HUSCH BLACKWELL

INTERNATIONAL TRADE LAW

2022 Year in Review & Outlook for 2023

December 2022

Introduction

This past year brought forth new regulatory regimes, continued bipartisan scrutiny of China (for technology transfer, infringement of intellectual property, human-rights violations, and national security-related concerns), unprecedented and expansive new sanctions and export controls, increased enforcement for U.S. importers, and increased friction between shippers and ocean carriers. In last year's report, we noted that the Trump-era trade policies might prove to be more lasting than some might have anticipated, and that point was illustrated throughout 2022, as tariffs against Chinese imports continued, despite legal and lobbying efforts to eliminate them. This past year also brought increased scrutiny and enforcement by U.S. government agencies against importers for allegations of forced labor violations and potential evasion concerns relating to antidumping and countervailing duty orders currently in place.

With Russia's invasion of Ukraine in early 2022, U.S. companies are now navigating a labyrinth of new export controls and sanctions against Russia, designated regions of Ukraine, and Belarus, in addition to new targeted sanctions against China, Colombia, Sudan, and Venezuela. While the Biden administration has considered resuming talks with Iran concerning the Joint Comprehensive Plan of Action (JCPOA), with Iran's recent support of Russia, the lifting of any sanctions on Iran in the near future appears unlikely. We anticipate additional export controls on emerging technology, quantum computing, and technology transfer will likely be released in 2023.

Additionally, U.S. companies engaged in international transactions must stay alert for potential transshipment and diversion concerns in light of these new sanctions and export controls. With increased resources for Customs and Commerce, we anticipate that audits and enforcement activity will continue to rise in 2023, requiring U.S. importers to closely analyze their supply chains.

Finally, demurrage and detention (D&D) fees increased roughly nine-fold from April 2020 to June 2022. For the largest nine ocean carriers, this translated into about $10.9 billion billed and roughly $8.6 billion collected over that period. While fees have moderated recently, the uncollected portions of these D&D charges have resulted in a multitude of lawsuits with stakes that have escalated throughout the year. We anticipate that shippers will increasingly turn to the newly passed Ocean Shipping Reform Act of 2022, which contains some potential remedies, to moderate these D&D risks.

This report provides a detailed look at the many moving parts that make up a comprehensive approach to international trade issues. We hope the framework presented here will help your business maximize potential cost savings and minimize potential risks as enforcement activity continues to rise amid increasing geopolitical tensions and a challenging supply-chain dynamic.

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Tariffs, Trade Remedies, and Trade Policy

While there was an expectation by many that there would be a significant shift in trade policy with the Biden administration entering its second year, the reality was that little changed in 2022 from the enforcement approaches of the previous administration's imposition of tariffs and other trade remedies.

Section 301: China and Other Tariffs

Section 301 tariffs continued to be a key area of concern for the Biden administration in 2022. Starting 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 U.S. Court of International Trade (CIT). In 2022, the CIT issued an interim decision remanding the case to the Office of the United States Trade Representative (USTR) to further explain its decision-making process and to provide sufficient information as to the procedures followed to review the numerous comments on the record. USTR filed its remand in August 2022, and the final set of briefs and comments related to the remand was filed on December 5, 2022. As it stands now, we anticipate that a decision will be issued by the Court in the first half of 2023, and at that juncture, we also anticipate, if plaintiffs are successful, that the Court will order the refund of duties for the plaintiffs. USTR has also opened a comment period for interested parties to comment on the economic and financial impact of the implementation of the Section 301 tariffs on U.S. consumers, importers, and manufacturers. Comments must be filed by January 15, 2023.

Uyghur Forced Labor Protection Act

The Uyghur Forced Labor Prevention Act (UFLPA) was enacted on December 2021, with a June 21, 2022 enforcement date for its "rebuttable presumption", which applies to all imports on or after that date. U.S. law (19 U.S.C. §1307) already prohibited the importation of goods produced by forced labor, but the UFLPA imposes more targeted sanctions and imposes new standards of proof applicable to imports of goods produced in the Xinjiang province and by Uyghurs in China. While there has been an obligation on the part of importers for many years to exercise "reasonable care" or "know your supply chain," the new provisions of the UFLPA reverse the standard of proof. If challenged by U.S. Customs and Border Protection (CBP), it requires that importers accused of violations prove that they did not purchase merchandise (including inputs) from the Xinjiang Province, in whole or in part, by "clear and convincing evidence" (a standard much higher than the normal "preponderance of the evidence standard" and with the burden of proof reversed). This new landscape for forced labor compliance will create major new challenges for importers and U.S. businesses, and we discuss the various complexities of UFLPA enforcement in the Customs section of this report, beginning on page 12.

Antidumping/Countervailing Duties

We anticipate that the U.S. will continue to aggressively utilize antidumping and countervailing duty (AD/CVD) laws in 2023, as well as a continued increase in enforcement actions covering the panoply of tools available to the government.

In addition to new AD/CVD petitions, CBP also stepped up enforcement through increased use of Notices of Action, also known as CBP Form 29s. Specifically, CBP has issued notices indicating 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 customs 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 2022, at least 30 new AD/CVD investigations have been initiated covering a variety of products from 16 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 Certain Steel Nails from seven countries, U.S. producers filed a new set of allegations against imports of the same product from four additional countries (India, Sri Lanka, Thailand, and Turkey). In addition, they filed a new countervailing duty allegation against Oman, which is already subject to an antidumping duty order.

ANTICIRCUMVENTION AND ENFORCE AND PROTECT ACT (EAPA) ACTIONS

We have seen a steady uptick in allegations by CBP of evasion of existing AD/CVD orders under the Enforce and Protect Act (EAPA) and actions against alleged circumvention of AD/CVD orders by the Department of Commerce.

To date in 2022, CBP has issued 12 notices of initiation in new EAPA cases, and Commerce has initiated 10 new circumvention inquiries. We see this trend continuing into 2023, as both EAPA and anticircumvention inquiries are seen as a useful tool by U.S. domestic industries to address what are potentially complex global trade issues.

Examples of New AD/CVD Cases in 2022

We anticipate that cases will continue to be filed at a steady rate in 2023 as the world economy continues to recover 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.

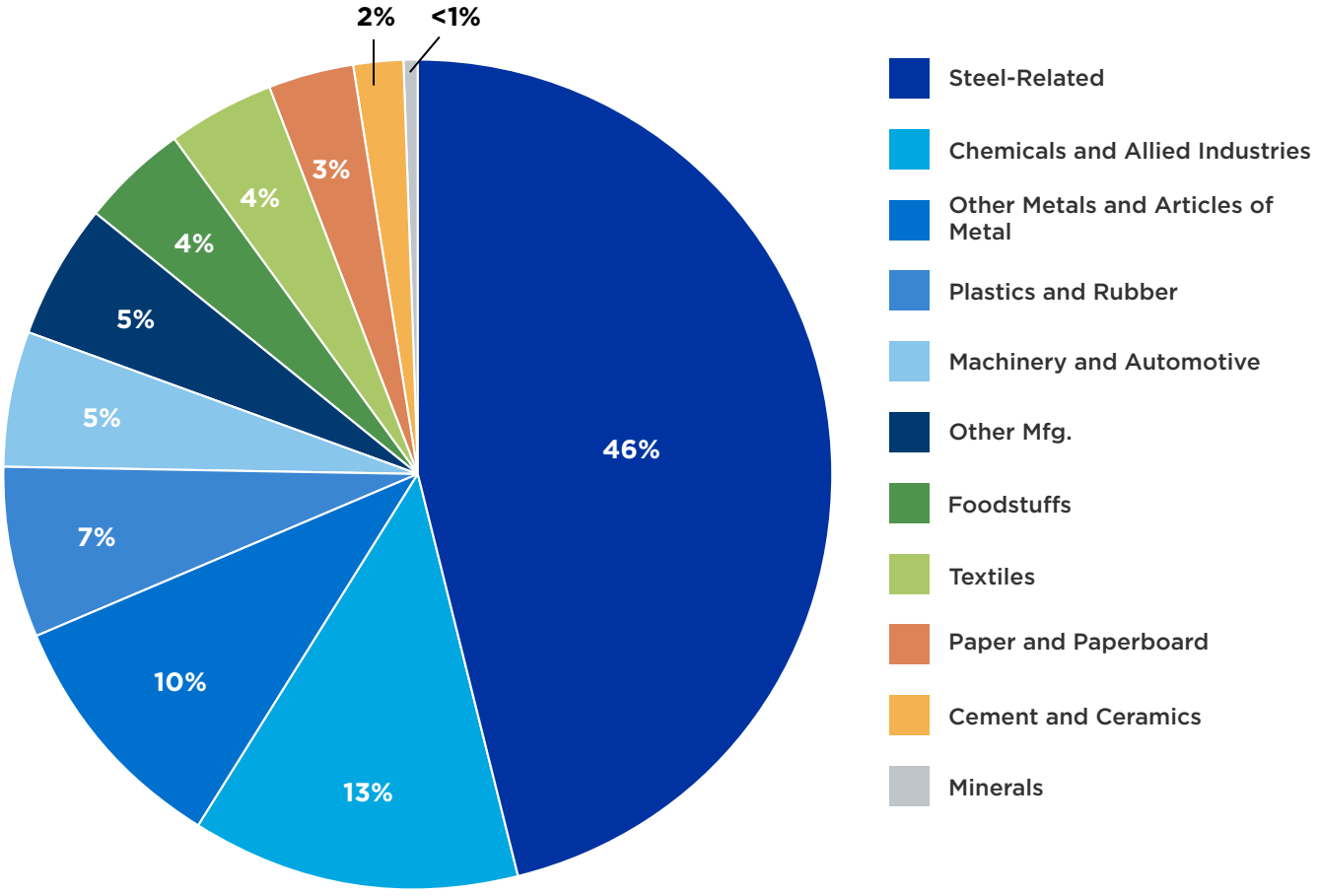
The U.S. International Trade Commission (ITC) reached several negative injury determinations during 2022, including in cases involving steel nails, urea ammonium nitrate solutions, acrylonitrile-butadiene rubber, and freight rail coupler systems. In addition, the U.S. Department of Commerce determined that Russia will no longer be considered a market economy country in antidumping proceedings. This will likely result for higher AD margins for Russian exporters.

Antidumping and Countervailing Duty Orders in Place

AS OF DECEMBER 2, 2022

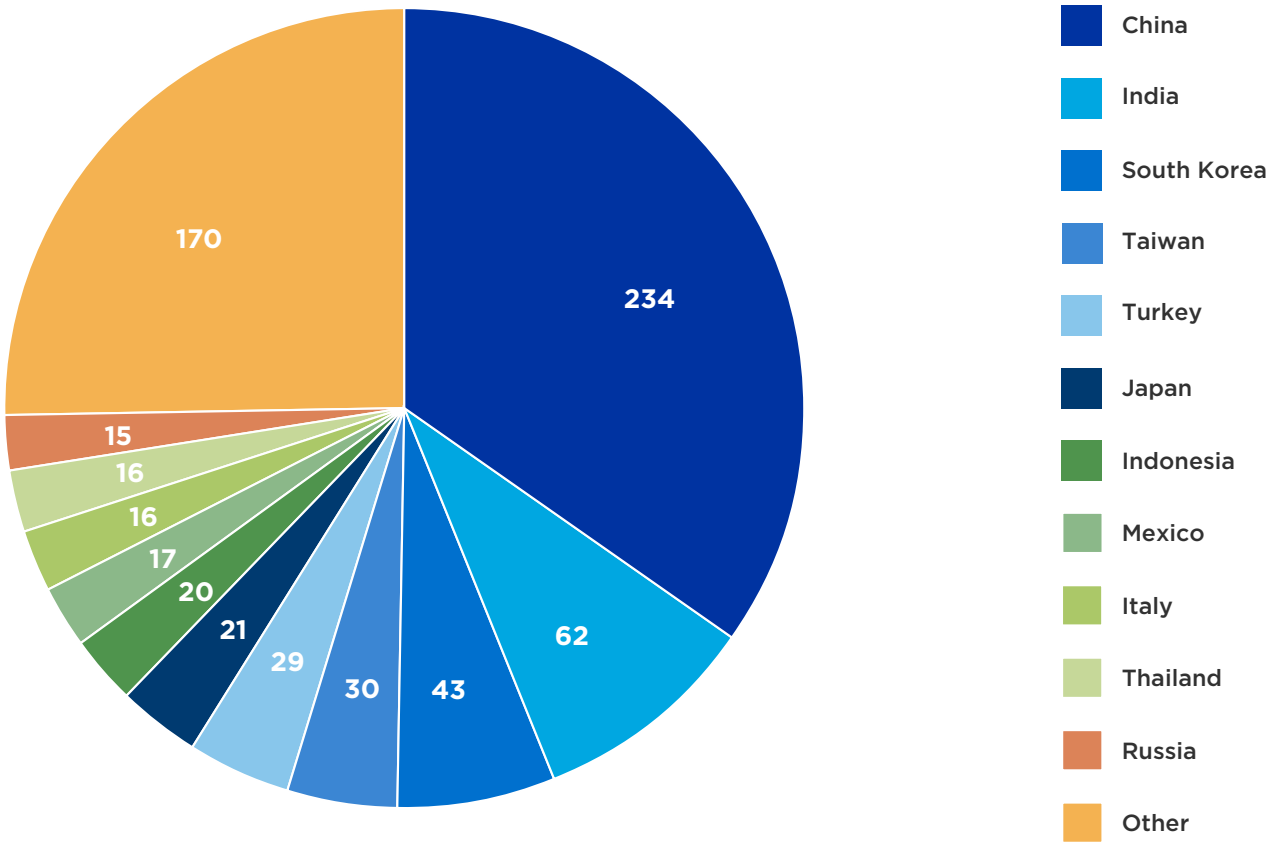
TOTAL ACTIVE ORDERS

ORDERS BY PRODUCT GROUP



Source: International Trade Administration, U.S. Department of Commerce

TITLE ORDERS/SUSPENSION AGREEMENTS PER COUNTRY



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

Dept. of Commerce Finds Solar Panel Imports Evaded AD/CV Orders

On December 2, 2022, the Department of Commerce announced its preliminary circumvention determination with respect to certain solar cells and modules exported from Cambodia, Malaysia, Thailand, and Vietnam. Commerce found that imports of solar cells from all four countries circumvented AD/CVD orders on solar cells and modules from the People's Republic of China. Commerce conducted an eight-month investigation following allegations by the domestic solar industry claiming that solar cell producers, which manufacture solar cells and modules in China, were sending the fabricated cells and modules to one of the four named countries to undergo only minor processing prior to export to the U.S. in an attempt to evade AD/CVD orders. U.S. imports of solar cells and modules from China have been subject to AD/CVD orders since 2012. See 77 Fed. Reg. 73017-73018 (Dec. 7, 2012).

Commerce individually examined eight exporters; however, the preliminary determination applies on a country-wide basis to all solar cells and modules produced in and exported from Cambodia, Malaysia, Thailand, and Vietnam to the U.S., except for the four companies that Commerce determined were not circumventing the Chinese order. Commerce also has allowed comments on the instituting of a certification process that exporters can submit to demonstrate and certify that they are not circumventing the AD/CVD orders and avoid paying the AD/CVD imposed by this determination. The four companies specifically

exempted from the preliminary determination are New East Solar in Cambodia, Hanwha Q Cells and Jinko Solar in Malaysia, and Boviet Solar Technology in Vietnam, provided their production process and supply chain remain unchanged.

The certification requirements went into effect on December 8, 2022, such that any imports starting with the date of publication of the preliminary anticircumvention determination will require a certification to be presented at the time of entry. Should an exporter wish to continue to export from non-exempt companies from one of these countries, the certification requirements will be stringent and exporters should work with their importers on these issues. Solar cells and modules would not be subject to AD/CVD duties if an exporter can certify that the input cells are not made from Chinese wafers, or if the modules are either not made from Chinese wafers or not using certain other Chinese components. However, despite the general availability of importer/exporter certifications permitted to exempt entries from AD/CVD, Commerce preliminarily found 22 individual companies in Malaysia, Thailand, and Vietnam are ineligible for certification due to their failure to cooperate with the inquiry. Any companies wishing to have their certification ineligibility re-evaluated may request an administrative review "during the next anniversary month of these Orders (i.e., December 2022 for the Solar Cells AD Order and December 2023 for the Solar Cells CVD Order)."

As this is a preliminary determination, Commerce will next conduct in-person verifications over the ensuing months to verify the information in its initial findings. In addition, all parties will be able to comment on Commerce's finding before Commerce issues its final determination on May 1, 2023.

We expect that many importers and consumers of solar panels now will need to assess their risks while signing contracts, with CVD and antidumping duties potentially being applied to exporters that may affect projects being planned for 2024 and beyond.

Notwithstanding Commerce's final determination, the Presidential Proclamation issued on June 6, 2022, provides that CBP will not collect duties on any solar module and cell imports from these four countries until June 2024, unless parties cannot certify that the imports will not be consumed in the U.S. market within six months of the entry date (see side panel). Domestic solar importers should utilize this time to make any necessary supply chain adjustments and to ensure they are not sourcing from companies found to be circumventing these duties.

PRESIDENTIAL PROCLAMATION ON SOLAR PANEL IMPORTS

On June 6, 2022, President Biden signed Presidential Proclamation 10414, declaring an emergency action to ensure access to imported solar cells and modules. The Proclamation authorizes the Secretary of Commerce to allow the importation of certain solar cells and modules from certain Southeast Asian countries free of the collection of duties and estimated duties under AD/CVD duty laws up to 24 months after the date of the Proclamation. Accordingly, Commerce postponed and waived the application of certain regulations, in effect, providing that in the event of an affirmative preliminary or final determination in circumvention inquiries, Commerce would not instruct CBP to suspend liquidation of entries of these cells and modules, collect cash deposits on those entries, or apply antidumping or countervailing duties to those entries, so long as the entries of the cells or modules were entered, or withdrawn from warehouse, for consumption before June 6, 2024 or before the date the emergency has terminated, whichever occurs first.

U.S. Customs and Border Protection Developments

It was a busy year for U.S. Customs and Border Protection as the agency took on a massive initiative to address concerns involving the perception of forced labor from China in products imported into the U.S., among other reforms.

In 2022 forced labor enforcement provisions under the new Uyghur Forced Labor Prevention Act (UFLPA), signed into law by President Biden at the end of 2021, shifted the way that CBP reviews a number of products imported into the U.S., as well as all facets of the companies and supplies chains associated with those imports. The UFLPA created a rebuttable presumption that goods, wares, articles, or merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region—or produced by certain entities on the Forced Labor Enforcement Task Force (FLETF) Entity List—were made with forced labor and thus prohibited pursuant to 19 U.S.C. § 1307. The UFLPA has significantly strengthened a longstanding prohibition against importing goods made through forced labor.

UFLPA's rebuttable presumption, which went into effect on June 21, requires importers with goods detained under suspicion of forced labor to either demonstrate that their goods are out of scope of the UFLPA, or show by clear and convincing evidence that the imported items were not produced using forced labor.

Since enforcement of the new statute began, CBP's monthly operational guidance has demonstrated active targeting of shipments potentially involving forced labor. CBP has detained the following quantities of entries each month for suspected forced labor concerns in the production of imported goods:

- August 2022: 838 entries valued at more than $266.5 million
- September 2022: 491 entries valued at more than $158.6 million
- October 2022: 398 entries valued at more than $129.8 million

To assist the trade community in complying with UFLPA requirements, CBP issued its Operational Guidance for Importers in June of this year. That Guidance included resources for supply chain diligence and tracing, as well as the nature and type of information that may be expected when an importer requests an exception to the UFLPA. The FLETF, chaired by the Department of Homeland Security, also introduced its "Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China," which provided further details on the risk of forced labor and CBP plans to support forced labor prevention.

Notably, the guidance provided by CBP stresses the importance of importers engaging in extensive supply chain tracing and producing tracing documentation should the goods come under question for forced labor suspicions. In that regard, importers sought practical implementation advice given the numerous supply chain structures and overall complexity of supply chain tracing. In short, we recommend that importers take steps proactively to ensure they can identify the source of input materials and production from the raw materials through to production of the finished goods.

CBP is considering numerous proposals to streamline enforcement measures and provide greater visibility

for importers. Expected in December 2022, CBP will deploy a new mandatory data element in the Automated Commercial Environment (ACE) system—manufacturer postal codes—which will provide an early notification to importers that certain goods may have been produced in Xinjiang. This enhancement is likely one of several expected to come as forced labor concerns and enforcement continue to rise.

New Broker Requirements

In 2022, CBP published two final rules aimed at aligning broker regulations with more modernized business practices. The broker regulations defined in 19 CFR 111 have been under scrutiny for several years as the trade community along with CBP and COAC sought to improve key aspects of the broker operating framework. Key changes involved certain transitions to national permits, changes to broker fees, heightened broker supervisory requirements, and broker responsibility to advise clients in the case of noncompliance. Also, under the new regulations, all powers of attorney must be directly executed with importers of record or drawback claimants. These changes reflect a desire to modernize broker processes while ensuring that brokers play an active role in policing compliance both internally and externally.

Tariff Relief under GSP & MTB

The Generalized System of Preferences (GSP) is the largest and oldest U.S. trade preference program that provides nonreciprocal, duty-free treatment enabling many of the world's developing countries to spur economic growth through trade. With GSP having expired December 31, 2020, legislation to renew it has been pending in both houses of Congress. The Miscellaneous Tariff Bill (MTB) is another program that provides temporary legislation allowing duty suspensions for certain qualifying goods. The MTB also expired December 31, 2020, with legislation pending to extend it through 2023 and authorize two additional cycles through 2027. At this time we do not see significant movement to renew the GSP or MTB, particularly as the lame-duck session of Congress expires.

On September 19, 2022, Congressperson Debbie Wasserman Schultz (D-FL) introduced HR 8906, which if passed, would provide duty-free treatment or preferential treatment to entries that otherwise would have been covered under the GSP. The Coalition for GSP estimates that American companies have paid at least $1.9 billion in direct tariffs, January 1, 2021, through August 2022. In essence, the U.S. would refund amounts owed without interest no later than 90 days after the date of liquidation or reliquidation for entries made after December 31, 2020, but before September 1, 2022.

Congressman Earl Blumenauer (D-OR) is reportedly working on a comprehensive trade bill to introduce in the lame-duck session that would include a seven-year renewal of Trade Adjustment Assistance, GSP and MTB. However, we believe the bill is unlikely to have Republican support as GSP and MTB language is similar to proposed legislation the GOP has previously opposed.

Section 337 Litigation

Section 337 litigation continues to build an impressive profile as a trade remedy. Adjudication of Section 337 investigations and ancillary proceedings has increased approximately 40 percent in the last year alone.

This past year was relatively active for Section 337 litigation, with 56 new complaints filed and 50 investigations instituted during the fiscal year of the ITC. The number of complaints filed was the same as 2021, but there was a slight decrease in the number of investigations instituted—which was expected after a very active post-pandemic 2021.

In 2022, the ITC concluded 90 investigations and ancillary proceedings (as opposed to 64 in 2021). The ITC, like much of the federal government, was slow to reopen its doors: in-person trials and hearings did not resume until September 2022. Administrative Law Judges (ALJs) have finally begun conducting such in-person proceedings over the past few months.

For the second consecutive year, the ITC welcomed a new ALJ in Bryan F. Moore, who was named May 9, 2022. Prior to his appointment, Judge Moore had served as an Administrative Patent Judge (APJ) at the U.S. Patent and Trademark Office. Before his stint as an APJ, Judge Moore was an investigative attorney in the ITC's Office of Unfair Import Investigations from 2005 to 2012. Judge Moore is widely respected among the Section 337 bar, particularly for his technical approach, and his appointment was met with praise by a multitude of commentators.

Diversification of Caseload

Just a few years ago, almost all Section 337 cases were patent-focused and mostly involved consumer electronic devices. In the last couple of years, however, the diversification trend continued, with complainants raising a variety of non-patent issues (e.g., trade secrets, Lanham Act claims). In 2022, complainants have targeted products such as wet and dry surface cleaning devices, fitness equipment, barcode scanners, sports equipment, weapons and ammunition, pool cleaners, renewable energy systems, and gardening apparel. It is clear that more types of companies—not just patent-heavy technology companies—are discovering the relevance of Section 337.

SECTION 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.

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." 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 2022, the ITC delegated the development of a factual record on public interest in very few new investigations.

Slight Increase in Exclusion and Cease-and-Desist Orders

As noted above, the ITC concluded almost 40 percent more investigations in 2022 than it did in 2021. The number of general and limited exclusion orders doubled and tripled, respectively. Likewise, 75 cease and desist orders were issued, a 135 percent increase from the 32 such orders issued in 2021.

Interaction with the Patent Trial and Appeal Board (PTAB)

In what constitutes a notable change from previous established practice, the PTAB issued in June 2022 a guidance memorandum significantly limiting the circumstances in which the PTAB should exercise its discretion to deny institution. Before the guidance was issued, the PTAB routinely used its discretionary power to deny petitions for post-grant review or *inter partes* review (IPR) of a patent under 35 U.S.C. §§ 314(a) and 324(a). Now, the memorandum states "the PTAB will not discretionarily deny petitions based on a parallel ITC proceeding." As a result of this change, IPRs are now an attractive option to respondents in Section 337 investigations—although timing of resolution will likely dictate how the ITC will treat an IPR final written decision. Given timing concerns, respondents seeking to file an IPR should do so as soon as practicable, especially if the respondent hopes to use a favorable IPR final written decision to suspend any remedial orders issued by the ITC until the patent claims are formally canceled.

[1] 19 U.S.C. § 1337(d)(1)

Export Controls & Trade Sanctions

The U.S. Department of Commerce's Bureau of Industry and Security (BIS) headlined export control and trade sanctions developments in 2022 with respect to its denial orders and entity listings, particularly those in support of the expansive export controls imposed on Russia and Belarus throughout the year.

In June, BIS announced four policy changes designed to strengthen, while reallocating, its administrative enforcement efforts: (i) imposition of significantly higher penalties for serious violations; (ii) use of non-monetary resolutions for less serious violations and the imposition of higher penalties for more serious violations; (iii) elimination of "No Admit, No Deny" settlements; and (iv) dual-track processing of Voluntary Self-Disclosures (VSDs). Shortly after, BIS announced its first non-monetary settlement under its new policies. BIS's requirement that, to be eligible for non-monetary penalties, companies admit responsibility for the underlying conduct and agree to "remediation-oriented measures," such as training and compliance audits, will be something for businesses to consider as they navigate their specific circumstances.

Whether this shift in enforcement strategy will be long-lived remains to be seen. In October 2022, Rep. Michael McCaul (R-TX)—the top Republican on the House Foreign Affairs Committee—announced his intention to commence a formal review of BIS and its export control procedures if Republicans retook control of the House of Representatives after the midterm elections. Republicans did just that in November. This comes on the heels of several members of Congress proposing legislation that would transfer authority over export controls to the Defense Technology Security Administration within the Department of Defense. Republican complaints include a perceived lenient licensing policy for China, a lack of restrictions on foundational technologies, and an inherent tension between BIS's dual mission of promoting trade and protecting national security. Amidst committee reviews and pending legislation, it bears watching how the increasing calls for oversight—and potential reform—of BIS and export control jurisdiction play out in 2023.

Anti-Boycott Enforcement

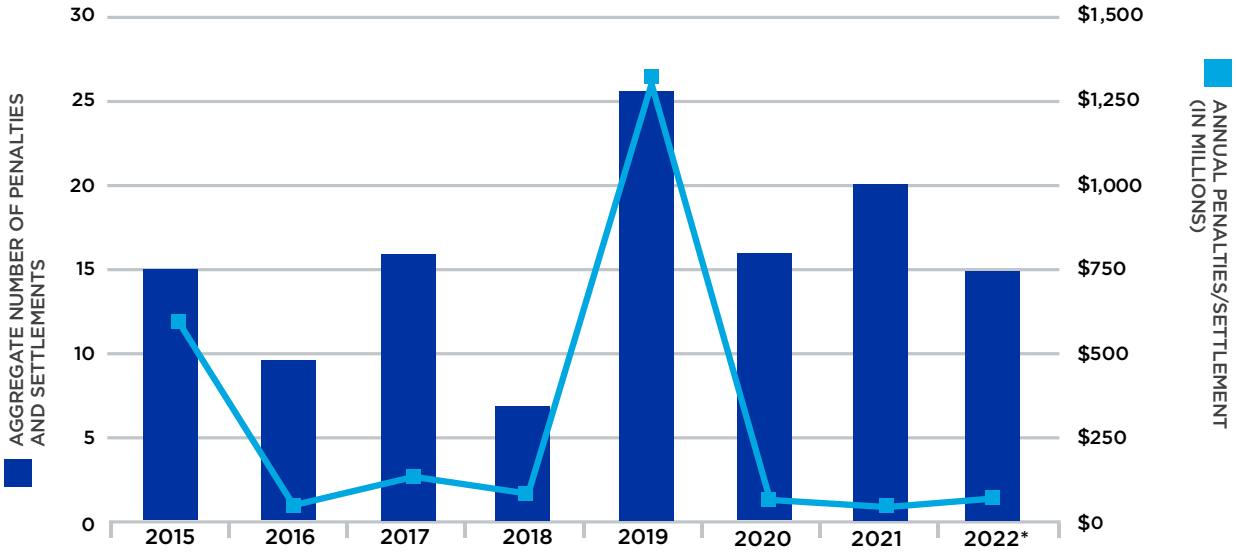
In October, BIS announced its intention to increase enforcement of anti-boycott rules. In the announcement, BIS outlined four changes to strengthen its ability to enforce anti-boycott rules. Those changes include (1) enhanced penalties to reflect the seriousness of the offense; (2) reprioritization of violation categories to reflect the seriousness of these types of violations; (3) requiring companies entering into settlements to resolve violations of anti-boycott rules to admit to a statement of facts rather than continuing to allow "no admit/no deny" settlements; and (4) renewing a continued focus on virtual foreign subsidiaries of U.S. companies.

OFAC's Continued Focus on Virtual Currencies, IP Address Blocking and Geolocation

In 2022 the Office of Foreign Assets Control (OFAC) continued its enforcement campaign in the virtual currency sector with notable enforcement actions against Bittrex, Inc. (charged with approximately $25 million in penalties after performing 116,421 virtual currency-related transactions in apparent violation of multiple OFAC sanctions programs), Payward, Inc. (d/b/a/ Kraken) (charged with $362,158.70 in penalties after processing 826 cryptocurrency transactions for apparent residents of Iran) and virtual currency mixer Tornado Cash (added to the SDN List after being used to launder over $455 million on behalf of a North Korean hacking group who was already designated as a SDN). The Bittrex, Inc. and Kraken enforcement actions specifically cited the offending companies' failure to perform adequate IP address screening as a factor which increased the size of the penalties imposed. Specifically, OFAC found

that Kraken failed to "timely implement appropriate geolocation tools, including an automated internet protocol (IP) blocking system." As a result, users accessed their accounts and conducted transactions from sanctioned jurisdictions. One aggravating factor of note and specifically flagged by OFAC was Kraken's failure "to exercise due caution…when, knowing it had customers worldwide, it applied its geolocation controls only at the time of onboarding and not with respect to subsequent transactional activity." This failure to implement was despite Kraken's having reason to know, based on IP addresses, that transactions appeared to have been conducted from Iran. Although none of OFAC's various sanctions regulations expressly require companies to perform IP address tracking or geolocation, these enforcement actions underscore that OFAC clearly expects virtual currency and internet-based companies to have adequate, continuous and consistent sanctions compliance controls in place and that OFAC will level significantly higher penalties when it finds that offenders have not established those controls.

OFAC ENFORCEMENT ACTIONS BY VOLUME AND VALUE



*Through December 14, 2022

Source: U.S. Department of Treasury

Relatedly, in September OFAC issued its *Sanctions Compliance Guidance for Instant Payment Systems.* According to OFAC, instant payment systems "allow users to send and receive funds almost instantly, at any time of the day, on any day of the year." Thus, in addition to traditional financial institutions that offer such systems, this guidance also very likely applies to cryptocurrency payment systems. Although OFAC encouraged financial institutions to development a risk-based approach commensurate with their particular sanctions risks, it also identified several compliance technologies and solutions for companies to consider implementing as part of their compliance best practices moving forward. Among those were artificial intelligence tools and other emerging technologies to facilitate greater information sharing and communication among financial institutions, thereby enhancing screening functions and reducing false positives; incorporating sanctions compliance during the design and development phase to help ensure compliance controls are integrated as new payment systems technologies develop; and allowing for "exception processing," which would remove a transaction from automated processing to permit adequate opportunity for further investigation of any potential concerns.

Russian Federation

On February 24, 2022, Russia launched an undeclared war against Ukraine, eight years after first invading, occupying, and annexing Crimea, a region of Ukraine. After the February invasion, the U.S. and its allies implemented coordinated sanctions, export controls, and other trade measures against Russia. Notable actions included:

- Sanctioning Russia's central bank and other major financial institutions
- Removing Russian financial institutions from the SWIFT network that facilitates international payments
- Implementing export controls which generally target a wide variety of industrial activities and specifically Russia's defense, aerospace, and energy sectors
- Prohibiting new investments in Russia and secondary-market transactions by U.S. financial institutions in Russian sovereign debt
- Banning the import of Russian luxury goods into the U.S. and the export of luxury goods to Russia
- Banning the entry of Russian aircraft into U.S. airspace, entry of Russian vessels into U.S. ports, and the servicing of various aircraft known to have flown into Russia
- Restricting new equity investments and financing for several companies in Russia, including Gazprom and Sovcomflot
- Embargoing the Donetsk and Luhansk regions in Ukraine, thereby prohibiting any trade with individuals or entities within those regions
- Prohibiting the export of accounting, trust and corporate formation, and management consulting services to any person located in Russia
- Expanding the scope of the Export Administration Regulations' (EAR's) Russian industry sector sanctions to add items that may be useful for Russia's chemical and biological weapons

The Biden administration also sanctioned numerous individuals as a result of those individuals' roles in the invasion, including President Vladimir Putin, Prime Minister Mikhail Mishustin, and the State Duma and Federation Council and their members, among others throughout Russia's government.

The Administration also took aim at Russian oligarchs in an attempt to cut off outside funding for the war. With those sanctions came the creation of new task forces, specifically Kleptocapture, designed to track down and seize illicitly obtained funds and items.

OFAC has made it clear, however, that these extensive sanctions do not extend to agricultural trade. In a July 2022 Fact Sheet, OFAC has confirmed that "the United States has not imposed sanctions on the production, manufacturing, sale, or transport of agricultural commodities (including fertilizer), agricultural equipment, or medicine relating to the Russian Federation". OFAC has also issued a General License 6B which authorizes various transactions related to agricultural commodities, agricultural equipment, medicine and medical equipment. However, persons seeking to utilize OFAC General License 6B should be aware that items authorized for export to Russia under General License 6B could still require separate licensing from BIS under the EAR.

People's Republic of China

Observers had been waiting to see what the Biden administration's next steps would be in the ongoing trade tensions with China and the U.S.'s escalating efforts to safeguard its technology and intellectual property. In October, the U.S. Department of Commerce's Bureau of Industry and Security (BIS) answered

that question when it released its much-anticipated export controls on advanced supercomputing and semiconductor manufacturing items. At the root of these restrictions is artificial intelligence and the U.S. government's increasing concerns that China is gaining ground on its AI capabilities. Specifically, the new set of export controls curbed China's ability to obtain advanced computing chips, develop supercomputers, and manufacture advanced semiconductors—functions the U.S. government has identified as critical to China's pursuit of advanced military systems. Although BIS issued its first set of guidance shortly thereafter, many questions remain as to how the controls and their wide-ranging technological implications will be interpreted and ultimately enforced. Nevertheless, to close the year, BIS built on these controls in December by adding 35 Chinese entities to the Entity List for various activities in support of China's military modernization efforts.

Islamic Republic of Iran

The beginning of 2022 witnessed Biden administration efforts to reenter the Joint Comprehensive Plan of Action (JCPOA) to address Iran's nuclear developments and capabilities; however, with the installment of a hardline government in Iran, Iran's support for Russia's invasion of Ukraine, its continued nuclear developments, and, more recently, its domestic crackdown on political dissent, the two countries remain at an impasse. As of the date of this report, it seems unlikely that the US and Iran will enter into a similarly styled deal. The continued participation of European countries in the current JCPOA is unknown.

Belarus

Belarus has played an important role in supporting Russia's invasion of Ukraine. Because of that support, the U.S. and other countries have implemented sanctions and export controls against Belarus. Many of the sanctions and export controls implemented against Russia were implemented against Belarus as well.

Venezuela

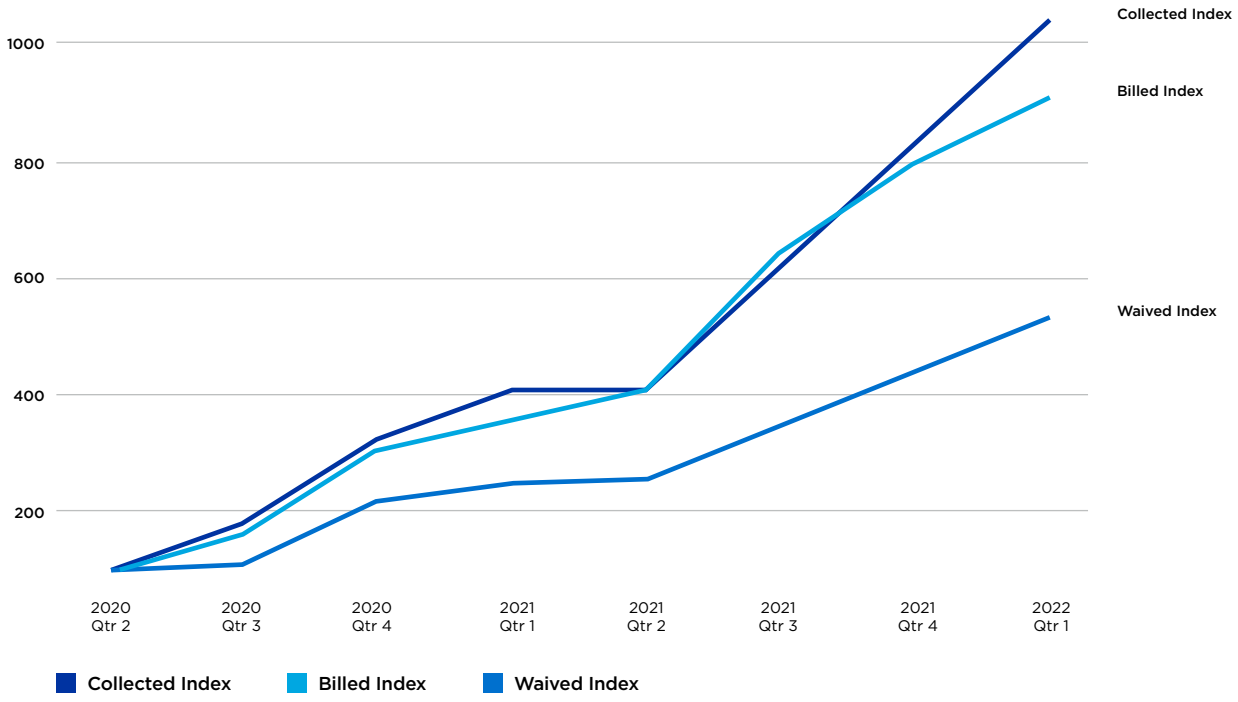
Back in 2019, the Trump administration imposed sweeping economic sanctions against the Government of Venezuela, which in turn prohibited U.S. imports of Venezuelan crude oil from state-owned Petróleos de Venezuela, S.A. (PDVSA); however, in November the Biden administration signaled its willingness to revisit sanctions against Venezuela by granting Chevron a license to resume oil production through its joint ventures with PDVSA in Venezuela. While sanctions remain in place, we believe it's possible that OFAC could grant additional similar licenses and/or roll back other sanctions against the Government of Venezuela if relations between the U.S. and Venezuela continue to improve.

Supply Chain & Logistics

Supply chain concerns once again dominated headlines in 2022. In response to these challenges, Congress passed the first major reform of U.S. shipping law in a generation and acted decisively late in the year to quash a rail-worker strike that could have led to serious economic consequences.

The U.S. Congress passed the Ocean Shipping Reform Act of 2022 (OSRA), and President Biden signed it into law on June 16, 2022. The Federal Maritime Commission (FMC) will continue enacting portions of OSRA throughout the coming year, with FMC pursuing rules on detention and demurrage (D&D) and charge complaints and NVOCCs in the short term, while turning its attention over the longer term to a range of reforms intended to increase the efficiency of port operations.

Detention and Demurrage Indices



Source: *Federal Maritime Commission*

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 with regard to compliance with Section 41104(a) and Section 41102. 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 Section 545.5 of Title 46, Code of Federal Regulations (or successor regulations)." There is clearly a shift of burden to the ocean carriers on D&D charges deemed

unlawful, i.e., where the ocean carrier has to prove that their invoices meet the reasonable tests as defined in the Act. These investigations can lead to shipper refunds and/or penalties for ocean carriers.

Invoicing Reform

OSRA 2022 provided for D&D invoicing reform. If invoices are issued without the required information, they may not be enforceable. These items include the date that a container is made available; the port of discharge; the container number or numbers; for exported shipments, the earliest return date; the allowed free time in days; the start date of free time; the end date of free time; the applicable detention or demurrage rule on which the daily rate is based; the applicable rate or rates per the applicable rule; the total amount due; the email, telephone number, or other appropriate contact information for questions or requests for mitigation of fees; a statement that the charges are consistent with any of Federal Maritime Commission rules with respect to detention and demurrage; and a statement that the common carrier's performance did not cause or contribute to the underlying invoiced charges.

The NVOCC Role

In the investigation by the FMC of charge complaints 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 would seem to signal 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

Shipping Exchange Registry. OSRA provides for a Shipping Exchange Registry to require exchanges—such as the New York Shipping Exchange (NYSHEX)—to enter service contract agreements with shippers. FMC's public position is that such agreements guarantee that shippers' cargo will be loaded and that volume committed will be delivered to destination; however, the motivations and origins of the provision are unclear, as it appeared unprompted and was perhaps unneeded given the lack of previous regulatory concern or public disapproval with NYSHEX or competing exchanges. The rulemaking has a three-year timeframe for completion.

Retaliation Prohibition. OSRA contains a provision aimed at ocean carriers, terminal operators, and OTIs, prohibiting them from retaliation against shippers, agents of shippers, OTIs, or motor carriers for patronizing another carrier, for filing a complaint against the ocean carrier, terminal operator, or OTI, or for any other reason. Interestingly, there are similar regulations already on the books—including 46 C.F.R. § 545.1 (Interpretation of Shipping Act of 1984—Refusal to negotiate with shippers' associations)—which go unnoticed or regulated, especially given recent refusals to negotiate with shippers' associations. This section, however, could get greater attention if such retaliation should become prevalent in the D&D scenario; nonetheless, there are unaddressed issues in the "refusal to negotiate" arena worth watching throughout 2023.

Public Disclosure. In a "Wall of Shame" solution, FMC will publish at the end of the year all common carriers found to be in violation of false detention and demurrage invoice information and the penalties assessed against such common carriers. The difference here is the end-of-year spotlight, as opposed to the current case-by-case public notices as these penalties are being assessed against common carriers.

Dwell Time Statistics. These statistics include total street dwell time when the equipment is not in a terminal and average out-of-service percentages for equipment. We would have liked to have seen regular import container dwell time averages on a weekly basis for loads in order to measure when ocean carriers and/or NVOCCs are not utilizing due diligence in removing loaded containers from terminals within free times, or at least within the average dwell times for such loaded containers. This would certainly provide indicia for measuring reasonableness for parties with duties to pick up and deliver loaded containers.

Additional Enforcement Staff. No fewer than seven enforcement positions will be added within 18 months of OSRA's passage.

Temporary Emergency Authority. The FMC may make a unanimous determination by the commissioners that congestion of carriage of goods has created an emergency situation of a magnitude such that there exists a substantial, adverse effect on the competitiveness and reliability of the international ocean transportation supply system. This device would trigger information-gathering powers in the form of orders to common carriers and marine terminals in order to best address such congestion.

Best Practices for Chassis Pools. The FMC and other federal agencies shall 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. This has a timeframe for completion of no later than April 1, 2023.

U.S. RAIL STRIKE AVERTED

Freight railroads and rail labor are in an ongoing dispute that would impact further supply chain challenges. Freight carriers and labor have been negotiating since 2019. This year, President Biden has been involved in negotiations and set up a Presidential Emergency Board in July 2022. On December 2, 2022, President Biden signed a bill passed by Congress that made a rail strike illegal, but it did not ensure paid sick days, which is a major issue for engineers, conductors, and rail yard workers due to the exigent schedules of freight trains, and corresponding rail company practices which penalize absences even for reasons of illness. Nevertheless, Congress avoided a disastrous and expensive rail strike which would have been in play by December 9, 2022, had the law not been passed. Costs had been estimated in the billions of dollars per day. It is expected the Biden administration will continue to seek legislative cures to pursue the ongoing sick day issues.

Inland Ports for Storage and Transfer of Cargo Containers. Within 90 days of the Act's implementation, the FMC and DOT shall develop strategies for including inland ports for purposes of storage and transfer of cargo.

Discrimination of HAZMAT by Ocean Carriers. Not later than 90 days after the date of enactment of the Act, the Comptroller General of the United States shall initiate a review of whether there have been any systemic decisions by ocean common carriers to discriminate against maritime transport of qualified hazardous materials by unreasonably denying vessel space accommodations, equipment, or other instrumentalities needed to transport such materials.

Other Long-Term Provisions. There are other longer term projects related to adoption of technology at U.S. ports, and the utilization of Transportation Worker Identification Credentials for the purpose of using same within the interior of the United States.

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 detention and demurrage. 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. The public comment period on FMC's proposed rulemaking ended December 13, 2022.

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