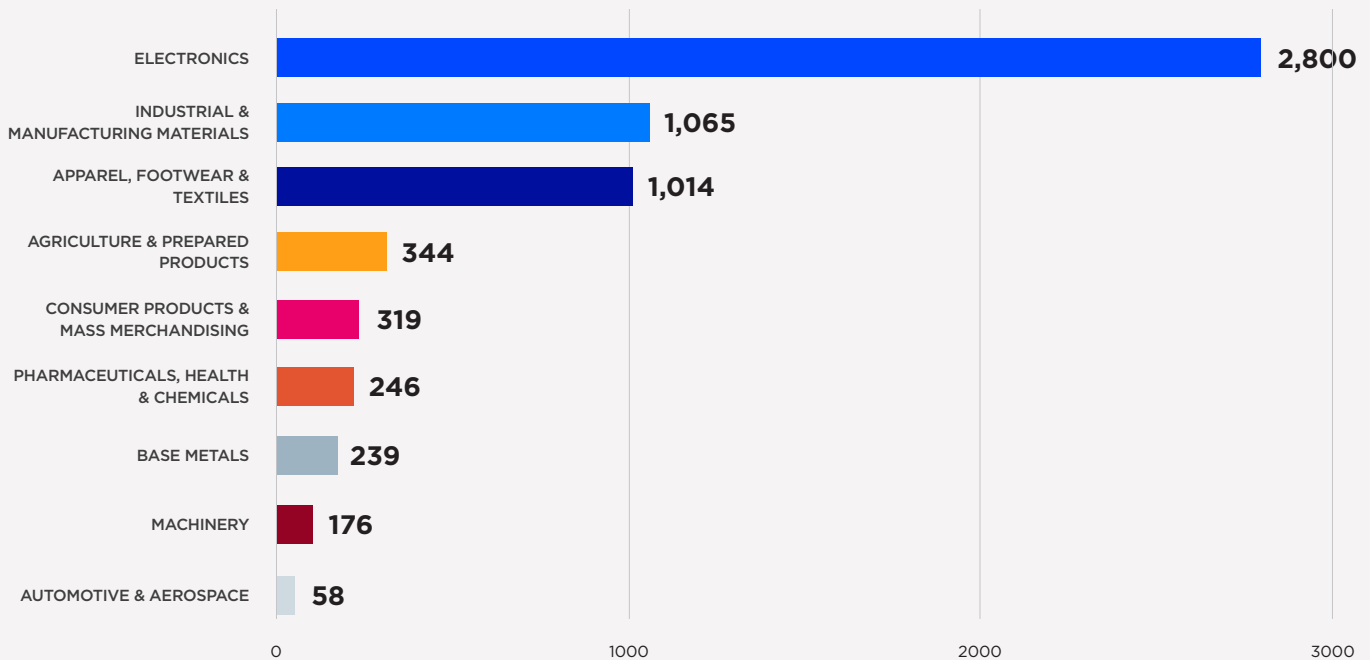
Source: U.S. Customs and Border Protection.

Targeted Products

CBP recently increased the number of high-priority sectors targeted for enforcement. Initially there were three strategic sectors—cotton, tomatoes, and polysilicon—identified as areas of concern in the UFLPA statute, but CBP formally expanded the targeted products list in its 2023 Strategy Update. The expanded list encompasses more high-risk sectors and products, including those identified by non-government organizations (NGOs).

Enforcement has not been limited to just these identified sectors. CBP has taken the approach that it has a broad mandate when it comes to forced labor issues and has detained products across a broad range of industries including automotive parts, metals,

UFLPA ENFORCEMENT: DETAINED SHIPMENTS BY INDUSTRY*



*From June FY2022 to November 8, 2023.

Source: U.S. Customs and Border Protection.

pharmaceuticals, automotive, and aerospace, to name a few. Due to the fact that there have been an estimated 31 distinct types of products alleged to be manufactured in Xinjiang with ties to forced labor, enforcement of forced labor is complex and evolving as CBP gains more experience in implementing both the statute and regulations. The auto industry, which includes battery manufacturing, has been particularly scrutinized for links to component production in Xinjiang, and as a result, CBP began detaining shipments containing automotive and aerospace products this year. Given the broad range of products being targeted, companies should seek to proactively address forced labor vulnerabilities within the supply chain in anticipation of continued enforcement.

Entity List

The Forced Labor Enforcement Task Force (FLETF) is required to publish the [UFLPA Entity List](#), which is a consolidated register of the four lists required to be developed and maintained pursuant to Section 2(d)(2)(B) of the UFLPA. Specifically, those

lists include companies found to be (a) located in the Xinjiang Uyghur Autonomous Region and using forced labor; (b) working with the government of Xinjiang in furtherance of forced labor; (c) exporting products with forced labor as described in clause (iii); or (d) operating facilities and entities that source materials from Xinjiang or from persons working with the government of Xinjiang for forced labor schemes. Importers are encouraged to monitor the Entity List as goods produced by these companies, wholly or in part, will be restricted from entering the United States. In the first year of enforcement, the Entity List only had 20 entities and that list remained static until 2023 when in three separate tranches CBP added additional entities—two in June 2023; two in August 2023; three in September 2023 and another three in December 2023. With NGOs continuing to provide allegations of companies with forced labor in their supply chains, we expect the entity list to continue to grow moving forward and recommend that importers monitor the Entity List especially if their supply chain continues to have sourcing from Xinjiang.

Challenges to UFLPA Administration

Since the enactment of the UFLPA, both domestic importers and foreign exporters have struggled with the lack of transparency in its administration. For example, if CBP detains goods upon entry for suspected UFLPA violations, it typically does not share the information upon which the detention is based. We expect challenges regarding the government's implementation of the UFLPA in the year ahead, and a recent court ruling suggests that the Court of International Trade may be willing to adjudicate these issues. In *Ninestar Corporation et. al. v. United States et. al.*, Court No. 23-00182, Judge Gary S. Katzmann ruled in November 2023 that the court's residual jurisdiction provision provides subject matter jurisdiction over a Chinese exporter's challenge to its placement on the UFLPA Entity List.

C-TPAT

On August 1, 2022, the Customs Trade Partnership Against Terrorism (C-TPAT) trade compliance program announced the addition of six new program requirements regarding the prevention of forced labor within supply chains. In January 2023, the new minimum-security requirements (MSC) became mandatory for C-TPAT members, and all requirements were expected to be met by August 1, 2023. The new requirements focused on establishing internal controls for forced labor prevention such as:

- Supply chain mapping
- Codes of conduct
- Social compliance program implementation evidence
- Supplier training
- Non-compliance remediation plans
- Best practice sharing

CBP has previously committed to providing additional benefits for C-TPAT members regarding forced labor enforcement measures. For instance, this year CBP announced front-of-line admissibility reviews, redelivery hold options, and preliminary notification of UFLPA holds for C-TPAT members.

Technology Developments for Supply Chain Tracing

CBP also hosted a Forced Labor Technical Expo in March 2023 to share the latest technologies available for addressing forced labor in the supply chain. Several of these programs leverage artificial intelligence, as well as private and federal government data.

Nineteen presenters discussed technological approaches to supply chain mapping, forensic testing, and identification of tier suppliers.

On March 14, 2023, CBP published a [dashboard](#) with statistics on shipments detained under the UFLPA. The dashboard shows the total detentions, including shipments excluded, released, and under review. The dashboard also shows the value of detained shipments by country of origin and by industry. In addition to the dashboard, CBP's Monthly Operational Update provides statistics on entries that were targeted for suspected use of forced labor (under the UFLPA and withhold release orders) each month. As shown in the operational updates, the number of targeted shipments each month confirms that CBP has been increasingly active in targeting imports with suspected links to forced labor this year.

On March 18, 2023, CBP deployed the UFLPA Region Alert enhancement to the Automated Commercial Environment (ACE). CBP designed this enhancement to provide an early notification to importers of goods that may have been produced in Xinjiang and as such, may be excluded from importation into the U.S.

On August 1, 2023, FLETF published an updated UFLPA Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China. The updated UFLPA Strategy provides insight into enforcement of the UFLPA's rebuttable presumption and the process undertaken when a shipment is suspected of forced labor.

We expect that more technological resources will be made available in the coming year, as importers seek additional guidance to ensure that their supply chains comply with U.S. Customs laws and requirements and as CBP gains experience and insight on effective enforcement against forced labor. By utilizing the resources provided by Customs and staying informed of the latest developments in technology and enforcement, importers will be better equipped to navigate this continually evolving landscape.

Export Controls & Sanctions

In 2023, the U.S. government invested considerable time and resources in enforcement of the export controls and sanctions introduced and imposed on Russia, Belarus, and China the previous year by targeting transshipment and diversion efforts. At the same time, the government proposed new restrictions on outbound investment in China and significantly expanded restrictions on semiconductor technology exports to China.

Targeting Transshipment to Russia and Beyond

While last year saw a steady increase of sanctions and export controls designed to restrict Russia's initial war efforts against Ukraine, this year the U.S. government enhanced its determination to cut Russia off from much of the global supply chain by targeting illicit diversion of high-priority items by third parties and increasing coordination among both its own governmental departments and U.S. allies.

To be sure, both the U.S. Department of Commerce's Bureau of Industry and Security (BIS) and the Department of the Treasury's Office of Foreign Assets Control (OFAC) continued implementing substantial packages of export controls and sanctions targeting specific items and entities. The two agencies began in February 2023 by marking the first anniversary of Russia's invasion of Ukraine with new sets of export controls and sanctions on Russia and Belarus and continued by imposing follow-up export controls in May 2023.

Altogether, BIS added hundreds of additional low technology items that would otherwise be designated as EAR99 to its list of items requiring a license in Supplement Nos. 4, 6, and 7 to Part 746 of the Export Administration Regulations (EAR). With these expanded restrictions, BIS has now seemingly prohibited the

export of most items and related parts to Russia and Belarus. Further, OFAC subjected several new sectors of the Russian economy to sanctions designations, including the architectural, engineering, construction, manufacturing, and transportation sectors.

In light of BIS's expanded export controls and the addition of hundreds of new companies and individuals to BIS's Entity List and OFAC's Specially Designated Nationals (SDN) List, the risk of doing business with or in Russia has substantially increased. These new restrictions do not account for much without enforcement, and BIS, in conjunction with a variety of other U.S. government departments, announced several initiatives designed to enhance both criminal and administrative enforcement of export control laws and to sever the third-party evasion networks that have stepped in to continue supplying Russia.

The Disruptive Technology Strike Force (DTSF), a multi-agency initiative including the Federal Bureau of Investigation, Homeland Security Investigations, and 14 U.S. Attorneys' offices, represents a larger and more aggressive stance toward investigating and prosecuting sanctions evasion and export control violations. BIS, OFAC, and the Department of Justice (DOJ) have also issued a variety of notices and official guidance

encouraging exporters to do their part in conducting due diligence on customers, intermediaries, and counterparties to identify evasion red flags in transactions with countries outside of Russia. In addition to pledging increased cooperation going forward, BIS and OFAC also identified over a dozen countries as common transshipment points for reexports to Russia and Belarus.

Both the DOJ and BIS have already announced actions under the new initiatives, with the DOJ having begun multiple federal prosecutions for export control violations related to sensitive technologies and military applications, and BIS issuing several temporary denial orders for attempted diversion of aircraft parts and electronics to Russia.

BIS and the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) also issued multiple joint alerts identifying diversion red flags and advising U.S. financial institutions of new Suspicious Activity Report (SAR) key terms to assist the agencies in identifying transshipments to both Russia and other countries. Working in conjunction with several allies, BIS identified 45 "common high priority items" by their six-digit Harmonized System (HS) Codes that Russia has sought for its









weapons programs. Of these, BIS further prioritized nine items and their corresponding HS codes, including integrated circuits, for which banks must file a SAR when diversion is suspected.

In addition to its efforts to combat diversion to Russia, BIS and FinCEN issued a joint notice in November 2023 intended to solicit assistance in identifying efforts to evade export controls to illicit entities beyond Russia, such as for the purpose of enhancing adversaries' military capabilities or supporting mass surveillance programs that enable human rights abuses. The DTSF is prioritizing investigations into these types of "disruptive technologies," which include advanced semiconductors and supercomputer computing hardware.

When encountering transactions involving items under these HS codes and any non-Global Export Control Coalition (GECC) countries, BIS has strongly urged companies to conduct heightened due diligence on all parties involved and to obtain customer certifications. Heading into 2024, U.S. companies and financial institutions should remain on high alert for any signs indicating that their goods may be diverted away from their intended end user, end destination, and/or end use.

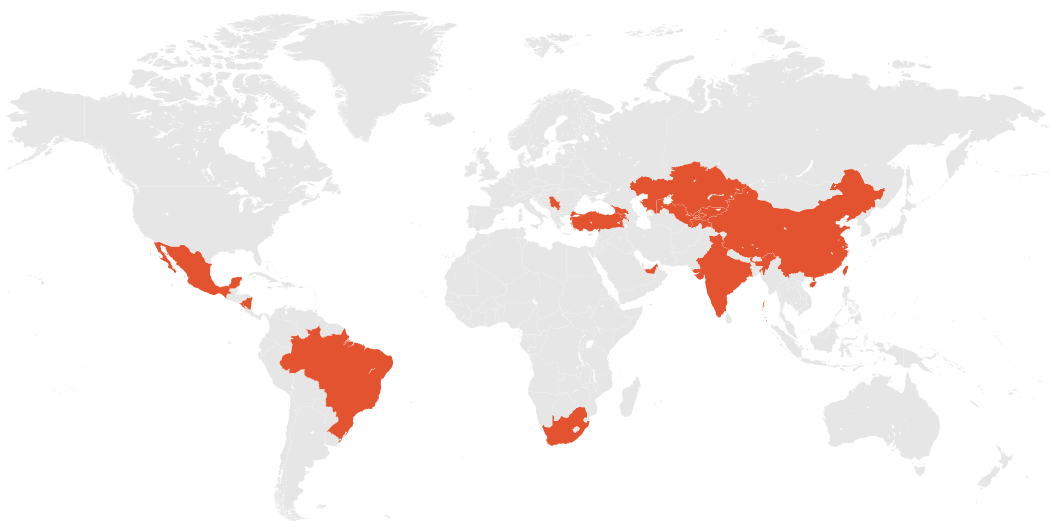
RUSSIA AND BELARUS DIVERSION RED FLAGS

Enforcement agencies have advised exporters to look out for these diversion warning signs.

-  **ANY INVOLVEMENT FROM KNOWN TRANSSHIPMENT COUNTRIES**
-  **CUSTOMER ASKS TO REDIRECT GOODS PREVIOUSLY ORDERED FOR RUSSIA OR BELARUS**
-  **CUSTOMER WILLING TO PAY ABOVE MARKET RATES**
-  **CUSTOMER RELIANT ON THIRD PARTY TO MAKE PAYMENTS**
-  **CUSTOMER IS PRESSURING YOU TO MOVE AS QUICKLY AS POSSIBLE**
-  **NO SIGN THAT CUSTOMER EXISTED PRIOR TO RUSSIA'S INVASION OF UKRAINE IN FEBRUARY 2022**
-  **CUSTOMER HAS LITTLE OR NO WEB PRESENCE**
-  **AN EXISTING CUSTOMER'S ATTEMPT TO PURCHASE NEW PRODUCTS OR INCREASED QUANTITIES WHICH ARE INCONSISTENT WITH THEIR BUYING HISTORY PRIOR TO FEBRUARY 2022**

COMMON TRANSSHIPMENT POINTS

BIS and OFAC have identified the following countries as common points for reexports to Russia and Belarus.



ARMENIA
BRAZIL
CHINA
GEORGIA
INDIA
ISRAEL
KAZAKHSTAN
KYRGYZSTAN
MEXICO
NICARAGUA
SERBIA
SINGAPORE
SOUTH AFRICA
TAIWAN
TAJKISTAN
TURKEY
UAE
UZBEKISTAN

Furthermore, on December 6, 2023, BIS added 42 entities to the Entity List as a result of their ongoing efforts to circumvent U.S. export controls on sensitive military electronics through the acquisition and illicit diversion of U.S.-origin electronic components on behalf of parties in China and Russia. As noted by Assistant Secretary for Export Enforcement Matthew S. Axelrod, these designations were the result of recent BIS enforcement actions ranging from criminal investigations to end-use checks to analytical tradecraft and were effectuated through efforts by multiple U.S. authorities working together in the Disruptive Technology Strike Force.

Continued Focus on China's Technology Industries

The U.S. government finally issued its much-anticipated outbound investment restrictions in 2023. On August 9, the Biden administration released an Executive Order directing the Department of the Treasury to develop and implement regulations for outbound investments in support of “sensitive technologies and products critical for the military, intelligence, surveillance, or cyber-enabled capabilities,” of certain countries. Currently, the regulations only focus on China, Hong Kong, and Macau, but the list could be expanded in the future.

Treasury then published an Advanced Notice of Proposed Rulemaking (ANPR) which outlined the intended scope of the regulations and opened a public comment period. The ANPR do not represent final regulations, and any restrictions or prohibitions contained therein will not be effective until the rules are finalized. The ANPR focuses on several target industries in China, including semiconductors and microelectronics, quantum information technologies; and artificial intelligence systems. The ANPR anticipates restricting investments in companies operating within these target industries that produce or develop certain technologies.

The ANPR also contemplates that its restrictions will only apply to the following types of “covered transactions”:

- Acquisition of an equity interest or contingent equity interest in a covered foreign person;
- Provision of debt financing to a covered foreign person where such debt financing is convertible to an equity interest;
- Greenfield investment that could result in the establishment of a covered foreign person; or
- Establishment of a joint venture, wherever located, that

is formed with a covered foreign person or could result in the establishment of a covered foreign person. is formed with a covered foreign person or could result in the establishment of a covered foreign person.

After the regulations are finalized, the legal community and relevant industries will have a better understanding as to the rule's scope and any restrictions or reporting obligations for transactions.

Export Controls on Semiconductor Manufacturing Equipment

An October 17, 2023, IFR implemented new export controls on semiconductor manufacturing equipment (SME). This new IFR implemented, among other changes, the following:

- Added more semiconductor manufacturing items to those previously included under ECCN 3B090 and controls all items under ECCNs 3B001 and 3B002.
- Revises the associated technology and software controls to reflect the licensing requirements for items moved from ECCN 3B090 to ECCNs 3B001 and 3B002.
- Revises national security license requirements to impose national security controls on SME.
- Revises regional stability requirements to reflect changes to ECCN 3B090 and expand license requirement for Macau and Country Group D:5 countries.
- Adds a 0% de minimis rule for items in ECCN 3B001.f.1.b.2.b.
- Adds new defined terms for “extreme ultraviolet” (EUV) and “advanced-node integrated circuits.”
- Adds a new Temporary General License to allow companies time to identify alternative supply chains.

Advanced Computing, Supercomputer and Semiconductor End Use

This IFR sets new parameters for advanced chips that will require export licenses and imposes additional measures to prevent circumvention of the rules.

Among other changes, this new IFR implemented the following:

- Replaces the language “any other item on the CCL that meets or exceeds performance parameters of 3A090 or 4A090” by explicitly listing such ECCNs in .z paragraphs to 9 ECCNs on the CCL.
- Clarifies the scope of “U.S. person” and end-use controls related

REVISED SEMICONDUCTOR AND SUPERCOMPUTING RULES

On October 17, 2023, the Bureau of Industry and Security (BIS) published two interim final rules (IFRs) for supercomputing and semiconductors. These two rules supplement BIS's previously published October 2022 rule and are aimed at closing loopholes in the October 2022 rule. Commerce Secretary Gina Raimondo stated that these rules will be updated “at least annually” to make sure they are current with the latest technological developments and to ensure the rules are effective.

to supercomputers and advanced computing items.

- Includes ECCNs 3A991.p and 4A994.1 items within the scope of items eligible for the Consumer Communications Device license exception.
- Expands the Regional Stability license requirement and amends the licensing policy.
- Broadens the country scope for items controlled for Regional Stability, under the advanced computing Foreign Direct Product Rule, and advanced computing provisions, to countries in Country Groups D:1, D:4, and D:5.
- Broadens the country scope for supercomputing and advanced-node integrated circuit provisions of the October 2022 rule to include countries in Country Group D:5.
- A Temporary General License to allow companies to identify alternative supply chains.

Specifically, the new rule made parameter changes to identifying restricted chips. The rule removed the phrase “interconnected bandwidth” as a parameter and implemented restrictions if the chip exceeds the preexisting performance threshold in the October 7 rule or the chips exceed a new “performance density threshold” designed to preempt workarounds.

As to the clarification of scope for “U.S. persons,” BIS explains that the clarification largely codifies previously provided guidance issued by the agency. Specifically, the IFR makes clear that the following “U.S. persons” are subject to license requirements in § 744.6(c):

- Under paragraph (c)(3)(i)(A) those “U.S. persons” that authorize the shipment, transmittal, or transfer (in-country) of items not subject to the EAR;
- Under paragraph (c)(3)(i)(B) those “U.S. persons” that conduct the delivery, by shipment, transmittal, or transfer in-country, of items not subject to the EAR; and
- Under paragraph (c)(3)(i)(C) are “U.S. person” that service, including maintaining, repairing, overhauling, or refurbishing items not subject to the EAR.

The IFR also added a new subsection (c)(3)(ii), which details the due diligence necessary for U.S. companies to undertake to comply with the rules. The subsection states that appropriate due diligence “includes but is not limited to review of publicly available information, capability of items to be provided, proprietary market data, and end-use statements” and that “U.S. persons” need to conduct due diligence “to assess whether the item is for the ‘development’ or ‘production’ of ‘advanced-node integrated circuits’ at a ‘facility’” in compliance with the rule.

Antiboycott Enforcement

In 2023, BIS delivered on the new “Enhanced Enforcement of the Antiboycott Rules” issued in 2023 with several enforcement actions targeting antiboycott violations, in addition to a new reporting requirement.

Beginning in May 2023 and running through November, BIS announced five settlement agreements resulting from its first enforcement actions under the new compliance initiative to resolve apparent violations of the antiboycott regulations. The penalties levied by BIS in each action ranged from \$44,740 to \$283,500 and involved failure to report boycott requests and/or complying with impermissible boycott requests. Importantly, each company at issue voluntarily disclosed its apparent violations. BIS’s decision to nevertheless bring an enforcement action is a strong indicator that the agency intends to pursue these violations openly and vigorously. If not accounted for already, U.S. companies and their foreign subsidiaries, regardless of size, should make antiboycott compliance an integral part of their overall trade compliance program heading into the new year.

In addition to increased enforcement, BIS enhanced its compliance focus by adding a new requirement that U.S. persons reporting boycott-related requests to its Office of Antiboycott Compliance (OAC) must now also disclose the identity of the specific party that made the request. Previously, U.S. persons were required to disclose only when they had received a boycott-related request and the country the request originated from. BIS hopes this new mandate will assist OAC’s efforts to deter foreign entities from issuing boycott-related requests to begin with.

RECENT LEGAL SETTLEMENTS INVOLVING VIOLATIONS OF ANTIBOYCOTT REGULATIONS

May - November 2023

Regal Beloit FZE	\$283,500
Pratt & Whitney Component Solutions, Inc.	\$48,750
Profense LLC	\$48,500
B.E. Meyers & Co., Inc.	\$44,750
Forta LLC	\$44,750

Source: U.S. Department of Commerce, Bureau of Industry and Security

Supply Chain & Logistics

Following the enactment of the Ocean Shipping Reform Act of 2022 (OSRA) and major bankruptcies and mergers within the shipping industry, 2023 saw continued litigation in the aftermath of port congestion.

In the first full year since its passage the Ocean Shipping Reform Act of 2022 (OSRA) created a big impact. The Federal Maritime Commission (FMC) continued to enact portions of OSRA with rules on detention and demurrage (D&D) but continues to move slowly on charge complaints. The primary focus appears to be audits, as the FMC has continued to ramp up enforcement in that arena. As the shipping industry slows and retailers are more cautious about managing inventories, we expect the FMC to continue to decide cases from the era of peak port congestion, as new litigation begins to emerge with disputes from the post-OSRA period.

Charge Complaints

Shippers and others may submit to the FMC—and the FMC must accept—information concerning complaints about charges assessed by a common carrier. Upon receipt of a submission of such an “informal” complaint (this term is not one pursuant to the formal complaint procedures of the FMC regulations) with supporting documents, the Commission shall promptly investigate the charge under Sections 41104(a) and 41102. Accordingly, the common carrier shall “(1) be provided an opportunity to submit additional information related to the charge in question” and “(2) bear the burden of establishing the reasonableness of any demurrage or detention charges” pursuant to 46 CFR § 545.5. This procedure shifts the burden to the ocean carriers on D&D charges deemed unlawful, requiring the ocean carrier to prove that its invoices meet the reasonableness tests as defined in the OSRA. These investigations can lead to shipper refunds and/or penalties for ocean carriers.

The NVOCC Role

In the investigation of charge complaints as noted above, the FMC may find that a non-vessel operating common carrier (NVOCC) is responsible for the non-compliant assessment of the charge in whole or in part. This suggests that NVOCCs cannot merely sit back on the “pass through” solutions of NVOCCs if they are not meeting their obligations with the underlying shippers in keeping them timely informed of the Last Free Days for the transactions and other factors which are required under the FMC’s Interpretive Rules. NVOCCs with door delivery obligations are particularly vulnerable in those transactions unless the terms are very clear and the notices are provided in a timely manner to allow shippers reasonable alternatives if the NVOCCs are not acting with due diligence in their delivery efforts.

Long-Term Policy Implications of OSRA

One of the principal long-term implications of OSRA is the requirement that the FMC and other federal agencies carry out a study and develop best practices for on-terminal or near-terminal chassis pools that provide service to marine terminal operators, motor carriers, railroads, and other stakeholders that use the chassis pools, with the goal of optimizing supply chain efficiency and effectiveness. The FMC has entered into an agreement with the Transportation Research Board to conduct this study. The study is ongoing, and the results are expected in mid-2024.

Other notable policy implications include FMC’s longer-term projects related to adoption of technology at U.S. ports, the utilization of Transportation Worker Identification Credentials for the purpose of using same within the U.S. interior with a purpose of providing direct assistance to a U.S. port.

FMC Seeks to Adopt New Invoice and Billing Framework

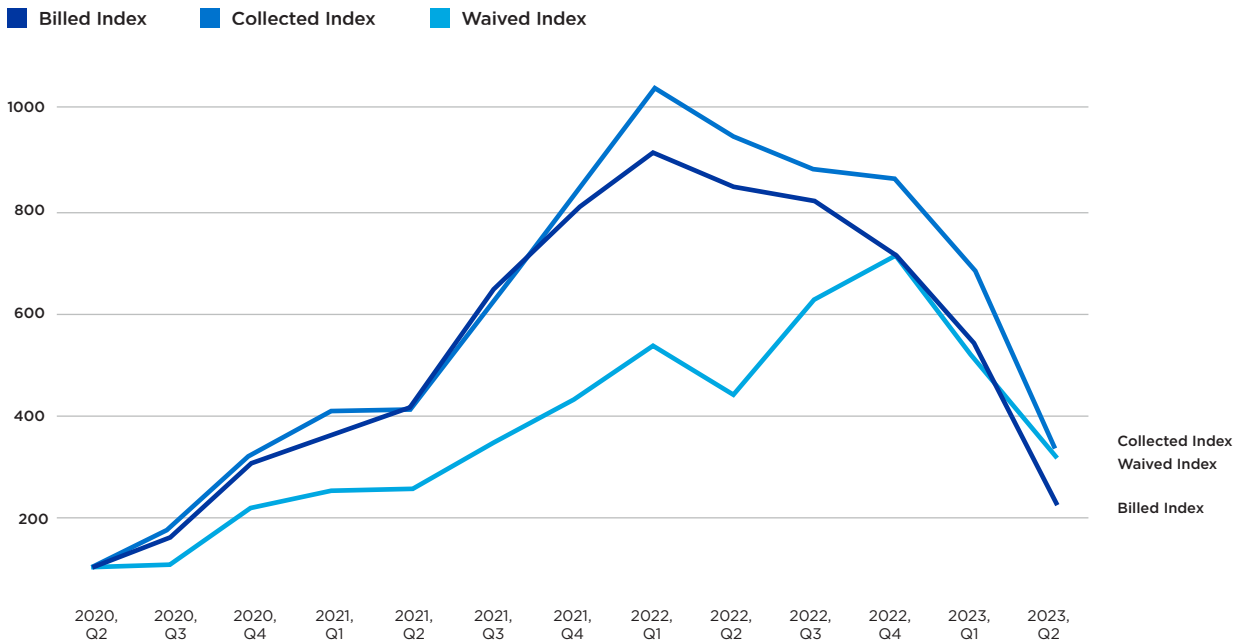
FMC issued a Proposed Rule in 2022 that would expand and clarify information common carriers and marine terminals (MTOs) must include in invoices for D&D. The FMC additionally proposed new requirements regarding whom may be issued such invoices and the timeframes within which invoices must be issued, disputed, and resolved. This feature would be a game changer since the current proposed rule would require that D&D invoices be issued within 30 days from when the charges are incurred or the charges may be voided. Likewise, complaints on invoices need to be reported within 30 days of the date of the invoice or the remedy sought may be waived. This is significant because commonly D&D invoices are sent two years—or more—after the D&D was incurred. The Final Rule is expected in Q1 of 2024. The industry on all sides of these issues will need to modify internal procedures in dealing with D&D in order to avoid major monetary issues which were experienced during the congestion period. The proposed rule would:

- Adopt minimum information requirements that common carriers and MTOs must include in detention and demurrage invoices (including information in addition to the 13 data points required by OSRA 2022)
- Specify timelines and practices for issuing and disputing invoices
- Clarify which parties appropriately may be billed for detention and demurrage charges

INVOICING REQUIREMENTS UNDER OSRA

- Date container is made available
- Port of discharge
- Container number or numbers
- For exported shipments, the earliest return date.
- Allowed free time in days
- Start date of free time
- End date of free time
- Applicable detention or demurrage rule on which the daily rate is based
- Applicable rate or rates per the applicable rule
- Total amount due
- Email, telephone number, or other appropriate contact information for questions or requests for mitigation of fees
- Statement that charges are consistent with all FMC rules with respect to D&D
- Statement that common carrier's performance did not cause or contribute to the underlying invoiced charges

DETENTION AND DEMURRAGE INDICES



Source: Federal Maritime Commission, <https://www.fmc.gov/detention-and-demurrage/>

Detention and Demurrage Liability—Risk Mitigation

In the aftermath of port congestion, rules tariffs, bills of lading, and negotiated rates arrangements (NRAs) should ensure that risk is mitigated in all scenarios, including:

- When the NVOCC caused the demurrage and/or detention;
- When the Shipper caused the demurrage and/or detention;
- or
- When neither the NVOCC nor the Shipper is at fault—such as the following scenarios: chassis shortages, driver shortages, weather conditions, delivery rail ramp stacked the containers into stacks and not recoverable for some time, other ocean carrier, terminal reasons for demurrage and/or detention.

A deep review of rules tariffs, bills of lading, and NRA language is key to ensuring that there is no conflicting or confusing language as to who is responsible for D&D.

With most ocean carrier service contracts expiring on April 30, 2024, keep in mind the risk mitigation language as those contracts are negotiated. While the industry has slowed since peak activity during the pandemic, we expect the final slate of remaining pandemic-era disputes to be resolved in 2024.

Husch Blackwell's International Trade Team

Julia Banegas

Associate | Washington, DC
julia.banegas@huschblackwell.com

Sergio Balbontin

Attorney | Washington, D.C.
sergio.balbontin@huschblackwell.com

Stephen Brophy

Senior Counsel | Washington, DC
stephen.brophy@huschblackwell.com

Eric Dama

Associate | Dallas
eric.dama@huschblackwell.com

Joseph Diedrich

Senior Associate | Madison
joseph.diedrich@huschblackwell.com

Beau Jackson

Partner | Kansas City | Washington, DC
beau.jackson@huschblackwell.com

Grant D. Leach

Partner | Omaha
grant.leach@huschblackwell.com

Jasmine Martel

Associate | Houston
jasmine.martel@huschblackwell.com

Emily Mikes

Associate | Washington D.C.
emily.mikes@huschblackwell.com

Cortney O'Toole Morgan

Partner | Washington, DC
cortney.morgan@huschblackwell.com

Nithya Nagarajan

Partner | Washington, DC
nithya.nagarajan@huschblackwell.com

Jeffrey S. Neeley

Partner | Washington, DC
jeffrey.neeley@huschblackwell.com

Carlos Rodriguez

Partner | Washington, DC
carlos.rodriguez@huschblackwell.com

Jamie Shookman

Senior Counsel | Milwaukee
jamie.shookman@huschblackwell.com

Robert Stang

Partner | Washington, DC
robert.stang@huschblackwell.com

Daniel Wilson

Partner | Washington, D.C.
daniel.wilson@huschblackwell.com

Bernardo Zito Porto

Associate | Kansas City
bernardo.zitoporto@huschblackwell.com

Welcome to Our New Colleagues!

As trade law-related challenges continue to escalate, we have broadened and deepened our team throughout 2023 in order to provide the best-in-class service our clients count on. **Dan Wilson** joined our D.C. office in August as a partner, bringing substantial experience representing U.S.-based and foreign companies in AD/CVD proceedings before the Department of Commerce and the International Trade Commission. Former DOJ attorney **Jamie Shookman** joined our team as senior counsel during 2023 and has brought a deep understanding of matters related to tariff classification, valuation, preferential tariff treatment, duty drawback, country of origin, and the scope of AD/CVD duties. Additionally, attorney **Sergio Balbontin**, a 14-year veteran as a lead investigator with the Department of Commerce's International Trade Administration, also joined our team in 2023.

Please visit online Husch Blackwell's [International Trade](#) team page to view our entire team.