INTERNATIONAL TRADE LAW

2021 Year in Review & Outlook for 2022

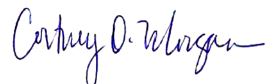
HUSCH BLACKWELL

International Trade Law: 2021 Year in Review

Amid lockdowns and supply-chain disruptions due to the Covid-19 pandemic, 2021 was a year defined by irony. For decades, U.S. trade policy had been premised on trade liberalization and the use of multilateral institutions to strike agreements and settle disputes. The election of Donald Trump in 2016 ended this approach and ushered in four years of aggressive, unilateral U.S. trade policies, roiling allies and foes alike. For those who might have thought that the Biden administration would reset policy to the status quo ante, the reset was neither as full nor as fast as some desired. The world had changed greatly since 2016, and many of the Trump-era trade policies persist.

Taking a step back from the impacts of the pandemic and the tumult of the 2020 U.S. presidential election, a second irony comes into view. Despite the bluster of Donald Trump's approach—the questionable use of tariffs, the renegotiation of NAFTA, and the nationalistic rhetoric—the U.S. trade deficit grew considerably during the Trump years, culminating in a $676 billion deficit in 2020, the highest since the onset of the Global Financial Crisis. The deficit has only widened over the past year.

This report provides a detailed look at how 2021 played out and takes a peek at how 2022 might develop. As clients and companies begin to strategize on what a second year of the Biden administration will bring, we hope the framework presented in this report will help your business maximize potential cost savings and minimize potential risks as enforcement activity continues to rise and supply chains look to remain under pressure well into the coming year.



Cortney Morgan, Partner
International Trade and Supply Chain Practice Group Leader

A Note on Timing and Our International Trade Insights Blog

The information presented in this report is current as of December 20, 2021. As always, key policy changes occurred as we were preparing this report, and additional changes are likely to be forthcoming in the coming weeks and months. To stay up to date on these future international trade law developments, please subscribe to our blog at https://www.internationaltradeinsights.com/.

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Tariffs, Trade Remedies, and Trade Policy

Despite the start of a new presidential administration, U.S. trade policy with respect to tariffs and trade remedies did not dramatically shift in 2021. There was an expectation by many that there would be a significant shift in trade policy with the Biden administration taking office in January 2021, but there was little change or transition from the enforcement approaches of the Trump administration's imposition of tariffs and other trade remedies. The major trade policy highlight for 2021 was the confirmation of Katherine Tai as the United States Trade Representative. Ambassador Tai appears to be prioritizing relationships with traditional U.S. allies, but with no clearly announced direction that those renewed alliances should take. Towards the end of the year, there were discussions with China addressing key trade issues, but overall, the relationship between the United States and China continues to be strained. Section 301 and 232 tariffs remain mostly in place with little movement toward the recission or removal of these tariffs for the foreseeable future. While the United States and European Union have recently come to an agreement that will roll back a significant amount of Section 232 tariffs on goods from the EU, what the implementation will look like in practice and to what extent this addresses the larger global position with respect to Chinese overcapacity is yet to be determined. We anticipate that the second year of the administration will bring a more concentrated focus on how to address these global trade issues that impact the operations of many U.S. businesses large and small.

Tariffs

For the past several years, the previous administration made particularly aggressive use of legal provisions under Section 301 of the Tariff Act of 1930 and Section 232 of the Trade Expansion Act of 1962 to justify the imposition of significant tariffs against products imported into the United States. Section 301 tariffs have been used against numerous products from China to offset the alleged unfairness of Chinese government actions regarding intellectual property issues and requirements for investors in China. Section 232 has been used to increase tariffs on major steel and aluminum products from many countries, including many allies of the United States, centered on the premise that these imports pose a national security threat to the United States. The use of both types of tariffs are currently being challenged in the U.S. Court of International Trade (CIT) and the U.S Court of Appeals for the Federal Circuit. There also is a pending request for a writ of certiorari before the U.S. Supreme Court for an appeal on the expansion of certain Section 232 tariffs during the Trump administration.

Section 301: China and Other Tariffs

Section 301 tariffs continue to be a key area of concern. In the fall of 2020, over 6,500 individual plaintiffs filed actions challenging the Trump administration's institution of Section 301 List 3 and List 4A duties. This consolidated case is still under review at the CIT. The final set of briefs was filed on November 15, 2021, and oral argument is scheduled for February 1, 2022. As it stands now, we anticipate that a decision will be issued by the Court in the first half of 2022.

One significant development in this litigation in 2021 was that the CIT ordered that—in the event the Court finds that the List 3 and/or List 4A tariffs were illegally collected—plaintiffs would be entitled to either a reliquidation of unliquidated entries or would be entitled to a refund with interest on those entries. Unfortunately, while the case is pending, U.S. Customs and Border Protection (CBP) will continue to

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process and liquidate entries as it normally does, and importers will have to continue to pay Section 301 tariffs for goods entered. We are hopeful that there will be some resolution to this uncertainty in 2022.

In early October, the Biden administration indicated that it would seek comments concerning new exclusion processes and other trade remedies to strengthen American competitiveness. As a first step, the administration opened up an opportunity to comment on expired exclusions for 549 specific Harmonized Tariff Schedule of the United States (HTSUS) codes and product descriptions on goods from China. Comments were due on December 1, 2021. As of the date of publication of this report, 914 companies had filed 2,024 sets of comments related to 489 specific product exclusions. While the administration has indicated that it is engaging in ongoing discussions on potentially opening the exclusion process for additional products, nothing has been announced to date.

Section 232: Steel and Derivative Tariffs

The United States ended the year with a noteworthy trade policy shift related to Section 232 steel and aluminum tariffs implemented during the Trump administration. In November, the United States and the European Union reached an agreement to utilize tariff rate quotas rather than Section 232 tariffs on imports of steel and aluminum from the EU. The EU is the third-largest supplier of steel and aluminum to the United States and this rollback should help curtail rising prices on vehicles and construction materials.

At the same time, the challenges brought by U.S. importers against the imposition of Section 232 tariffs continue to work their way through the courts. Some key decisions that will impact the continued use of Section 232 tariffs include whether or not the Trump administration had the authority to expand the scope of the original 232 steel and aluminum tariffs to derivative products, and whether the tariffs themselves could be increased without further investigation of the impact to national security.

In *PrimeSource Bldg. Prods. v. United States*, the CIT found that the imposition of Section 232 steel tariffs on derivative products under Proclamation 9980 was invalid and contrary to law. The most important aspect of the CIT's decision was the instruction to the government to refund duties paid by PrimeSource on all entries subject to the Section 232 tariffs under Proclamation 9980, whether they were liquidated or unliquidated. This decision will have an impact on several other pending cases before both the CIT and the U.S. Court of Appeals for the Federal Circuit, which will be of great importance in 2022.

In addition, there is an ongoing challenge to the Section 232 tariffs related to the sudden increase in tariffs in August 2018 on exports of steel and aluminum from Turkey. A U.S. importer challenged the increase in *Transpacific Steel, LLC et. al. v. United States et. al.*, and the request for a writ of certiorari to hear the case before the U.S. Supreme Court is pending. This action is a result of the Federal Circuit holding in July that the President may modify Section 232 tariffs beyond the 105-day procedural deadline specified in the statute. This reversal of the lower-court decision was based on the finding by the Federal Circuit that the President did not depart from the Secretary of Commerce's original report which found that a national security threat existed with respect to these imports. The implications of this appeal and the extent of the President's authority to modify or alter tariffs under Section 232 will be an issue to follow in 2022. If the Supreme Court accepts the case, it would be one of a handful of trade remedy and tariff cases that the Court has heard in the past two decades.

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Other Trade Policy Shifts

The Office of the United States Trade Representative (USTR) announced in October that the U.S. Department of the Treasury reached an agreement with Austria, France, Italy, Spain, and the United Kingdom regarding the treatment of Digital Services Taxes (DSTs). Treasury reached the agreement in conjunction with the Organization for Economic Co-operation and Development (OECD) global agreement. In coordination with Treasury, USTR plans to work together with these governments to ensure implementation of the agreement and rollback of existing Section 301 DSTs. The products affected by the Section 301 tariffs included glassware from Austria; cosmetics and handbags from France; furniture and jewelry from India; footwear and handbags from Italy; shellfish and footwear from Spain; carpets and linens from Turkey; and beauty products and apparel from the United Kingdom.

Finally, at the 2021 United Nations Climate Change Conference, commonly referred to as COP26, the United States and China reached a surprise agreement to promote more "green trade." This will likely go hand in hand with reducing Section 301 and 232 tariffs on China since there is incentive for China to prioritize cleaner steel and aluminum production.

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Antidumping/Countervailing Duties

This coming year will continue to see shifts in the enforcement of antidumping and countervailing duty (AD/CVD) matters. We anticipate an increase in enforcement actions covering the panoply of tools available to the government. In addition to new AD/CVD petitions, there continues to be a steady uptick in allegations of evasion of existing AD/CVD orders by CBP under the Enforce and Protect Act (EAPA) and actions against alleged circumvention of AD/CVD orders by the U.S. Department of Commerce. CBP also has stepped up enforcement through the use of Notices of Action, also known as CBP Form 29s. These notices state that an importer should have declared their shipments as being subject to antidumping/countervailing duties (known as Type 3 entries) rather than as just being subject to normal duties (Type 1 entries). The effect of such Notices of Action can be severe, with importers being asked to pay huge additional duty deposits suddenly and unexpectedly. It is critical for importers to address these issues with CBP immediately and with a persuasive response to avoid having their import privileges affected.

Since the beginning of 2021, at least 34 new AD/CVD investigations have been initiated covering a variety of products from 13 different countries. In several cases, allegations were filed against additional countries where there was already an AD/CVD order in place on imports of the product from other countries. For example, with AD/CVD orders already in place on Oil Country Tubular Goods from China, India, Korea, Turkey, and Vietnam, U.S. producers filed a new set of allegations against imports of the same product from four additional countries (Argentina, Mexico, South Korea, and Russia).

In 2021, there has been a steady flow in the number of AD/CVD cases which were filed on a variety of different products. We anticipate that cases will continue to be filed at a steady rate in 2022 as the world economy recovers from the pandemic. There will be shifts in the global manufacturing sector that will potentially result in cases being brought against specialized products, and this trend does not look likely to abate for the foreseeable future.

ANTIDUMPING/ COUNTERVAILING DUTIES
The Basics

Dumping is defined as selling at prices in the United States at less than the price charged in the home market (i.e., the domestic market of the producer). These "dumped" imports cause—or threaten to cause—material injury to the U.S. domestic industry filing the complaint. A subsidy is a financial contribution by a foreign government authority which confers a benefit to a manufacturing entity in a manner that enables that entity to either produce more goods or export more goods to gain foreign market share.

Examples of New AD/CVD Cases in 2021

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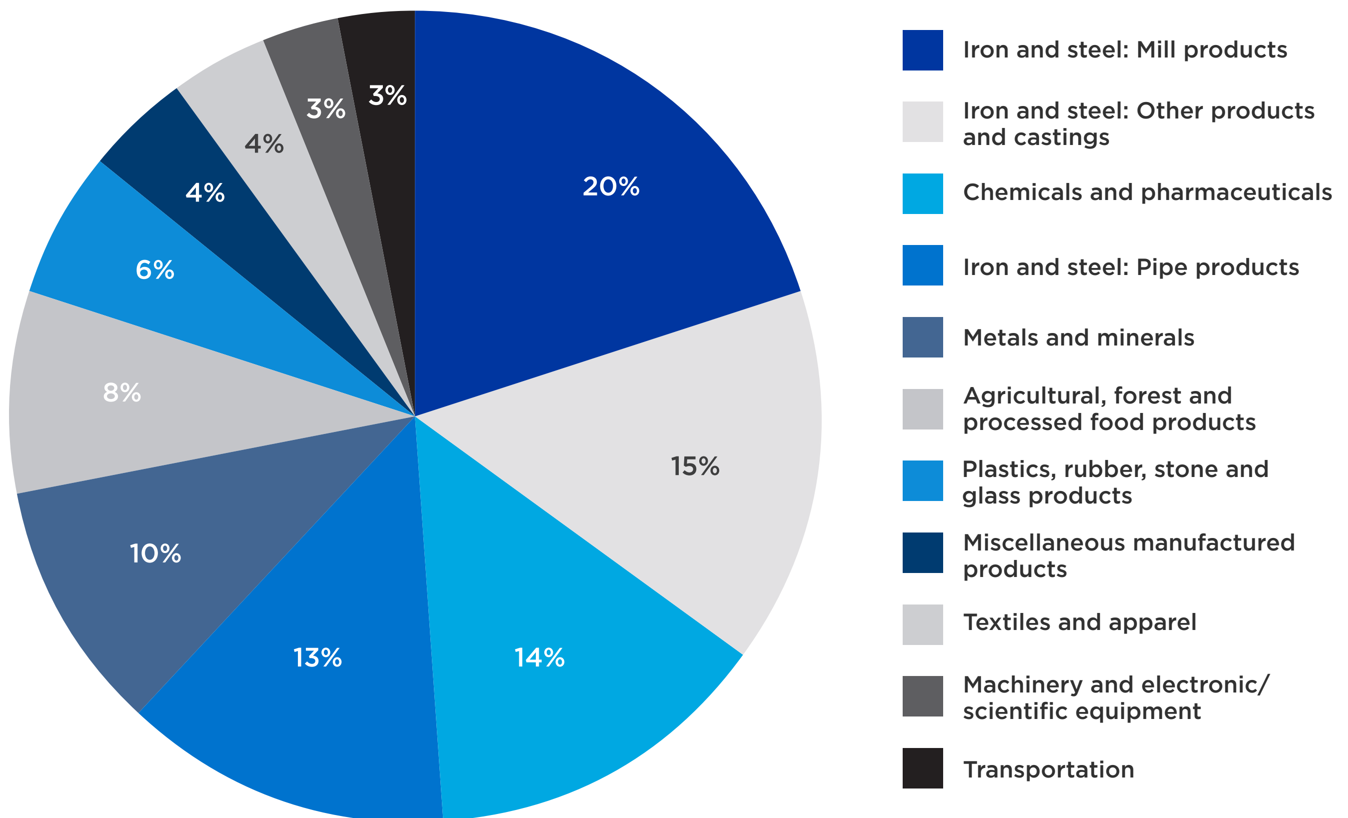
Antidumping and Countervailing Duty Orders in Place

AS OF DECEMBER 2, 2021

TOTAL ACTIVE ORDERS

ORDERS BY PRODUCT GROUP



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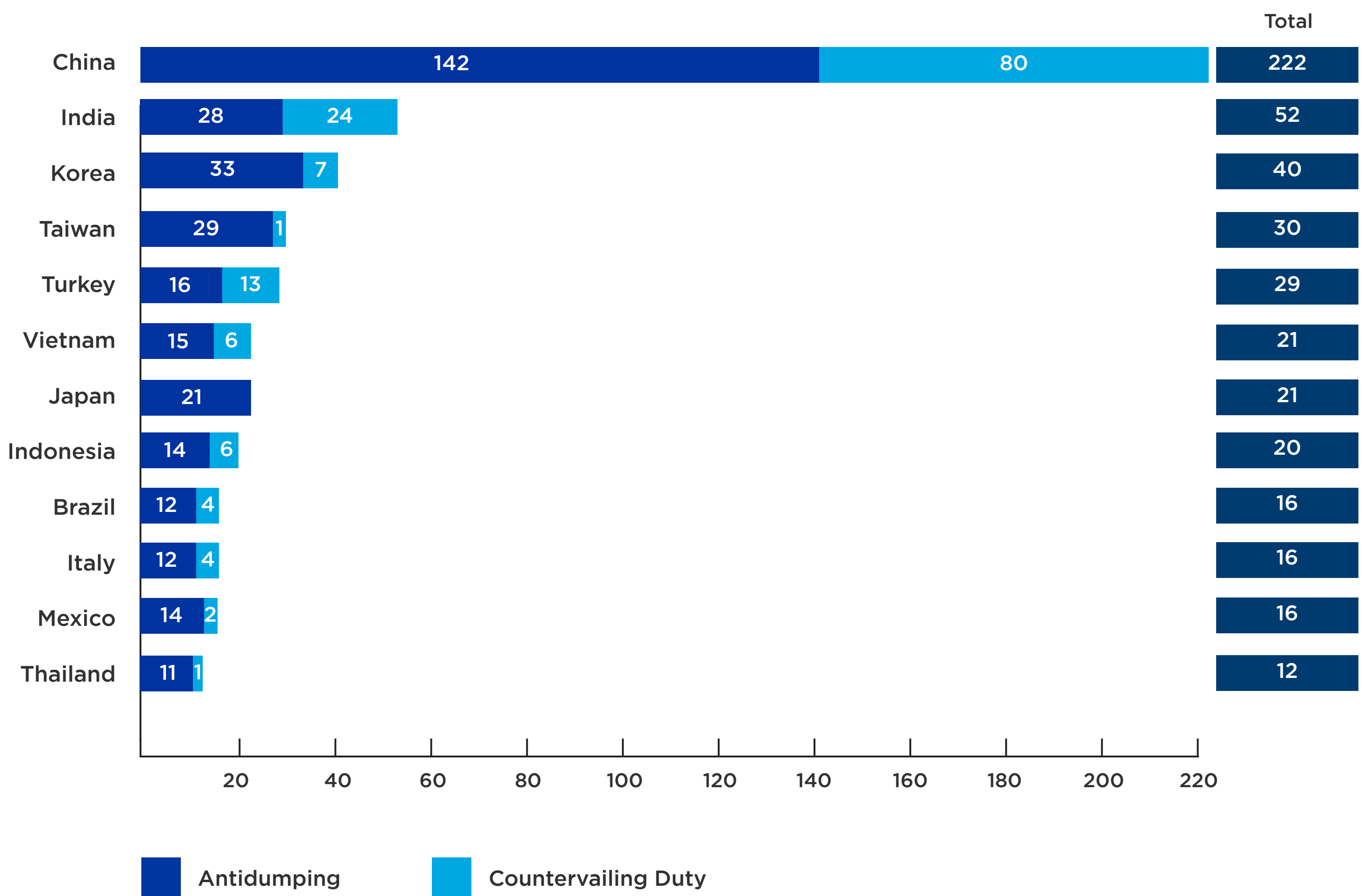
TOP 12 COUNTRIES WITH ACTIVE ORDERS



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New AD/CVD Regulations Promulgated

In September, the Commerce Department issued new AD/CVD regulations altering the way that importers navigate certain administrative proceedings. The key changes covered the areas of new shipper reviews, scope rulings, circumvention inquiries, and certification requirements.

Among the specific changes included are modifications to the documentation requirements for new shipper reviews which were codified in support of Commerce's efforts to establish bona fide sales. The new requirements now allow Commerce more authority over new shipper reviews with respect to certain certification requirements imposed on the producer, exporter, and any unaffiliated customers.

The process for requesting and participating in scope rulings also saw significant change. A standardized scope ruling application was put in place and clear guidelines were established for Commerce's handling of scope requests. Commerce now has the ability to self-initiate scope rulings but is on a 30-day window to accept applications and a 120-day timeframe to complete a scope ruling, unless extended. Timeframes were also imposed for covered merchandise referrals, requiring Commerce to respond within 20 days and to reach a final determination within 12 days, unless extended.

In addition to the changes with the new shipper reviews and scope ruling requests, Commerce provided new rules for anti-circumvention requests. These new rules placed clear deadlines on the amount of time allotted to address and complete an inquiry. Most importantly, the rules afford Commerce broad powers to extend liquidation, though some questions remain regarding cash deposits and when Commerce can officially suspend an entry.

Lastly, a new provision was introduced which codifies previous certification requirements. Under the new rules, Commerce has increased authority to require documentation be maintained and proof of compliance be provided if requested. With these new regulations and stricter enforcement taking place, importers and exporters should remain diligent in conducting strategic planning with their suppliers and customers to mitigate any potential or continued risk of AD/CVD duties.

Export Buyer's Credit

The battle between the CIT and Commerce over China's Export Buyer's Credit program continued in 2021. The program extends credit at preferential rates to foreign importers to promote the export of Chinese goods. Commerce has continued to rely on adverse facts available to determine the margin for this program in countervailing duty cases based on the failure of the Chinese government to provide certain information on the operation of the program. Commerce has used this methodology even in cases where record evidence, such as affidavits from U.S. customers, indicated that the program was not used. During 2021, the CIT continued to remand numerous appeals on this issue to force Commerce to at least attempt to verify the accuracy of such affidavits or to provide an adequate explanation of why such evidence is not verifiable.[1] In some cases, Commerce has simply accepted the information on remand and concluded that respondent did not benefit from the program. In such cases, the Court has affirmed this decision (*See Clearon Corp.*

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[1] See *Cooper (Kunshan) Tire Co. v. United States*, Slip Op. 21-141 (Ct. Int'l Trade Oct. 12, 2021); *Canadian Solar Inc. v. United States*, Slip Op. 21-114(Ct. Int'l Trade Sept. 3, 2021); *Guizhou Tyre Co. v. United States,* 523 F. Supp. 3d 1312, 1323 (Ct. Int'l Trade 2021); *Yama Ribbons & Bows Co. v. United States*, 517 F. Supp. 3d 1325, 1326 (Ct. Int'l Trade 2021).

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v. United States, Slip Op. 21-56 (Ct. Int'l Trade May 6, 2021). More recently, however, Commerce has started sending respondents supplemental questionnaires requesting further information from their U.S. customers to support non-use of the program. Further litigation on this issue is expected in the coming year.

Particular Market Situation

In several cases, the Court of Appeals for the Federal Circuit and the CIT rejected Commerce's interpretation of the law dealing with particular market situations (PMS). The statute allows Commerce discretion to adjust the cost-of-production calculation methodology when determining constructed value, if Commerce finds that a PMS exists. Generally, a PMS exists when the market under investigation possesses a unique set of circumstances such that the cost of materials and fabrication or other processing of any kind does not accurately reflect the cost of production in the ordinary course of trade. On numerous occasions, the Court has held that the plain language only authorizes PMS adjustments when determining normal value using a constructed value methodology. It has routinely rejected Commerce's use of a PMS finding to determine whether to disregard home market sales below the cost of production.[2]

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[2] *See Hyndai Steel Company, et al. v. United States*, 2021-1748 (Fed. Cir. Dec. 10, 2021); *Nexteel Co. v. United States*, Slip Op. 21-132 (Ct. Int'l Trade Sept. 27, 2021); *HiSteel Co. v. United States*, Slip Op. 21-126 (Ct. Int'l Trade Sept. 23, 2021); *Borusan Mannesmann Boru Sanayi v. Ticaret A.S.*, 494 F. Supp. 3d 1365, 1366 (Ct. Int'l Trade 2021); *Husteel Co. v. United States*, Slip Op. 21-147 (Ct. Int'l Trade Oct. 19, 2021); *Saha Thai Steel Pipe Pub. Co. Ltd. v. United States*, Slip Op. 21-118 (Ct. Int'l Trade Sept. 17, 2021); *Saha Thai Steel Pipe Pub. Co. Ltd. v. United States*, Slip Op. 21-119 (Ct. Int'l Trade Sept. 17, 2021); *Hyundai Steel Co. v. United States*, 531 F. Supp. 3d 1344 (Ct. Int'l Trade 2021); *Garg Tube Exp. LLP v. United States*, 527 F. Supp. 3d 1362, 1364 (Ct. Int'l Trade 2021); *Dong-A Steel Co. v. United States*, 527 F. Supp. 3d 1350, 1352 (Ct. Int'l Trade 2021); *Husteel Co. v. United States*, 517 F. Supp. 3d 1342, 1344 (Ct. Int'l Trade 2021); *Husteel Co. v. United States*, 520 F. Supp. 3d 1296, 1300 (Ct. Int'l Trade 2021); *Husteel Co. v. United States*, 494 F. Supp. 3d 1287, 1289 (Ct. Int'l Trade 2021).

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False Claims Act Implications on International Trade

What is the False Claims Act?

The False Claims Act (FCA) is a federal statute that permits the government to sue any person or entity who knowingly submits false claims to the government for up to three times its damages, plus a penalty for each false claim. The FCA also allows for so-called *qui tam* actions, those brought by private citizens on the government's behalf against actors that have allegedly defrauded the government. In FY2020 alone, the Department of Justice obtained more than $2.2 billion in settlements and judgments from civil cases based on fraud and false claims against the government. If criminal activity were to be discovered during the civil case, this could lead to additional penalties as well.

The *qui tam* component of FCA litigation is significant and provides a strong financial incentive for private parties to file these cases. If the government intervenes in the case and if the case is successful through a settlement or a trial, the whistleblower, or "relator," is entitled to 15 to 25 percent of the amounts collected by the government. If the government declines to intervene in the case and the whistleblower successfully pursues it, the whistleblower reward is between 25 and 30 percent of the amounts collected.

RECENT FCA CASES RELATED TO TRADE

- At least one case has involved the alleged failure to mark goods properly under 19 U.S.C. § 1304.
- Several cases have involved misidentifying or misclassifying products in order to avoid anti-dumping duties.
- Other allegations involved circumvention or evasion of antidumping duties by further processing in third countries or transshipments.

How do FCA claims arise in trade?

More recently, there have been several so-called reverse false claims actions, where the cases involve money owed to the government rather than money which has been wrongly paid out by the government. Many of these reverse claims have involved failure to pay duties of various kinds, including antidumping and countervailing duties, Section 301 duties against China, and Section 232 duties on steel and aluminum products.

The FCA applies to anyone who:

"knowingly makes, uses, or causes to be made or used, a false record or statement material to an obligation to pay or transmit money or property to the Government or knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money to the Government."

FCA is a growing area of concern for companies involved in the import and export of goods or technology. Because of the Fraud Enforcement and Recovery Act of 2009 (FERA) Amendments, this is a different standard from what many are familiar with in the importing community. The FERA Amendments now allow for reverse false claims, in which no actual false statement was made, and instead "mere knowledge and avoidance of an obligation" is enough for a claim. FCA liability tops the list of any potential liability to CBP.

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Additionally, as a civil enforcement statute, the government's burden of proof in a FCA case is merely a preponderance of the evidence—a much lower threshold to clear than that of a criminal statute, which requires proof beyond a reasonable doubt. In light of the potentially devastating civil penalties associated with the FCA and this lower burden of proof, it is especially important to understand that what constitutes a *knowing* violation of the statute may be easier to prove than one might think. The terms "knowing" and "knowingly" mean that a person (a) has actual knowledge of the true information, or (b) acts with deliberate ignorance of the truth or falsity of the information, or (c) acts in reckless disregard of the truth or falsity of the information.

In 2022, we expect that the same principles may be applied to imports that are allegedly misclassified and thus subject to tariffs under the Section 301 or 232. We also expect that there will be an uptick in cases based on some imports being subject to antidumping and countervailing duties. In parallel, we also expect to see an increase in *qui tam* cases.

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U.S. Customs and Border Protection (CBP) Developments

Increased CBP Enforcement Activity

In 2021, CBP increased detentions at the border, contributing to supply-chain issues in the United States for a number of importers, industries, and products. The increased detentions were attributable in large part to two causes: Withhold Release Orders (WROs) due to forced-labor concerns and CBP AD/CVD investigations due to country-of-origin (COO) concerns.

CBP issued a number of WROs this year as human rights issues have received more attention from U.S. policymakers. In China, the 2021 WROs focused on cotton, tomatoes, and downstream products from the Xinjiang Uyghur Autonomous Region (XUAR) and silica-based products involving Hoshine Silicon Industry Co. Ltd. and its subsidiaries. The cotton WRO was particularly problematic since CBP targeted companies producing textiles and wearing apparel outside of China (based on concerns that the cotton came from the XUAR). In that regard, CBP even detained goods produced with U.S.-origin cotton based on vague and unsubstantiated concerns that XUAR cotton was "commingled" at some point with the non-XUAR goods. It is also significant that, as opposed to prior WROs based on specific companies, the XUAR WRO targets a much broader array of companies. Even when provided with extensive and granular information, CBP has not accepted the evidence or has been very slow in evaluating the evidence. This continues to be an area of concern for importers and is something to closely monitor in 2022 to ensure that goods are not inadvertently or improperly detained at the U.S. border.

Consistent with the cotton WRO, of note was the detention of goods imported by apparel company Uniqlo in 2021. CBP asserted that Uniqlo failed to prove its goods were not connected to the use of forced labor. Uniqlo filed a protest demonstrating that its raw cotton was not from the XUAR or even China, but CBP dismissed the company's evidence. Additionally, at least one apparel company has challenged the detention of its goods in court (See *Changji Esquel Textile Co. Ltd. et al. v. United States*, DCDC Case 1:21-cv-01798).

WITHHOLD RELEASE ORDERS
THE BASICS

Section 307 of the Tariff Act of 1930 forbids the importation of goods mined, produced, or manufactured, wholly or in part, in any foreign country by convict labor and/or forced or indentured labor, including forced child labor. CBP updated its regulations and increased its enforcement of imported goods made with forced labor after the implementation of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA), which eliminated an exemption in Section 307 permitting the importation of necessary quantities of goods made with forced labor to meet the "consumptive demands" of the United States.

CBP implements Section 301 through issuance of Withhold Release Orders (WROs) to prevent merchandise produced in whole or in part in a foreign country using forced labor from being imported into the United States. CBP is responsible for preventing the entry of products made with forced labor into the U.S. market by investigating and acting upon allegations of forced labor in supply chains.

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In the AD/CVD sector, CBP initiated over 200 investigations in 2021 for country-of-origin purposes with many of the detentions focusing on the evasion of AD/CVDs specific to Chinese goods. Combined with the WROs implemented on Chinese goods, it appears there is a focused effort to subject goods from China to a higher level of scrutiny for enforcement purposes. The fact that the U.S. is resolving Section 301 and Section 232 issues with its EU trading partners suggests that the U.S. is attempting to form a bloc with the purpose of opposing certain Chinese trade actions and policies.

Key Court Decisions

In *National Association of Manufacturers v. Department of the Treasury* the Federal Circuit ruled against a U.S. government rule established in 2018 concerning the statutory definition of "drawback". Treasury's rule would have excluded certain goods imported—then exported—from being claimed under duty drawback privileges. The Court noted that drawback is "designed to incentivize exports from the United States and allow U.S. exporters to compete more fairly with overseas competitors" and held that Treasury's rule ran afoul to the intent of Congress. Accordingly, the Federal Circuit upheld a decision from the CIT permitting drawback claims on the alcohol beverage goods in question.

In another significant case in 2021, the CIT addressed the "first sale" rule for related-party transactions in Non-Market Economies (see *Meyer Corp., U.S. v. United States*, CIT Slip Op. 21-26, March 1, 2021). The CIT addressed the manner in which the importer's dutiable value could be calculated for its China-origin cookware and Thailand-origin cookware with China-origin component parts. Essentially, the Court held that the goods in the "first sale" in this case could not be appraised under "transaction value" because the first-sale transaction was between related parties and involved a Non-Market Economy (NME). In a related-party transaction the importer must be able to prove that the value declared was free of market-distorting factors. However, the goods in question had at least one of the following characteristics: (1) they were produced in a NME; (2) they were produced in a market economy with NME inputs, or (3) they were bought or sold by an NME entity. Consequently, the Court questioned whether the price of goods purchased in a transaction involving an NME could be viewed as an arm's length price free from any market or price distortions. More than 90% of all goods imported into the United States are valued for CBP purposes based on "transaction value," and a significant percentage of those goods involve an NME (China and Vietnam in particular). An appeal of this case is currently underway at the Federal Circuit. Meyer filed its brief on August 9, 2021, and the government filed its brief on November 16, 2021.

Free Trade Agreements

U.S. Free Trade Agreements (FTAs) were stagnant in 2021, if not completely at a standstill. None of the potential FTAs actively contemplated at the end of 2020 came to fruition. This is in part due to the expiration of Trade Promotion Authority (TPA) in July 2021. TPA provides an expedited, efficient means for Congress to approve and implement certain international trade agreements by limiting approval of the FTAs to an up-or-down vote. Without TPA "fast-track" authority, an FTA is exposed to additional time-consuming amendments and negotiations in an already fractured Congress. Additionally, given the importance of getting the new administration up and running, nominating and confirming political appointments, dealing

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with the COVID-19 pandemic, and pushing for a successful conclusion to the infrastructure legislation, FTAs have taken a backseat to other administration priorities.

Although FTAs did not see much movement in 2021, we are hopeful that the Generalized System of Preferences (GSP) and the Miscellaneous Tariff Bill (MTB) will pass Congress in the first quarter of 2022. If so, then we expect that they will be signed quickly by the President; however, we anticipate that GSP and the MTB—in whatever form passed by Congress—will contain stricter environmental and labor provisions than in years past.

Also, although there has been little progress in negotiating new FTAs, existing FTAs have continued to generate controversies. The U.S. and Mexico have been involved in an ongoing dispute under the United States-Canada-Mexico Agreement (USMCA) regarding auto content rules that became stricter when the USMCA replaced NAFTA in July 2020. Mexico initiated formal consultations with the U.S. on August 20th to resolve the conflict. The formal consultations require that U.S. trade representatives and their Mexican counterparts meet and attempt to solve the dispute through diplomacy; however, as of November 25, 2021, such formal consultations have not been successful, and we believe that Mexico is prepared to accelerate the dispute to arbitration.

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Section 337 Litigation

This past year was relatively active for Section 337 litigation, with 55 new complaints filed and 62 investigations instituted during the International Trade Commission's (ITC) fiscal year. This was a slight increase from 2020, when the caseload slowed, likely due to the pandemic. The ITC, like much of the federal government, has yet to fully re-open its doors; however, as the uptick in activity demonstrates, this has generally not slowed down the adjudication of Section 337 investigations. In 2021, the ITC concluded more investigations than in 2020, and Administrative Law Judges (ALJs) held several trials remotely. As of this writing, it is unclear when the ITC will again allow for in-person hearings.

Against this backdrop of activity, the ITC welcomed a new ALJ in Monica V. Bhattacharyya, who was named September 13, 2021. Prior to her appointment, Judge Bhattacharyya had served as an investigative attorney in the ITC's Office of Unfair Import Investigations since 2012. She is widely respected among the Section 337 bar, and her appointment was met with praise by a multitude of commentators.

Federal Legislation Relating to Section 337

In June, Senator John Cornyn introduced S. 2067, the "Stopping and Excluding Chinese Rip-offs and Exports with United States Trade Secrets Act of 2021," commonly referred to as the SECRETS Act of 2021. The bill would ban the importation of goods made with stolen trade secrets by establishing an interagency committee—headed by the Attorney General with input from USTR, the Departments of Commerce, Treasury and Homeland Security, and the Intellectual Property Enforcement coordinator. The ITC would have 30 days to conduct a confidential, ex parte preliminary review to determine whether "a reasonable indication" exists that the good was made with stolen trade secrets. The ITC would impose an import ban, if that finding were made, and the president could overrule the determination within 15 days. Determinations could be appealed to the Federal Circuit within 60 days. The legislation is still pending and does not appear likely to pass in the current Congress.

In September, the House of Representatives proposed a new law (H.R. 5184) with the stated goal "to ensure that the resources of the United States International Trade Commission are focused on protecting genuine domestic industries and to safeguard the public health and welfare and the United States economy (including competitive conditions)," by limiting the ability of certain entities from filing

§ 337 LITIGATION
THE BASICS

Section 337 (19 U.S.C. § 337) is administered by the U.S. International Trade Commission (ITC). This trade statute makes it unlawful to import or sell in the United States any article that: (a) infringes a valid and enforceable U.S. intellectual property right, or (b) is otherwise connected to unfair methods of competition. A successful complainant is typically awarded an exclusion order blocking the importation of the offending goods and a cease-and-desist order prohibiting the respondents from distributing or selling such articles in U.S. inventory. These remedies, along with numerous procedural advantages of litigating at the ITC, have made Section 337 a powerful tool for companies seeking to challenge foreign competition.

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complaints at the ITC. For example, among other changes, the bill would require a complainant attempting to establish a domestic industry through licensing activities to demonstrate that the activities led to the "adoption and development of articles that incorporate" the intellectual property in the United States. The legislation is still pending and does not appear likely to pass in the current Congress.

Diversification of Caseload

Just a few years ago, most Section 337 cases were patent-focused and involved consumer electronic devices. In 2021, however, the diversification trend continued, with complainants raising a variety of non-patent issues (e.g., trade secrets, Lanham Act claims) and targeting products such as recombinant proteins, automotive components and assemblies, telecommunications equipment, drones, vaping cartridges, sports equipment, and medical devices. It is clear that more types of companies—not just patent-heavy technology companies—are discovering the relevance of Section 337.

Less focus on public-interest analysis?

Where the ITC finds a violation of Section 337, it must exclude the unlawfully traded products from the U.S. market unless it finds that such exclusion would adversely impact "the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, [or] United States consumers.[1]" In addition to its mandatory review of public interest at the conclusion of an investigation, the ITC may direct the presiding ALJ to take evidence and make findings on public-interest issues; however, in 2021, the ITC delegated the development of a factual record on public interest in only 16 percent of new investigations.

Slight increase in settlements and consent orders

In 2021, 49 percent of investigations were terminated through a settlement agreement or consent order. This is a slight increase from the traditional average of around 40 percent.

Interaction with the Patent Trial and Appeal Board (PTAB)

When considering a petition for post-grant review or *inter partes* review of a patent, PTAB has discretion to deny institution under 35 U.S.C. §§ 314(a) and 324(a). The PTAB's Consolidated Trial Practice Guide states that the Board may consider "events in other proceedings related to the same patent, either at the Office, in district courts, or the ITC." As petitioners have found, a co-pending Section 337 investigation virtually guarantees that the PTAB will exercise its discretionary power to deny institution. Indeed, the uniquely fast and compressed nature of a Section 337 investigation seems to favor the PTAB exercising its discretionary authority to deny institution of a proceeding on a patent involved in a parallel ITC investigation.

[1] S19 U.S.C. § 1337(d)(1)

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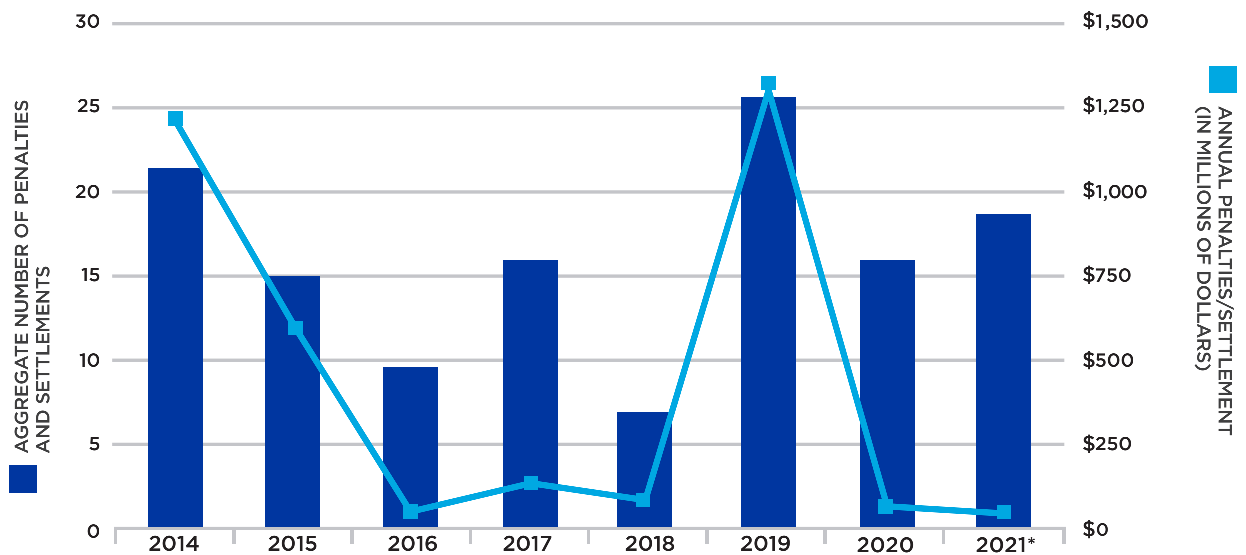
Export Controls & Trade Sanctions

In 2021, despite the start of a new presidential administration, many of the same export controls and trade sanctions policies of the previous administration continued, from aggressively applying export controls under the Export Administration Regulations (EAR) to trade sanctions administered by the Office of Foreign Assets Control (OFAC). Below, we have included some of the major developments in 2021.

OFAC ENFORCEMENT ACTIONS BY VOLUME AND VALUE



*Through December 14, 2021.

Source: U.S. Department of Treasury

Removal of Anti-Terrorism (AT) Controls on Sudan

Following the U.S. Secretary of State's rescission of Sudan's designation as a State Sponsor of Terrorism in December 2020, the Bureau of Industry and Security (BIS) amended the EAR in January to formally remove the Anti-Terrorism (AT) export controls which previously applied to Sudan. With these amendments, the EAR now permits Sudan to receive goods, technology, and software which are subject to AT export controls without BIS licensing. These amendments also increase the EAR's de minimis threshold for foreign-origin items exported, reexported or transferred in-country to Sudan. Previously those items were subject to the EAR when they contained greater than 10 percent controlled U.S.-origin content. Now those items will not be subject to the EAR unless they contain greater than twenty-five percent U.S.-origin content. These EAR amendments also made Sudan eligible for multiple EAR License Exceptions which were previously unavailable to it.

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People's Republic of China

In 2021, the U.S. maintained export controls and sanctions policies regarding China set in motion during the Trump administration and steadily escalated during the previous administration. Two main themes emerged over the year: human rights-based actions and measures to protect U.S. technological supremacy.

The Trump administration ended 2020 by amending the EAR in order to delist Hong Kong as a separate destination for export licensing purposes. These amendments terminated any favorable licensing and License Exception policies which previously applied to Hong Kong. As a result, all of the EAR's restrictions and licensing requirements which apply to China now also apply to Hong Kong. These initiatives arose from a Trump administration Executive Order (EO 13936) which changed the U.S. posture toward Hong Kong because of U.S. concerns that China had ended Hong Kong's autonomous self-rule. The U.S. maintains that Hong Kong has since been effectively absorbed into China due to China's Law on Safeguarding National Security in Hong Kong, which the U.S. alleges tramples upon the civil and political rights of Hong Kong's citizens. OFAC continued these initiatives in early 2021 by publishing the Hong Kong-Related Sanctions Regulations and formally codifying certain sanctions imposed under EO 13936.

In June and July, the Biden Administration took new actions related to forced labor in the Xinjiang Uygur Autonomous Region (XUAR) that affected the supply for material critical for solar panels, certain foods, and clothing materials. Among those actions, some of which are covered elsewhere in this report, BIS updated its Entity List by adding approximately 20 entities it determined participated in China's campaign of repression against Muslim minority groups in XUAR. These updates came after the G7 Summit that was held in mid-June, which has continued to denounce forced labor in the Xinjiang region.

Concurrent with human rights sanctions, the Biden administration also introduced sanctions based on technology. In March, the Commerce Department began sending subpoenas to Chinese companies as the new information and communications technology and services (ICTS) rules took effect that month. The ICTS rules—described under the Trump administration's May 2019 Executive Order 13873 and later promulgated via interim final rule on January 19, 2021—enable the Commerce Department to block any ICTS transaction involving ICTS goods or services designed, developed, manufactured, or supplied from "foreign adversaries" or "persons owned by, controlled by, or subject to the jurisdiction or direction of a foreign adversary" (which can include, but is not limited to, companies located or organized in a "foreign adversary" country and companies conducting operations such as research, development, manufacturing, testing or distribution in a "foreign adversary" country). The ICTS rules are written broadly, and "foreign adversaries" include not only China (including Hong Kong), but also Cuba, Iran, North Korea, Russia, and acting Venezuelan president Nicolas Maduro. However, it is well understood that China is the primary target of this new national security investigation tool, and public reporting so far suggests Commerce has been focusing most of its efforts on China, as expected.

BIS also sought to curb technology transfer to entities in China. Specifically, BIS added eight technology companies to the Entity List that perform quantum computing work for the Chinese Military. BIS stated those entities support the Chinese military in the areas of counter-stealth and counter-submarine applications, cryptanalysis, and advanced development of unbreakable codes.

In response to new export controls and sanctions imposed by the U.S., China adopted an Anti-Foreign Sanctions Law, which authorizes both the Chinese government and private individuals or entities a way to effectively retaliate against what China calls "discriminatory restrictive" sanctions. These ongoing back-and-forth sanctions are not winding down and, instead, continue to escalate. For most of the year, the

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Biden administration heavily prioritized re-establishing good relations with traditional allies; however, in October the USTR and the White House announced their intentions to realign trade policies towards China to defend U.S. interests, and in November the U.S.-China Economic and Security Review Commission (USCC) released a report that included 32 wide-ranging recommendations across several sectors and industries. With respect to exports, the USCC recommended formation of a new Technology Working Group to address "emerging technology" controls and scolded U.S. regulators over lax China end-user scrutiny. The report also called for expanding Chinese military end-user verification well beyond the current China MEU Entity Listings in the regulations.

The Biden administration also issued EO 14032 in June 2021 to amend previous Trump administration EOs 13959 and 13974, which had established OFAC's Non-SDN Communist Chinese Military Companies List (the NS-CCMC List) and generally prohibited U.S. persons from performing transactions in publicly traded securities issued by NS-CCMC List companies. EO 14032 deleted the NS-CCMC List and replaced and superseded it with the Non-SDN Chinese Military-Industrial Complex Companies List (the NS-CMIC List). OFAC kept most companies from the NS-CCMC List on the NS-CMIC List while also adding 33 companies to the NS-CMIC List which were not listed on the NS-CCMC. Additionally, effective August 2, 2021, EO 14032 prohibited U.S. persons from purchasing or selling any publicly traded securities issued by NS-CMIC List companies. While EOs 13959 and 13974 would have required US persons to divest any previously acquired NS-CCMC List company securities prior to November 11, 2021, EO 14032 will permit US persons to continue to hold such previously acquired securities while also allowing US persons to perform transactions in order to divest such securities without penalty through June 3, 2022.

The U.S. government appears likely to continue using export controls and sanctions to apply pressure on China in 2022. During 2022, the Commerce Department is also expected to begin more actively using its ICTS rules to prevent the use of certain Chinese-origin hardware and software products within the US. Additionally, if Chinese policy does not change vis-a-vis XUAR, then OFAC, BIS and multiple other U.S. government agencies will likely respond with additional sanctions measures.

Huawei and the Seagate Technologies Investigation

In 2021, multiple Congressional actors scrutinized BIS regarding enforcement and administration of its Huawei- and Semiconductor Manufacturing International Cooperation (SMIC)-related restrictions. First, in an extraordinary independent investigation of apparent EAR violations by a specific U.S. company, Minority Staff on the U.S. Senate Committee on Commerce, Science, and Transportation released a report in October regarding California-based Seagate Technology's continued sales of hard disk drives to Huawei despite the 2020 Huawei Foreign-Produced Direct Product Rule (Huawei FPDP Rule). BIS promulgated the Huawei FPDP Rule to enhance its ability to prevent Huawei's global network of companies from gaining access to products made with certain U.S. software or technologies unless a BIS license is first obtained.

The report alleges Seagate "benefitted from an uneven playing field to the detriment of national security and at the expense of its competitors." The report also asserts that "[f]ailure of BIS to provide clarity on the rule's scope, in combination with the lack of enforcement actions taken against violators, has created a commercial environment that incentivizes companies to continue shipping prohibited products to Huawei." To assuage lawmakers' concerns without changing the scope of the Huawei FPDP Rule, BIS issued an updated FAQ on its FPDP rules in late October. These new FAQs clarify and better explain the licensing policy BIS has in place for monitoring such transactions.

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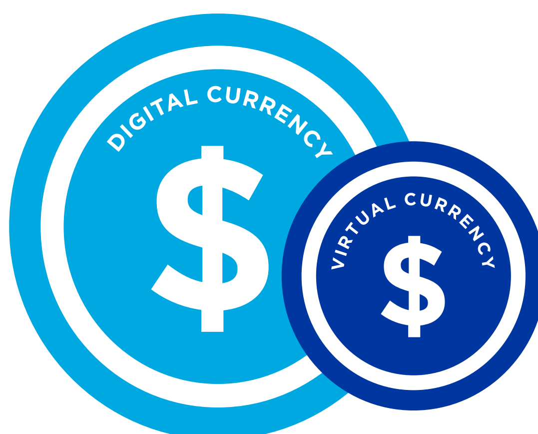
Also in October, the Ranking Member on the House Foreign Affairs Committee, Michael McCaul (R-TX), released export license statistics for licenses BIS issued to Huawei and SMIC between Nov. 9, 2020 and April 20, 2021. Huawei and SMIC companies have been on the Entity List since May 2019 and December 2020, respectively (with some additional Huawei entities added in 2020). Export licenses were therefore required for exports, reexports, and transfers of items "subject to the EAR" (with some exceptions for certain items to Huawei) and were subject to a BIS license review policy of presumption of denial. The report disclosed by McCaul shows BIS authorized a large majority of license applications or dismissed them without an official denial. Many in Congress believe that BIS has been too generous in issuing licenses for Huawei and SMIC transactions and would like to see BIS reduce the number of licenses issued and increase enforcement efforts targeted at Huawei and SMIC.

Digital Currencies and Geotracking

In 2021, OFAC was especially active with enforcement in the digital currency space. OFAC began this campaign during the final days of 2020 by entering into a $98,830 Settlement Agreement with BitGo, Inc. to resolve 183 apparent violations of multiple sanctions programs. Although BitGo was actively collecting its users' IP addresses, it chose not to perform sanctions screening on those IP addresses and allowed users located in multiple sanctioned destinations to repeatedly use BitGo's noncustodial secure digital wallet management service. In February OFAC announced a $507,375 settlement with BitPay, a digital currency payment service provider. In a digital version of the perennially challenging sales intermediary compliance problem, BitPay performed due diligence on the merchants for whom it provided payment services but failed to screen the IP addresses of the merchants' customers, many of whom were operating out of sanctioned destinations. Even the most well-known digital currency exchange, Coinbase Global, Inc., was not immune to government scrutiny. It announced in March that it had disclosed apparent sanctions violations to OFAC.

DIGITAL CURRENCY VS VIRTUAL CURRENCY

Digital Currency
includes sovereign cryptocurrency, virtual currency (non-fiat), and a digital representation of fiat currency.



Virtual Currency
is a digital representation of value that functions as (i) a medium of exchange; (ii) a unit of accounts; and/or (iii) a store of value; and is neither issued nor guaranteed by any jurisdiction.

Source: OFAC.

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OFAC made it clear that its geolocation IP address tracking expectations also apply to digital services companies outside of the cryptocurrency sector. SAP, an enterprise software company headquartered in Germany, entered into settlements with OFAC, BIS, and DOJ in May valued at a combined $8 million in order to resolve violations stemming from approximately 25,000 electronic transfers of software, upgrades, and/or patches from the U.S. to users in Iran. OFAC's settlement with SAP also required SAP to spend $27 million on compliance program improvements. OFAC specifically cited SAP's failure to implement geolocation IP address screening as an "aggravating factor" which OFAC considered when imposing SAP's penalties and required compliance program improvements. The overwhelming majority of these downloads were transmitted to a group of 14 front companies outside of Iran, but which appeared to exist solely for the acquisition of software for use by Iranian companies in Iran. SAP also allowed approximately 2,360 Iranian users to access cloud-based services which operated from servers located in the U.S.

Reflecting the growing need for companies to know their customers, particularly in the digital currency sector, OFAC released a communication in October explaining its approach with respect to digital currencies, strongly emphasizing the need for parties involved in the digital currency sector to screen users using geolocation tools and IP address blocking tools. The communication also recommends employing software to identify improbable logins "such as the same user logging in with an IP address in the U.S., and then shortly after with an IP address in Japan." The brochure notes that enforcement actions against companies in this sector involving access by users in sanctioned destinations were "due, in part, to a failure to use the geolocation information in [those companies'] possession."

Russian Federation

The Biden administration took multiple sanctions actions against Russia in 2021 with a focus on four primary issues: (1) Russia's Foreign Intelligence Services responsibility for the SolarWinds cyberattack, which affected multiple U.S. businesses and government agencies in Spring 2020; (2) Russian meddling in the 2020 U.S. presidential election as confirmed by the March 2021 U.S. National Intelligence Council's Foreign Threats to the 2020 U.S. Federal Elections report; (3) Russia's 2020 poisoning and 2021 imprisonment of dissident and political opposition leader Alexei Navalny; and (4) Russia's continued efforts to complete the Nord Stream 2 and TurkStream pipelines against U.S. and some European objections. Nord Stream 2 would be the largest gas pipeline throughout Europe, which the U.S. regards as Russia's attempt to gain the capability to impose energy insecurity on the EU and Ukraine.

In April President Biden issued EO 14024, titled "Blocking Property with Respect to Specified Harmful Foreign Activities of the Government of the Russian Federation," which gives Treasury the discretionary authority to impose blocking sanctions on a very broad range of persons involved in various malign activities, industry sectors, or government and government-controlled entities. Treasury simultaneously used its new authority to issue a new Directive 1 prohibiting U.S. financial institutions from engaging in activities with the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation, effective June 14, 2021. In a break from the norm in other sanctions programs, OFAC clarified that its 50-percent ownership rule does not apply to entities owned, directly or indirectly, 50 percent or more by any one or more of the three entities designated under Directive 1. Additionally, OFAC immediately added to the SDN List six Russian technology companies for "operating in the technology sector of the Russian Federation" economy; 16 entities and 16 individuals

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for attempting to influence the 2020 U.S. presidential election; and five individuals and three entities in connection with Russia's occupation of the Crimea Region of Ukraine. While responding to the SolarWinds cyberattack and Russian meddling in the 2020 U.S. presidential election were the first high-profile targets of this new authority, EO 14024 provides the U.S. with a streamlined sanctions lever to punish and deter a wide range of Russian activities and actors if the U.S. determines lack of progress on foreign policy goals or Russian transgressions warrant such escalations.

With respect to Mr. Navalny, the Secretary of State determined in March, pursuant to the Chemical and Biological Weapons Control and Warfare Elimination Act of 1991 (the CBW Act), that the Russian government used chemical weapons in violation of international law or legal chemical weapons against its own nationals. Later in March, DDTC added Russia to its arms embargo list introducing a policy of denial for all exports of defense articles and defense services to Russia. Concurrently, BIS added Russia to the EAR Country Group D:5. These actions by DDTC and BIS will limit the availability of licenses, ITAR License Exemptions and EAR License Exceptions for exports of defense articles and other controlled items to Russia. In August and September, respectively, both OFAC and the State Department instituted sanctions under the new EO 14024, EO 13382 of 2005, and the CBW Act. Collectively, these new sanctions included more than 20 designations on the SDN List and the imposition of import restrictions on certain Russian firearms.

OFAC and the State Department also took steps to reinforce the U.S. opposition to the Nord Stream 2 pipeline, which is proposed to bypass Ukraine and enter Europe via Germany carrying natural gas. Europe is currently divided with respect to the pipeline—between a thirst for reliable energy sourcing and a desire to condemn Russia's de facto annexation of Crimea and other transgressions against Ukraine. In August the White House issued a new EO "Blocking Property with Respect to Certain Russian Energy Export Pipelines" granting the U.S. State Department sanctions authority under the Protecting European Energy Security Act (PEESA) (together, the PEESA EO). The DOS concurrently submitted an unpublished report to Congress listing one Russian vessel (the *Ostap Sheremeta*) and two Russian persons involved in the Nord Stream 2 pipeline construction (Nobility JSC and Konstanta OOO a/k/a Constanta LLC). OFAC's comprehensive list of the August designations also reflects that a number of persons previously listed on the Non-SDN Menu-Based Sanctions List (the NS-MBS List) were transferred to the SDN List upon designation under the new PEESA EO. Among those persons transferred is the Federal State Budgetary Institution Marine Rescue Service (MRS), for which OFAC issued an updated General License 1A (GL 1A) authorizing transactions with MRS or any entity owned 50 percent or greater by MRS "that are not related to the construction of the Nord Stream 2 pipeline project, the TurkStream pipeline project, or any project that is a successor to either such project."

As of this writing, Russia has placed significant military forces on its border with Ukraine. The Biden administration and the other G7 countries of Canada, France, Germany, Italy, Japan and the United Kingdom have condemned this military buildup and have called on Russia to de-escalate its military presence on the Ukrainian border. If Russia does proceed with some sort of military action against Ukraine, then the U.S. is expected to respond with significant sanctions. Reportedly, such sanctions could include (but would not necessarily be limited to) blocking Russia's access to the Society for Worldwide Interbank Financial Telecommunications (SWIFT) international payment processing network.

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Iran

Following a year of many new SDN List designations in 2020, this year's Iran-related sanctions designations activity was lighter. While there was some speculation in the first half of 2021 that the U.S. and Iran might be able to find common ground on the U.S. rejoining the Joint Comprehensive Plan of Action (JCPOA) or otherwise coming to an agreement that slows or stops Iranian uranium enrichment, as of this writing, seven rounds of talks have concluded and thus far no agreement has been reached.

In January, OFAC sanctioned approximately 35 individuals and entities involved in the Iranian steel and charitable trust sectors. OFAC cited the steel sector as a reliable source of revenue for the Iranian regime, its leaders, and its "nefarious" activities. Certain Iranian *bonyads*, which OFAC described as tax-exempt, "opaque, quasi-official organizations generally controlled by current and former government officials and clerics that report directly to the Supreme Leader" were designated on the SDN List along with related entities due to U.S. concerns that the *bonyads* accumulate wealth for the regime without delivering benefits to the Iranian people.

Other high-profile OFAC designations were related to an Iranian intelligence network targeting Iranian-American activities in the U.S., a network and individuals connected to Iran's unmanned aerial vehicle program, and designations of Iranian cyber company Emennet Pasargad and six of its employees for attempting to influence the 2020 U.S. presidential election.

Human Rights and Democracy Subversion Sanctions

During 2021, the Biden administration made it a priority to impose sanctions and export controls on various countries and persons engaged in activities to violate human rights and/or undermine democratic processes. In addition to the already-discussed Xinjiang sanctions against China, these initiatives also targeted countries such as Cuba, Belarus, Burma (Myanmar) and Ethiopia.

Cuba

In January, the Trump administration designated the Cuban Ministry of the Interior and the Minister of the Interior in his individual capacity on the SDN List under EO 13818, which builds upon and implements the Global Magnitsky Human Rights Accountability Act (GLOMAG). In mid-July, there were major protests across Cuba that appeared to be aimed at the economic crisis created by Covid-19, shortages of food and medicine, and political/human rights grievances. The July protests spurred OFAC and BIS into action. In July and August, OFAC designated 11 individuals and entities, all under the EO13818 GLOMAG authorities. Additionally, OFAC and BIS issued a joint fact sheet stating the U.S. "stands with the Cuban people" and describing existing OFAC general licenses and BIS license exceptions that facilitate certain telecommunications equipment, software, and services exports to Cuba without prior approval by the U.S. government.

Venezuela

New sanctions activity against Venezuela in 2021 was scarce. On the last full day of the Trump administration, OFAC announced sanctions against a Venezuelan oil sector sanctions evasion network, including not only designations of individuals and entities, but also seven vessels. Then, in March, in an interesting multi-agency and cross-program SDN designation action under EO 13949 of September 2020 addressing Iranian

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conventional arms activities, the State Department announced blocking sanctions designations against the Iranian Ministry of Defense and Armed Forces Logistics, Iran's Defense Industries Organization (DIO), DIO Director Mehrdad Akhlaghi-Ketabchi, and Venezuela's nominal president Nicholas Maduro for activities assisting Iran's acquisition of conventional arms and related spare parts (Maduro and the Government of Venezuela were already sanctioned under other authorities).

Belarus

In 2020, Belarus held its presidential election and like every presidential election since 1994, Alexander Lukashenko won. Fast forward to 2021 and a sustained protest movement was active throughout the first few months of the year. The first U.S. sanctions against Belarus were issued in 2006 after findings of a rigged election.

Following activist and journalist Roman Protasevich's May kidnapping from a RyanAir Flight from Athens, Greece, to Vilnius, Lithuania, the White House expanded the scope of the national emergency originally declared in 2006 giving OFAC the discretionary authority, in consultation with the State Department, to impose blocking sanctions on Government of Belarus (GoB) agencies, GoB leaders and officials, and individuals and companies operating in the defense and related materiel, security, energy, potassium chloride (potash), tobacco products, construction or transportation sectors of the Belarusian economy. The August 2021 EO also authorizes OFAC to sanction individuals and entities "responsible for or complicit in" activities such as "actions or policies that threaten the peace, security, stability, or territorial integrity of Belarus," suppression of human rights and freedom of the press, electoral fraud, deceptive transactions, and public corruption. Notably, the EO stops short of imposing automatic sectoral sanctions, such as those that apply to Russia—designations of persons and entities are still required as a final step. OFAC immediately used its authority under the EO to add multiple persons and entities to its SDN List. Contemporaneous with the new designations, OFAC issued a General License No. 4, which authorized the winding down of transactions involving Belaruskali OAO, or any entity owned fifty percent or more by Belaruskali OAO.

Burma (Myanmar)

In February, the Burmese military successfully executed a *coup d'état* that returned Burma (formerly Myanmar) to military rule. Despite widespread condemnation from Burmese citizens, the U.S., the EU, and the Association of Southeast Asian Nations, the military regime has refused to step down or reestablish a democratic process.

In response, the White House issued EO 14014 on February 10, 2021 authorizing OFAC to impose certain sanctions blocking U.S. property and interests of Burmese military officials and Burmese government officials on or after February 2, 2021, as well as secondary sanctions on non-U.S. persons who provide material assistance to or in support of persons or entities sanctioned under the EO. The EO also applies to foreign persons operating in the Burmese defense sector or threatening Burmese peace, democracy, freedom of expression or assembly, or engaging in human rights violations. The authority was used immediately to designate 13 individuals and entities on the SDN List. BIS took swift action thereafter to apply a presumption of denial for items requiring a license to Burma's Ministry of Defense, Ministry of Home Affairs, armed forces, and security services. BIS also stated it would revoke some previously issued licenses, eliminate some

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previously available EAR license exceptions, and add Burma to the list of nations subject to military end user/use (MEU) and military intelligence end user (MIEU) controls, which also includes China, Russia, and Venezuela.

Approximately 45 additional designations of Burmese individuals and entities to the SDN List were then made from March through July. At the end of 2021, sanctions remain in place, and the issues in Burma giving rise to the sanctions have not abated.

Cambodia

In November, the U.S. State, Treasury and Commerce Departments issued a joint Cambodia Business Advisory on High-Risk Investment and Interactions in order to publicize numerous human rights abuses, criminal activities and corrupt business practices which are ongoing in Cambodia. This Advisory advised that companies doing business with certain sectors of the Cambodian economy should perform appropriate due diligence to avoid legal risks associated under various sanctions authorities. In December, BIS took further action by adding Cambodia to Country Group D:5, imposing a more restrictive review standard for Cambodian license applications involving items controlled for national security reasons and adding Cambodia to the list of countries who are subject to military end use/user (MEU) export controls. At the same time the U.S. State Department amended the ITAR in order to enact a policy of denial for all license and other approval requests involving exports of defense articles and defense services to Cambodia.

Ethiopia and Eritrea

A conflict in the Tigray region of Ethiopia has escalated and threatens security in the Horn of Africa. In April, Eritrea acknowledged its forces were participating in hostilities in Tigray. Human rights abuse allegations are widespread, with reports of all sides committing potential acts of genocide and human rights abuses. OFAC first responded in August by using GLOMAG to impose an SDN List designation on an Eritrean Defense Forces (EDF) Chief of Staff for being a leader of an entity engaged in serious human rights abuses. On September 17, 2021, the White House issued EO 14046 authorizing Treasury to identify and sanction persons aiding or supporting the conflict and the human rights abuses. In November, OFAC used its new EO 14046 authority to designate six individuals and entities, among them the EDF. Also, in November, DDTC added Ethiopia to its arms embargo list and amended Eritrea's pre-existing entry on that list to introduce a policy of denial for all exports of defense articles and defense services destined to the armed forces, police, intelligence, or other internal security forces of both countries. While Eritrea had already been embargoed, the DDTC policy change also changes Ethiopia's treatment under EAR license exceptions because it is now automatically in Country Group D:5.

Nicaragua

Criticized as a sham by other countries and outside observers, Nicaragua's November 2021 elections saw Daniel Ortega reelected as President. Both before and after the election, OFAC designated individuals in Nicaragua on the SDN List for human rights abuses and anti-democratic actions.

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Afghanistan

In August, as American armed forces withdrew from Afghanistan, the Taliban returned to power after almost 20 years since it was originally removed by the 2001 U.S.-led invasion. The Taliban was originally designated an SDN in 1999 for harboring Osama bin Laden and Al-Qaeda. With the Taliban now effectively controlling the Afghanistan government, it is unclear whether various transactions with the Government of Afghanistan are now prohibited or potentially sanctionable. However, OFAC has issued General Licenses to authorize limited dealings with the Taliban in connection with the provision of humanitarian assistance, agricultural commodities, medicine and medical devices to Afghanistan. It is possible that OFAC could offer additional guidance during 2022 in order to better clarify sanctions exposure arising out of other transactions involving the Government Afghanistan.

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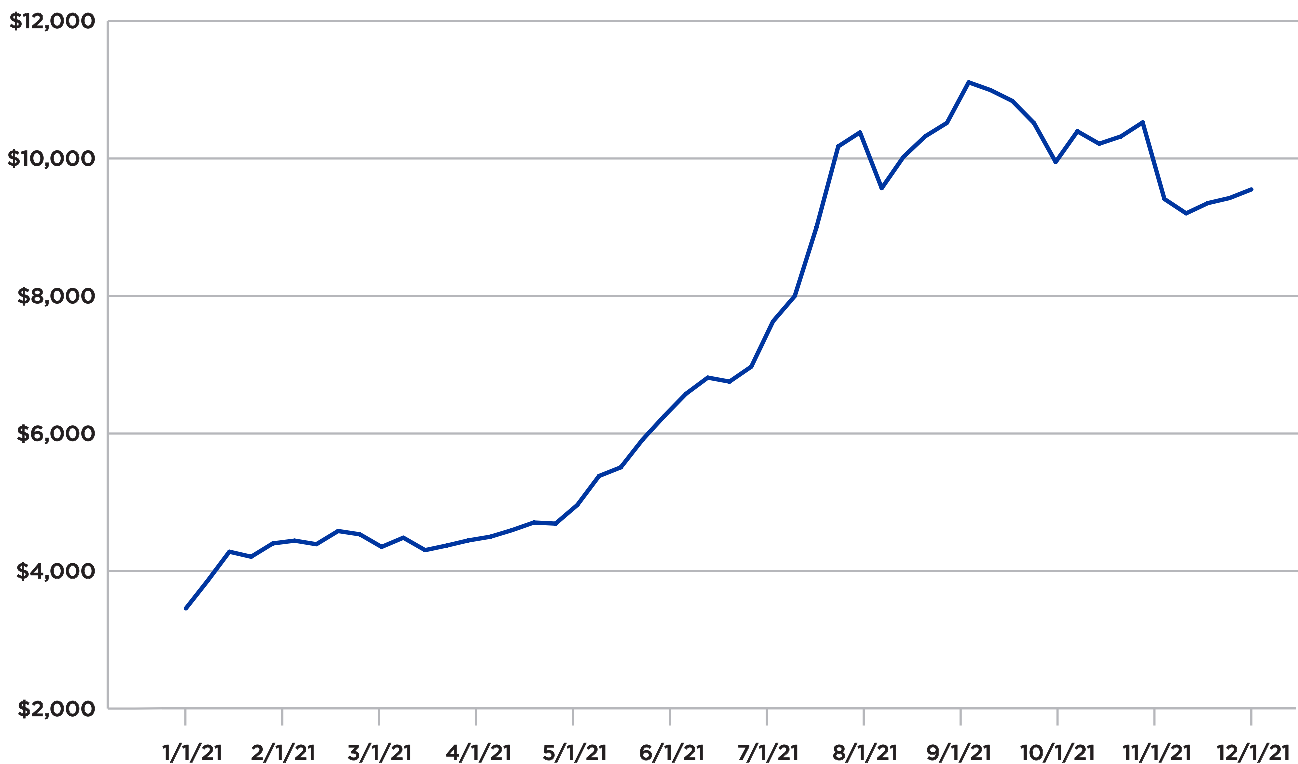
Supply Chain

This past year was a tumultuous one for the global supply chain, elevating supply-chain difficulties into mainstream news reporting for the first time in recent memory. Among the headlines, 2021 saw blockages of major trade bottlenecks and pandemic-related lockdowns, the increase of traffic inbound to the U.S., and the exposure of existing shortcomings in the transportation system which exacerbated cargo delivery and the positioning of empty containers. These issues, among others, frustrated attempts to stabilize the global supply chain, and we anticipate that these challenges will persist. The supply chain will probably not recover to pre-Covid efficiencies until 2023 at the earliest. The key developments which occurred in 2021 and contributed to supply-chain disruption in 2021 are discussed further below.

2021 FREIGHTOS BALTIC INDEX (FBX)*

An index providing market rates for 40-foot containers (FEUs).



*Through December 3, 2021.

The Suez Canal

In March, the Suez Canal was blocked when a container ship, the *Ever Given*, became lodged sideways in the canal, effectively blocking all traffic until Egyptian authorities were finally able to remove it. While the Suez Canal blockage did not cause any significant long-term backups for global trade, it did cost companies approximately $10 billion while waiting to transit the canal or taking the alternative route around Africa. This blockage is a good case study for understanding how fragile the global trade system is and how quickly it can back up and start costing billions of dollars. Egypt's mishandling of the incident reportedly added unnecessary problems to the resolution of the incident which underscores the fact that these are issues with global repercussions.

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Demurrage and Detention

2021 has seen a significant uptick in demurrage and detention fees. The Federal Maritime Commission (FMC) has initiated Interpretative Rules which require that the entities implementing detention/demurrage charges not invoice parties which are not "incentivized" by the imposition of these charges against them—they either do not have control of the loads or empties and/or the terminals cannot timely deliver loads or accept empties for many reasons not the fault of shippers, including shortage of equipment, such as chassis. This is the so-called "Incentive Principle," which currently is part of the defenses being sought in the various federal courts.

The Ports of Los Angeles and Long Beach recently announced the imposition of additional Container Dwell Fees against ocean carriers on containers which remain in the terminal a certain number of days, which can result in high fees ultimately to U.S. importers. Notwithstanding the announcement of these fees, the Ports of Los Angeles and Long Beach have not yet triggered these fees on the basis that port congestion seems to be easing; however, large numbers of vessels continue to be anchored in San Pedro Bay due to the current continuing port congestion phenomena. Congestion at these ports have significant impact on the maintenance of adequate inventories by U.S. retailers, since these ports handle roughly 40 percent of U.S. imports.

DEMURRAGE & DETENTION
The Basics

Demurrage refers to the fee charged to a shipper when a container has been unloaded from a ship and is sitting at the port waiting to be picked up. Detention refers to the fee charged when a container that has been picked up has not been returned to the port in the allotted amount of time. To put it simply, there are fees that accrue when containers are not moving within the allotted "free time" allowed for each container, typically up to two days. The ports, terminals, and ocean carriers use these fees as a penalty and an incentive to get containers moving more quickly; however, this system does not work when containers physically cannot for various reasons be moved by the parties to whom these fees are invoiced.

The Biden administration and the Ports of Los Angeles and Long Beach have taken the approach that more fees and more operating hours will solve the problem. In November President Biden announced to the surprise of many that the Ports of Los Angeles and Long Beach would begin operating around the clock and that extra fees of $100/day on a cumulative basis per container would be imposed on carriers and ultimately shippers, as noted above, if the containers sit at ports for a certain period of time. While this 24/7 model has been accepted by a handful of large importers, the larger number of medium-sized and small importers do not have the financial flexibility to maintain a 24/7 labor force. These smaller importers are responsible for a much larger percentage of imports than the handful of large importers which accepted the 24/7 plan so that the curative impact of this scheme will likely not be material to further easing port congestion.

To a large degree the main issue with the process is equipment shortages, specifically chassis to physically move the containers once they are unloaded from the ships. This has been especially devastating in the facilitation of draying loaded containers and/or empty equipment to railyards for transport by rail to Midwestern locations. Hand in hand with equipment shortages are ongoing shortages of drivers, port workers, and other integral employees. The 24/7 model and the recently imposed Container Dwell Fees will not solve the problem and will likely not even make much of a dent. The FMC rationale for implementing the demurrage/detention Interpretative Rules was basically a response to the fact that ocean carriers and terminals are not properly assessing these charges. Punishing shippers and carriers with extra fees when they are physically incapable of moving containers will only exacerbate the problem and becomes punitive rather than incentivizing.

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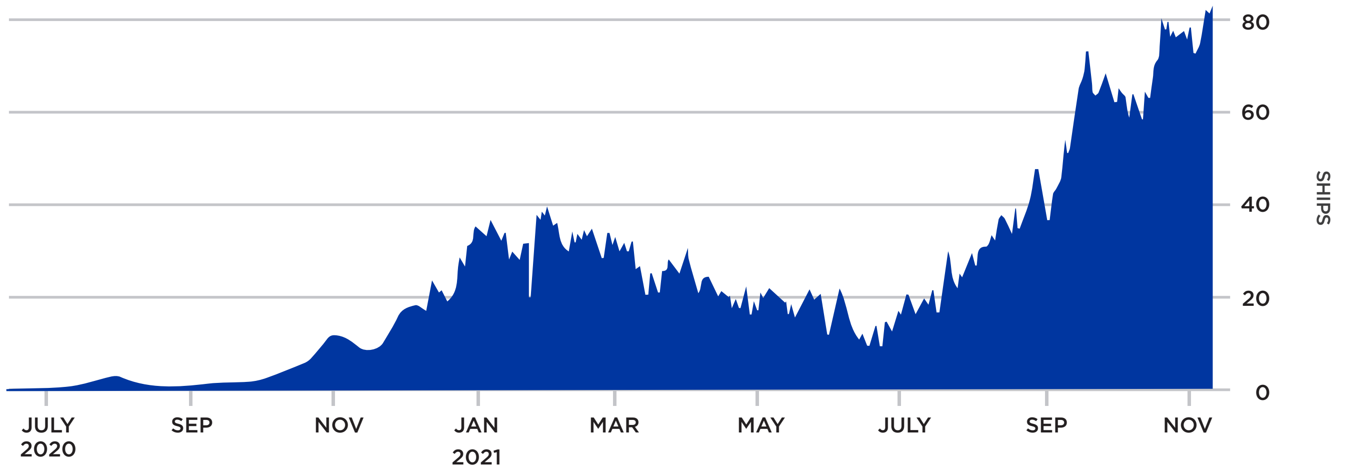
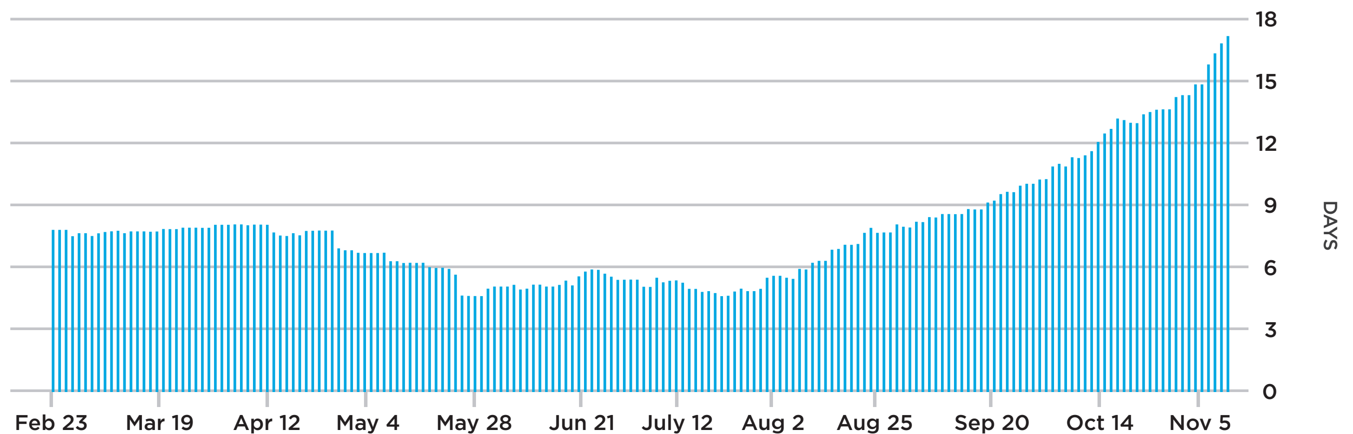
VESSELS WAITING IN SAN PEDRO BAY, CALIFORNIA



Source: Marine Exchange of Southern California & Vessel Traffic Service L.A./Long Beach

AVERAGE DAYS AT ANCHOR, PORT OF LOS ANGELES

February-November, 2021



Source: Wabtec Port Optimizer

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Increased Importance of Federal Maritime Commission's Role in Managing Supply Chain

The FMC is an independent government agency that is responsible for ocean transportation issues internationally in U.S. export and import traffic. It handles complaints between shippers (importers/exporters), ocean transportation intermediaries, carriers and terminals related to alleged violations of the Shipping Act. The FMC is currently investigating the newly implemented fees and dealing with the backlash that has ensued from the announcement. As noted, the ports have not yet implemented the fee schedule that it laid out ($100/day/container) due to the outcry of many stakeholders.

Congress' Role in Regulating Supply Chain Concerns

In August, congressmen John Garamendi (D-CA) and Dusty Johnson (R-SD) introduced the Ocean Shipping Reform Act of 2021. We do not see anything of major importance in this proposed legislation with respect to addressing the factors associated with port congestion. One of the items in the proposed legislation which may have some merit on the issue of "fairness" to the shipping sector (importers/exporters) is that it intends to shift the burden of proof in any proceeding with the FMC regarding the reasonableness of demurrage or detention charges from the invoiced party to the ocean carriers and/or marine terminal operators.

In November, a group of Senate Republicans, including Senators Roger Wicker (R-MO), John Thune (R-SD), Marsha Blackburn (R-TN), Shelly Moore Capito (R-WV), Jerry Moran (R-KS) and Todd Young (R-IN), introduced the Facilitating Relief for Efficient Intermodal Gateways to Handle Transportation (FREGHT) Act aimed at easing the short-term effects of the supply-chain issues. The legislation includes measures that would standardize documents and data, make permanent certain commercial truck driver's license waivers, and require collection of public data; however, these measures are likely inadequate to the supply-chain challenge.

Democrats have released separately proposed legislation that would establish a government office tasked with monitoring supply-chain issues and provide loans and grants to smaller manufacturers, allowing them to expand operations to address bottlenecks. It is our view, as noted previously, that small and medium-sized importers could be incentivized to utilize the 24/7 "remedy" to port congestion if they were provided some assistance with the additional labor expense of employing around-the-clock warehouse personnel. This Democrat initiative only addresses possible solutions for U.S. manufacturers.

Ultimately, Congress may not be the best place for changes of this sort to take place. Most congressmen lack professional or personal experience in the supply-chain or ocean transportation sector. Rather, it would be more beneficial for Congress to work alongside the FMC to better understand what actions and steps could provide a more long-term solution.

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Conclusion

The unfortunate reality is that the current supply-chain issues are to some extent directly related to the Covid-19 pandemic and the rapid transitions in the global economy that resulted. It is unlikely that legislation will fully address the issues at hand, or even solve a portion of it. On the other hand, we should not lose sight of the fact that two days after the Ports of Los Angeles and Long Beach announced the surcharges for containers not picked up in a timely fashion, the National Shippers Advisory Council (NSAC) held its inaugural meeting with the FMC. Created to advise the FMC, the NSAC is composed of 12 U.S. importers and exporters, respectively, as well as representatives from ocean transportation intermediaries. Members include large corporations with vested trade and transportation interests, such as Amazon, Walmart, Target, Office Depot, and Ikea. Initial responses from certain NSAC members on the new surcharges roundly criticized the ports' actions, calling them "catastrophic" and "the last thing we need." Some suggested that government action was needed "to put the brakes on the actions taken by the ports." These insights might have influenced the ports to forego triggering the Container Dwell Fees. These are the real experts; therefore, we suggest that all parties involved keep an eye on the actions of the NSAC and the FMC in the coming year.

Business is no longer usual. Neither are our solutions.

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