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What Will Happen in International Trade in 2023?

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Agenda

China Section 301 Developments

Forced Labor

USMCA

Inflation Reduction Act (IRA) / Buy America(n)

Foreign Direct Investment

China – Export Controls

Free Trade Agreements

China Section 301 Developments



- Section 301 tariffs (Lists 1, 2, 3 and 4A) still in effect on \$350 million in Chinese goods
- 6,804 product exclusions granted
- No current product exclusion process – most exclusions have expired
- 81 (of 99) COVID-19 product exclusions extended through Feb. 28, 2023
- 352 product exclusions expiring Dec. 31, 2022, extended through Sept. 30, 2023

China Section 301 Developments *(cont.)*

- China Section 301 tariffs currently subject to USTR four-year review
- Comments portal closed Jan. 17, 2023 – 1500 responses on continuation, termination, new product exclusion process, and *de minimis* decrease (\$800 to \$200)
- **Likely outcome:** Continuation with new product exclusion process
- Tariffs are now status quo, and U.S. government wants negotiating chip with China

China Section 301 Developments *(cont.)*

- CIT Section 301 tariff refund litigation over Lists 3 and 4A products (Sept. 2020)
- **Initial CIT April 2022 ruling:** Within President's authority to assess these tariffs, but USTR did not follow Administrative Procedure Act when it failed to provide adequate responses and explanations
- On remand, CIT instructed USTR to show adequate responses and explanations
- February 7, 2023 oral argument on August 1, 2022 USTR remand determination
- Final CIT decision expected by summer – vacate tariffs, further remand or affirm
- Any decision will be appealed by losing side to CAFC; CAFC decision could be appealed to and certified by U.S. Supreme Court
- **Outcome:** This won't be resolved for a long time

China Section 301 – Best Practices

If you are still paying these tariffs and want to lessen their sting

- Try the USTR product exclusion process IF it returns

- Shift the supply chain away from China-sourced product

- Further manufacture the China-sourced product in a third country so that the COO changes under the substantial transformation rules

- Consult a lawyer for the options that work best

Forced Labor Legal Trends



2012

California Transparency
in Supply Chains Act



2015

UK Modern
Slavery Act



2018

EU Non-Financial
Reporting Law



2020

Dutch Child
Labor Due
Diligence Law



2021

Uyghur Forced Labor
Prevention Act



2022-2024

EU Forced Labor
Ban Proposal



2015

US Trade Facilitation &
Trade Enforcement Act



2017

French Duty
of Care Law



2019

Australia
Modern
Slavery Act



2021

German Human
Rights Due
Diligence Law



2022-2024

EU Directives on
Corporate Sustainability
Due Diligence and
Corporate Sustainability
Reporting



U.S. Forced Labor Trends

- 54 active WROs and 9 findings
- 35 WROs and 5 findings related to China



Focus on Xinjiang

- Xinjiang Business Advisories, issued in 2020 and 2021, warn companies about the import/export risks of doing business in certain industries and in the region
- Uyghur Forced Labor Prevention Act (UFLPA) was signed into law and became effective on June 21, 2022
- UFLPA establishes a rebuttable presumption that imports of goods produced in whole or in part in the XUAR or involving a UFLPA Entity List person are produced from forced labor



Rebut = “Request an Exception” under UFLPA

■ Programmatic

- Due Diligence System
- Effective Supply Chain Tracing
- Supply-Chain Management Measures

■ Import Specific

- Clear and Convincing Evidence Standard
- Respond fully and completely to all CBP inquiries

Out of Scope Imports – Proof

- **Program related requirement:** must show effective supply chain tracing
- **Import specific requirement:** must show supply chain mapping for the imported good showing it was sourced outside of the Xinjiang region
- No clear and convincing standard

2023 – Forced Labor Focus



- Continued focus on supply chains tied to Xinjiang with spotlight on new industries
- Certain industries move out of spotlight as these industries improve supply chain management, but continue to see detentions
- CBP's enhanced resources continue to lead to new WROs
 - Companies should pay close attention to DOL List and news reports

Outside the United States

EU Corporate Due
Diligence Directive

EU Forced Labor
Proposal

EU Corporate
Sustainability
Reporting Directive

Canada – Modern
Slavery Act



The Balance and Costs of Trade?

- Inflation – Costs will go up? Whether we can reach 2% target
- Worker-Centric Trade – Costs, Compliance Procedures with HR, Collective Bargaining as Default?
- Manufacturing / Industrial Policy / “Friendshoring” – Buy America(n) and definition of FTAs
- Climate Change / “Green Shoring”

Substantial Transformation

- Restructuring Supply Chains through 3rd Countries

More than 1000
public/CROSS
substantial
transformation
US-CBP rulings

US-CBP slow
to have tight
enforcement via rulings;
in 2018, ramped up
enforcement; in
2019 & 2020, gradual
“easing” in
2020-present

2019-2020
one consistent trend
was that substantial
transformation test
was very “fluid”/“call it as
they see it”; geographic
focus with Mexico,
Vietnam, Taiwan
favorable; Thailand,
Malaysia less so.
Improving with Thailand

Substantial Transformation *(cont.)*

Trendlines in post-COVID environment

Vietnam, Philippines, India, Thailand, Taiwan, Mexico, favorable if originate/“start there” and still acceptable if final assembly/finishing in China. “Rebalance by Reversal” (e.g., “steel from global sources”)



Focus on “Enabling Technology” (e.g., security cameras, PCBAs)



Automotive/Aerospace (EVs, batteries), Chemicals, Pharmaceuticals, Metals, Critical Minerals warrant close attention, less so on consumer goods

Key USMCA Developments



- Rapid Response Labor Enforcement Mechanism (May 2023)
- Labor Value Content / Forced Labor
- Key Disputes (e.g., auto ROO) and Potential Retaliation
 - Expect new US-CBP guidance on Auto RoO and Uniform Regs

Key USMCA Developments



- USMCA PSRO & Auto ROO + Substantial Transformation when 301, 232, 201 and AD/CVD
- Certification of Origin (verb) vs. Certificate of Origin
 - Know your supplier's supplier
- Terms and Conditions

Key IRA Developments

- **Inflation Reduction Act of 2022 (IRA)**
 - Comments pending with Treasury and expected in March 2023 – “substantially all of the manufacturing or assembly activity” and definition of FTA
 - Tax vs. Trade Dispute (Canada, Mexico, E.U., Japan)
 - Extensions of existing programs likely acceptable; new investment credits (e.g., EVs) likely subject to challenge
 - Large focus on processing of critical minerals



Key BAA Developments



- **Buy American Act (BAA)**
 - Steel and Iron thresholds increasing to 60% (October 2022), 65% (2024) and 75% (2029)
 - Fallback to 55% if not available
 - Commercial Off the Shelf, WTO Government Procurement Agreement, and Domestic Content Test all remain in effect
 - Price Preference program

Key BABA Developments

- **Build America, Buy American**

- Broader types of projects (broadband, telecom, etc.)
- Iron and Steel – Melted And Poured
- Construction Materials – 60%
- Manufactured Products – 60% AND manufactured in U.S.
- COTS limited only to 60% threshold – still must be in U.S.
- Still unclear as to WTO GPA



Foreign Direct Investment

- October 2022, CFIUS released enforcement and penalty guidelines
- Much of the enforcement is tied to mitigation measures imposed as conditions to clearance of deals
 - Ongoing compliance with these obligations has been show to be more challenging than anticipated
- Expect to see continued focus on enforcing these mitigation measures

Foreign Direct Investment

- “Outbound CFIUS” bills have been proposed including bipartisan National Critical Capabilities Defense Act
- Axios reported that the President was preparing an executive order focusing on outbound investment to China; reports indicate that they are looking to target the order narrowly and coordinate with allies
 - Reportedly likely to focus on key technologies

China – Export Controls

- Late 2022 saw new controls on exports of semiconductor and advanced computing technology to China

Extended to
Macau in
January 2023

Continue to
wrestle with
implementation
as companies
received licenses
for some
continued sales at
least in short-term

Tied to focus on
investment and
development of
these industries in
the United States

Will be amended,
with comments on
the interim rule
due by January
31

China – Export Controls

- Dozens of Chinese companies added to Entity List in late 2022 for various reasons, including support of China's military modernization
- Anticipate this trend will continue
- BIS expected to devote substantial resources to enforcement related to diversion to Chinese companies on the Entity List



China – Export Controls

- US continuing to reconsider the meaning of “national security” and use export controls as a means to achieve strategic objectives
- Focus on multilateral controls and coordination with allies
- Expect new controls to focus on semiconductors, advanced computing, AI, and biotechnology



Biden Administration and FTAs

Biden Administration themes: Worker-centric trade policy/agreements (“bottom up and middle out”) and economic security issues in battle with China

Move beyond traditional FTAs (i.e., market access and lower tariffs)

Focus on values – “new global code of conduct”: worker rights, better labor conditions, environmental standards, anti-corruption, stable business investment climate, national security concerns, resilient supply chains, etc.

Strengthen U.S. manufacturing, innovation and competitiveness through reshoring and friendshoring

Biden Administration and FTAs *(cont.)*

No further FTA discussions with EU, UK and Kenya (currently, 14 FTAs with 20 countries)

No renewal of TPA (expired July 2021) needed or required (i.e., no Congressional involvement); executive agreement mechanism only

No FTAs addressing market access issues and lower tariff barriers expected the next two years

Biden Administration and FTAs *(cont.)*

Trade framework/dialogue talks launched instead

- India-Pacific Economic Framework (IPEF) on certain trade issues, supply chains, clean energy, infrastructure, anti-corruption, etc.; reestablish U.S. economic presence in Asia in the wake of Trans-Pacific Partnership (TPP) withdrawal
- December 2022 U.S. Memorandum of Understanding with African Continental Free Trade Area (AfCFTA) to promote sustainable trade, economic integration, investment and infrastructure development
- U.S.-E.U. Trade & Technology Council (TTC) on digital trade, export controls, regulatory standards and coordinated trade response to Russia and China
- Americas Partnership for Economic Prosperity (APEP) to build on existing FTAs to pursue worker-centric trade policies; ministerial last Friday
- U.S.-Taiwan Initiative on 21st Century Trade negotiating round January 14-17 on trade facilitation, anti-corruption, SMEs, regulatory practices and China's "economic coercion"
- Minerals Security Partnership with Korea, Japan, E.U., Canada, Australia, etc. to ensure secure, diversified critical minerals supply chain away from China and emphasize ESG principles

We invite you to stay abreast of continuing trade developments via our blog, [ThompsonHineSmarTrade.com](https://www.thomsonhine.com/blog). To receive an email notification whenever a new post is published, [please subscribe to the blog](#).

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