PROGRAM MATERIALS
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Why Is Everything Broken? Understanding Pandemic Supply Chains

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5255 North Federal Highway, Suite 100, Boca Raton, FL 33487
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WHY IS EVERYTHING BROKEN


CONSUMPTION
LABOR
DIPLOMATIC RELATIONSHIPS
LOGISTICS

Supply Chains Before COVID-19

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Just-In-Time Manufacturing

- 1930s – “The Toyota Way”
- Cost savings/ productivity
- No excess inventory in the system

Dominance of Harmonious Free Trade

(Relatively)

Rise Of Manufacturing In China

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1970s

China was not part of the global Economy until the late 1970s

1980s

China's manufacturing takes off as its economy opens

1990s

CHINA'S FIRST INDUSTRIAL REVOLUTION

China becomes the world's largest producer and exporter of textiles, furniture, and toys

2001

China joins the World Trade Organization

2000s

CHINA'S SECOND INDUSTRIAL REVOLUTION

Millions of miles of highways and train tracks are built

WTO Membership

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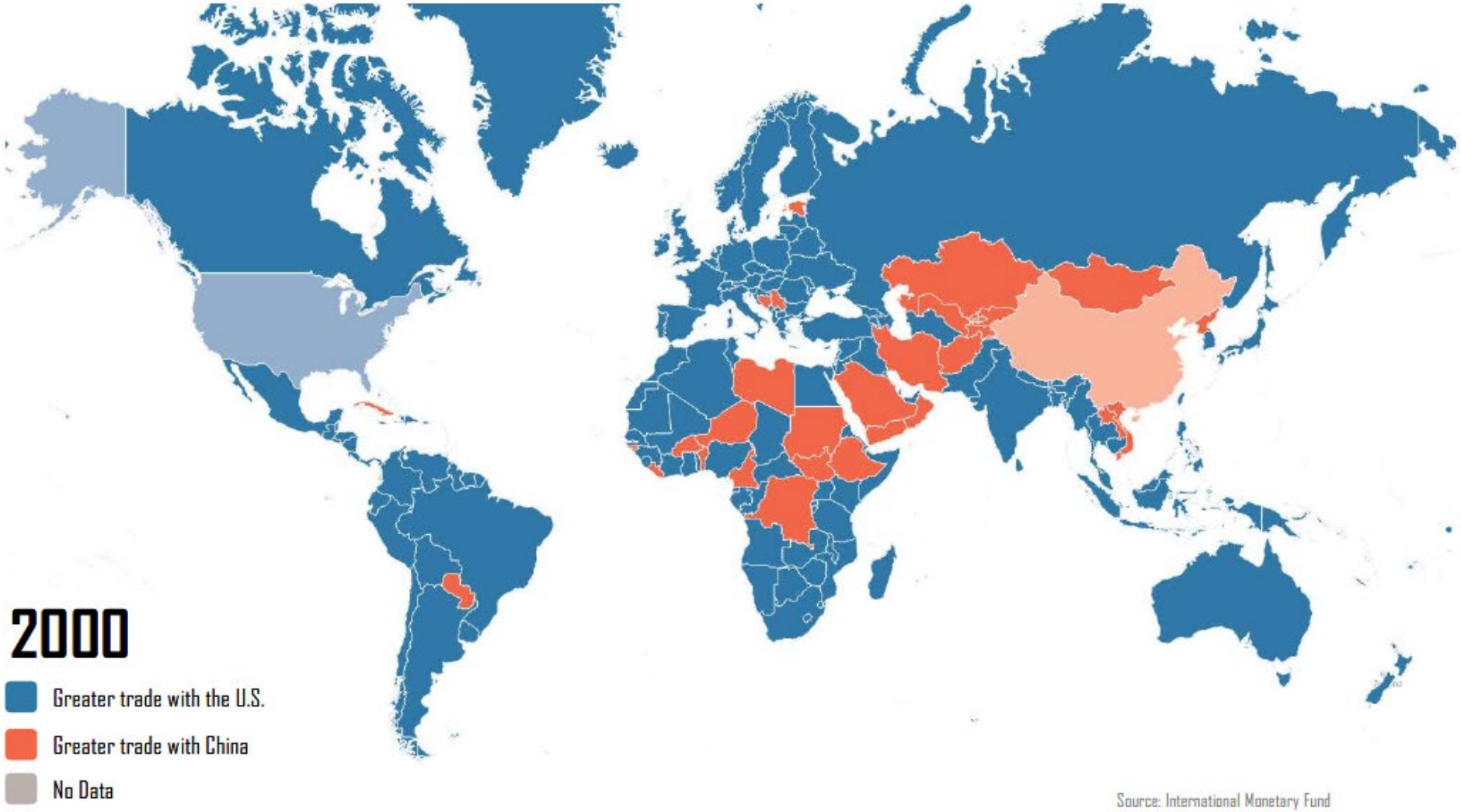
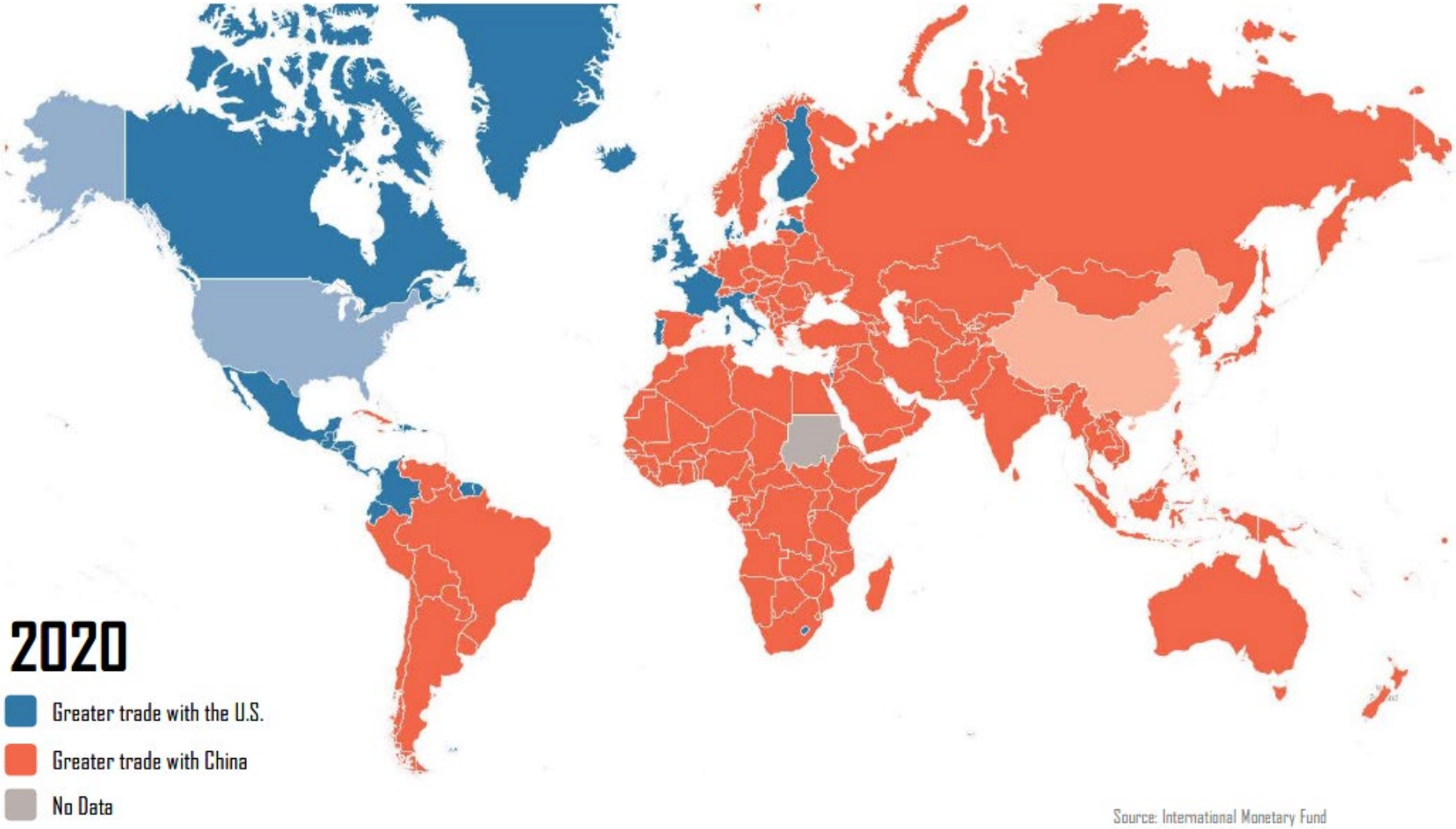
2001

China Joins the World Trade Organization

- Joined as a “developing nation,” which gave it special benefits
- Further opened China to foreign investment
- Expanded China’s ability to influence global trade policy


2000
Greater trade with the U.S.
Greater trade with China
No Data
Source: International Monetary Fund


2020
Greater trade with the U.S.
Greater trade with China
No Data
Source: International Monetary Fund

Rise of China

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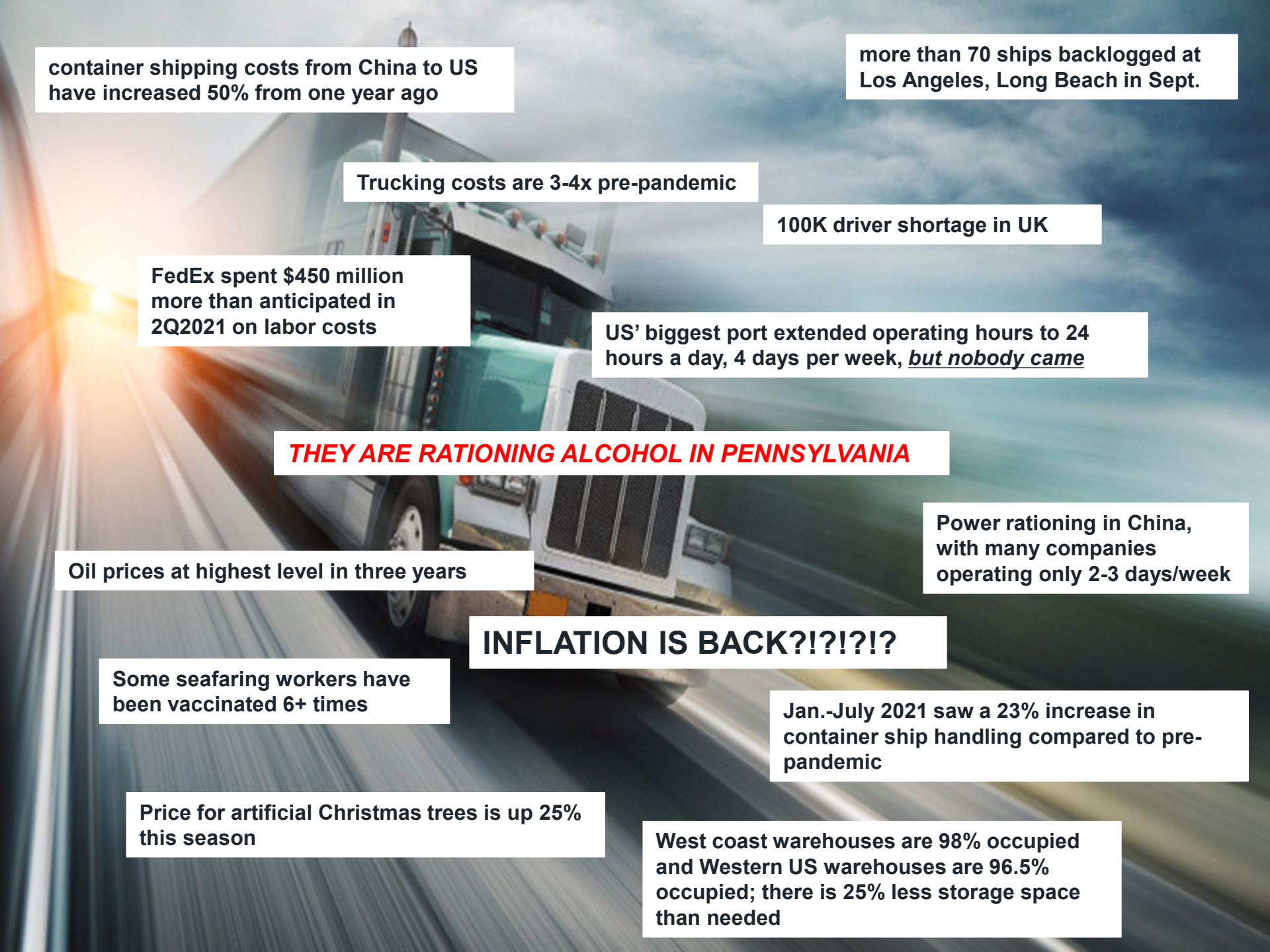
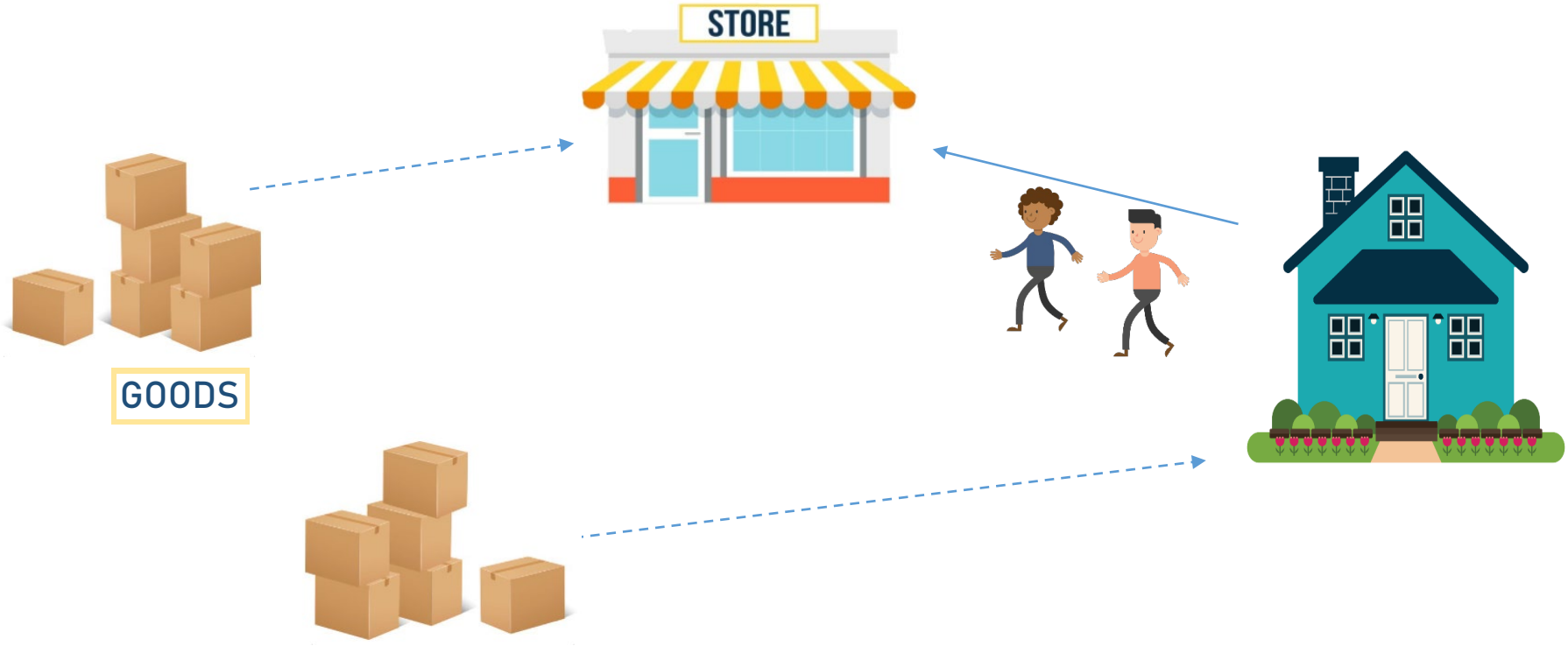
- National resolve to attain manufacturing excellence
- Ability to impose national resolve on citizens
- Population resources
- Need to add millions of jobs per year

The New Mayhem


container shipping costs from China to US have increased 50% from one year ago
more than 70 ships backlogged at Los Angeles, Long Beach in Sept.
Trucking costs are 3-4x pre-pandemic
100K driver shortage in UK
FedEx spent $450 million more than anticipated in 2Q2021 on labor costs
US' biggest port extended operating hours to 24 hours a day, 4 days per week, but nobody came
THEY ARE RATIONING ALCOHOL IN PENNSYLVANIA
Power rationing in China, with many companies operating only 2-3 days/week
Oil prices at highest level in three years
INFLATION IS BACK?!?!?!?
Some seafaring workers have been vaccinated 6+ times
Jan.-July 2021 saw a 23% increase in container ship handling compared to pre-pandemic
Price for artificial Christmas trees is up 25% this season
West coast warehouses are 98% occupied and Western US warehouses are 96.5% occupied; there is 25% less storage space than needed

CHANGED CONSUMPTION PATTERNS



Changes In Available Labor

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Changed Logistics

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Changed Diplomacy


New Alternatives To China

Thailand

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- Southeast Asia's second largest economy
- 70 million consumer market
- Good investment policies and transportation infrastructure
- Favorable geographic location
- Tax and non-tax incentives, e.g. special four-year visas for skilled workers
- Moving to more sophisticated tech manufacturing

Mexico

- 10 years ago, wages in Mexico were 600% higher than in China; now, only 30% higher – *and Mexico's worker productivity is higher*
- Chinese currency manipulation – US dollar buys more in Mexico
- Proximity
- Mexico has more free trade agreements than almost any country in the world
- *Maquiladora* system – cuts through regulatory/bureaucratic issues

Columbia

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- Tax and investment incentives
- Fastest growing large economy in Latin America
- Educated/skilled workforce with proven aptitude in pharma and tech
- US is already Columbia's top trading partner (in contrast with Brazil, Chile, Argentina, and Peru, whose top partner is China)
- Proximity to two oceans


WILL THINGS EVER BE NORMAL

Keys to Moving the Supply Chain Forward

Innovation

End-to-end transportation transparency

Automation

Force Majeure

Force Majeure Issues

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- The doctrine that performance is excused or delayed upon the occurrence of certain events

- **Three components:**
  - Description of events that excuse/delay performance
  - Consequence of events occurring
  - Notice requirements if invoking

- *THE LAW HAS NOT CHANGED*

2-615 Excuse by Failure of Presupposed Conditions

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Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:

(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale **if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid**.

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Corporate Social Responsibility

German Supply Chain Due Diligence Act

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- Approved by German Federal Council June 25, 2011
- Will Come into force January 1, 2023
- Companies must identify and assess human rights and environmental risks and establish an effective risk management system the prohibits child labor, forced labor, and certain environmental bad effects
- Applicable to companies with their head office in Germany and foreign companies with a branch office in German that employ more than 3,000 employees in Germany
  - In 2024, the threshold for applicability will be reduced to 1,000 employees
- Companies must issue a policy statement on their human rights strategy and introduce appropriate preventative measures – and ensure the same is in place at all direct suppliers
- If a human rights or environmental duties violation is found, company must take immediate remedial action, including potentially suspension or termination of business relationship with an offending supplier

German Supply Chain Due Diligence Act

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- If a company obtains material knowledge of a potential human rights or environmental obligation by an *indirect* supplier, a risk analysis must be conducted on that indirect supplier and appropriate preventative measures must be taken
- Companies must set up a whistleblower system
- Companies must publish an annual report on the fulfilment of their due diligence obligations under this law on the company website
- The German Federal Office for Economic Affairs and Export Control has authority to enforce the new law by requesting information, issuing remediation orders, and imposing civil fines
- Violations may be fined up to EUR 800,000 or up to 2% of total worldwide annual group turnover for companies with worldwide annual turnover of more than EUR 400 million
  - For fines over EUR 175,000, companies can be barred from public tender offers in Germany for up to three years

Ramifications

March 10, 2021 – European Parliament recommended initiating the preparation of a similar law

Global Coverage

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Frankfurt
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Moscow
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Palo Alto
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Perth
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San Francisco
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Tampa
Tokyo
Warsaw
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Africa
Brazil
Caribbean/Central America
India
Israel
Mexico

Office locations
Regional desks and strategic alliances

Sarah Rathke
Partner, Litigation
Cleveland, Ohio

GLOBAL SUPPLY CHAIN LAW BLOG

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CBP Likely To Issue More WROs Based on Forced Labor Allegations

By Ericka Johnson, Ludmilla Kasulke, Marisa Darden and Sarah Rathke on April 2, 2021
Posted in supply chain

Recent developments in Congress and now unprecedented action by U.S. Customs and Border Protection (CBP) likely signal increased supply chain enforcement may be coming – and US importers should take notice.

As discussed in our previous blog entry, on March 18, 2021, the Senate Finance Committee held a hearing titled, "Fighting Forced Labor: Closing Loopholes and Improving Customs Enforcement to Mandate Clean Supply Chains and Protect Workers." In his opening remarks, Chairman Ron Wyden (D-OR) unequivocally stated that forced labor, which is "modern day slavery", occurs in countries that are part of the American supply chain and that the US should use its economic muscle to defeat forced labor around the globe.

During the hearing, Senators called for stronger laws, increased enforcement, and greater transparency of US law prohibiting the importation of goods made with forced labor. Lawmakers also called for more action to punish bad actors, moving beyond simply stopping the importation of certain goods and issuing fines. In particular, Senator Elizabeth Warren stated, among other things, that corporations should be held accountable for their work supporting forced labor.

Now, CBP is reflecting this shift in increased supply chain enforcement. On May 29, 2021, CBP directed personnel at all US ports of entry to seize disposable gloves produced in Malaysia by Top Glove Corporation Bhd., following a record speed forced labor Finding.

CBP has the authority to issue Withhold Release Orders (WRO) when information "reasonably indicates" that merchandise was mined, produced, or manufactured, wholly or in part, in any foreign country by forced, prison, or indentured labor. Furthermore, upon sufficient evidence, CBP will publish a more formal Findings and may begin seizure of imports.

With regard to the gloves, CBP issued its forced labor Finding following a months-long investigation that began when CBP issued a related WRO in July 2020. For context, in October 2020, CBP issued its first forced labor Finding in nearly 25 years pertaining to a Chinese Stevia manufacturer, which took place four years after a May 2016 WRO.

The record speed in which CPB issued its most recent Finding likely reflects an increased trend in the US to combat forced labor in the supply chain of imported products. A trend Brenda Smith, the recently retired executive assistant commissioner of CBP's Office of Trade, who noted in remarks to the press that

Congressional stakeholders are now looking at ways to modernize both the statute and CBP regulations to make the process more responsive and efficient.

This shift underscores that simply having auditor services in place to verify supplier practices is not sufficient to ensure acceptance of such goods in the United States. As in previous blog posts, we urge shifting supplier compliance away from companies' operational functions and into the legal department to ensure best practices in this rapidly-evolving area.

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Congress Takes Aim At Uyghur Forced Labor

By Daniel Lonergan, Sarah Rathke and Lindsay Zhu on August 3, 2021
Posted in supply chain

U.S. companies importing certain products from China may be facing additional supply chain challenges in the near future. On July 14, 2021, the Uyghur Forced Labor Prevention Act ("UFLPA") was passed unanimously by the U.S. Senate. It now moves to the House, where it is expected to pass easily—a previous version of the bill passed 406-3 in September 2020. The UFLPA sets a new standard for goods produced in Xinjiang, banning all goods unless Customs and Border Protection (CBP) can firmly establish that the goods were not made using forced labor. The UFLPA reverses the previously-applied burden of proof, creating a presumption that goods produced in Xinjiang involve forced labor.

The CBP has previously offered at least some guidance on the kind of evidence importers seeking release of detained shipments must be prepared to provide, at least with regard to a Withhold Release Order concerning a silica-based product. In addition to the Certificate of Origin and importer's statement set forth in 19 CFR § 12.43 that must be "sufficiently detailed and include proof that the goods were not produced... with forced labor," the CBP has highlighted the following information:

- Affidavit from the provider of the product and identification of its source;
- Purchase Orders, Invoices, and Proofs of Payment;
- List of production steps and production records from the imported merchandise back through the supply chain;
- Transportation documents at all stages of the supply chain; and
- Daily process reports.

This increased burden of proof will no doubt create a burden for some U.S. importers. For example, some estimates have suggested that Xinjiang supplies more than 80% of Chinese cotton. A State Department advisory also describes a range of industries and products where Uyghur forced labor may be present, which includes electronics, solar energy, motor vehicles, agriculture, and coal, uranium, and asbestos.

The proposed legislation has collected mix reactions from American organizations. A number of human rights organizations have suggested that this could be an important step in driving companies to carry out proper due diligence on their supply chains.

Others have been less enthusiastic. The U.S. Chamber of Commerce wrote a letter to Congress, noting that while the Chamber of Commerce condemns human rights abuses, it believed that the Act "would prove ineffective and may hinder efforts to prevent human rights abuses." Likewise, the president of the American Apparel and Footwear Association predicted that the law "would not doubt make headlines, but… would wreak havoc on human rights, economic development, and legitimate supply chains, themselves already battered by COVID-19 all over the world."

Assuming the bill passes, U.S. companies will need to increase their awareness of what goes on in their Chinese supply chains. Technology may help; some vendors claim to be able to verify the supply chain of cotton products, for example, through genetic testing. But where that is not possible, in-country supplier investigations may be the only solution. How detailed these investigations need to be, the CBP has not made entirely certain, although full supply chain mapping and unannounced audits are likely to be the bare minimum of what is required. Companies wishing to do such investigations should be sure to include the right to do so in their supplier contracts – and should make sure to flow down the obligation to sub-suppliers as well. In the meantime, however, companies with supply chains in China await further guidance from the CBP.

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Coronavirus and US Litigation Involving Multinational Corporations

By Sarah Rathke on March 16, 2020
Posted in International, Legal Analysis

The globalization of business, combined with the rapid spread of the coronavirus disease 2019 (COVID-19), commonly referred to as the "coronavirus," renders multinational corporations highly susceptible to litigation in US courts.

US companies that have been damaged by COVID-19 issues will likely seek redress through litigation, and foreign businesses operating in the US must be prepared to defend themselves against a broad range of potential complaints relating to their business operations. While there may be no way to completely immunize non-US companies from US litigation, they may be able to raise some jurisdictional defenses and keep their coronavirus-related disputes out of US courts.

Threat of Coronavirus-Related Litigation Spreading Across the US

The US is already the most litigious country in the world. One of the principal reasons is that there are few limits on the types of cases that may be brought in US courts. Subject to certain jurisdictional rules, a broad range of disputes – e.g., contractual disagreements, labor and employment disputes, negligence and intentional torts, supply chain disputes, privacy invasion and data breaches, and consumer fraud and product liability allegations – may be resolved in US courts.

The pandemic will only exacerbate the situation, exposing foreign companies conducting business in the US to increased threats of litigation. Coronavirus-related litigation in the US could be triggered by:

- Inability to meet contractual obligations or delays in delivery of goods and services to coronavirus
- Switching to different suppliers, or using different products or raw materials due to shortages
- Failure to adequately protect health and safety of employees and failure to take reasonable steps to control spread of coronavirus at sites under the control of the employer
- Requiring non-essential business travel for employees
- Inadequate sick leave or telecommuting policies
- Reduced salaries, temporary layoffs or termination after an employee contracts coronavirus
- Disclosure of employees' travel, health or personal information
- Concealment of information relevant to coronavirus by businesses

Business-to-Business Force Majeure Issues

COVID-19 issues will undoubtedly precipitate a number of claimed *force majeure* events between businesses. To assess whether a COVID-19 event can cause the excuse or delay of a contractual obligation, the first step is to determine whether the applicable contract contains a *force majeure* clause. Essentially, a *force majeure* clause allows parties (usually suppliers, but sometimes buyer as well) to excuse or delay performance in the event a specified risk materializes. Drafting appropriately tailored *force majeure* clauses requires planning and forethought, and many businesses may not have predicted the impact a global epidemic like the coronavirus could have on business. There is no "standard" *force majeure* clause. But *force majeure* clauses generally share the same structure, in that they typically specify (1) what events excuse performance, (2) the extent to which performance is excused, and (3) what notice is required with the other party.

It is common for contracts to excuse or delay performance for weather and environmental catastrophes. It is less common to specifically include sickness or epidemics as a reason for excusing performance, so it is important to carefully examine the language of any applicable contract provisions. It is also typical for *force majeure* clauses to include a "catchall" phrase at the end – such as for "other acts of God" or "other events beyond the parties' control." While ambiguous, depending on the actual impact that the coronavirus is having on a company's ability to satisfy its contractual obligations, these phrases could excuse performance.

If a US contract for the sale of goods does not contain a *force majeure* clause, UCC 2-615 (adopted in all states except Louisiana) provides default provisions. Under UCC 2-615, unless the parties have agreed otherwise, a supplier's performance will be excused if it has been made "impracticable" by the "occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made." Comment 4 to UCC 2-615 clarifies that "[i]ncreased cost alone does not excuse performance" absent special circumstances, "because that is exactly the type of business risk which business contracts made at fixed prices are intended to cover." Again, the specific circumstances of a company's coronavirus impact would have to be examined to determine applicability (and would likely be contested by the buyer), but one could imagine that having a functioning workforce is a contingency upon which a contract had been made.

Dealing With Litigation in US Courts

Non-US corporations may be concerned about being involved in litigation in US courts relating to the coronavirus outbreak. If a coronavirus-related lawsuit is filed in the US against a multinational corporation, the threshold question is whether the court has the power to resolve the dispute. A US court may exercise what is known as "personal jurisdiction" over a person or company only where that entity has "minimum contacts" with the particular state in which that court sits. These contacts could take on a variety of forms, including the commission of some act within the state, contracting for the provision of goods or services within the state, deriving some benefit from conducting business within the state, owning property or maintaining a bank account within the state, or placing an item in the stream of commerce with the intention that it be distributed within the state. Additionally, each state has what is called a "long-arm statute," which sets out the circumstances under which a company could be subject to the state court's jurisdiction, even though it is not physically "present" in that state.

In the modern global economy (which is already showing signs of devastation from the coronavirus), jurisdictional lines are often blurred. In this increasingly interconnected society, it has become increasingly difficult for multinational corporations to avoid jurisdiction under the theory that they lack "minimum contacts" with a US forum. Indeed, minimum contacts can often be established by routine conduct such as using the internet for business purposes, advertising in the US or conducting business through subsidiaries or agents in the US. Ultimately, whether a multinational corporation has sufficient "minimum contacts" is a

highly factual determination that will turn on the circumstances of each case. But this "minimum contacts" question is a critical one, insofar as it determines whether a given dispute involving a foreign company will proceed in a US court.

A Potential Jurisdictional Antidote

In recent years, as the US Supreme Court has clarified how this "minimum contacts" analysis plays out, the reach of US courts' jurisdiction over multinational corporations has been shortened. The US Supreme Court has made clear that in order for a US court to adjudicate a matter involving a foreign company, the company must be subject to at least one form of personal jurisdiction: either "general" (all-claims) jurisdiction or "specific" (suit-related) jurisdiction. Because the US Supreme Court has begun to tighten the requirements for establishing both general and specific jurisdiction, foreign defendants are increasingly able to raise jurisdictional challenges and avoid US courts.

For instance, in 2011, the US Supreme Court struck down a finding of general jurisdiction over foreign companies in *Goodyear Dunlop Tires Operations S.A. v. Brown*, holding that jurisdiction over a foreign corporation requires contacts with the forum state that are so "continuous and systematic" as to render the corporation "at home" in the forum. Of particular interest to foreign companies that manufacture or sell goods in the US, the *Goodyear* court specifically held that the mere flow of a foreign corporation's products into the forum state, without more, cannot support general jurisdiction over the corporation in that state.

Further, in *Daimler AG v. Bauman* – decided in 2014 – the US Supreme Court unanimously rejected the notion that a foreign corporation was subject to general jurisdiction based on the contacts of a subsidiary, finding that general jurisdiction was improper where neither entity was incorporated or headquartered in the forum state, or maintained its principal place of business there. In other words, the foreign company's slim contacts to the forum state, relative to its vast international contacts, did not render it "at home" there. To hold otherwise would grant courts global reach as long as a foreign company conducted any business within a state.

In 2017, the US Supreme Court clarified that specific jurisdiction should be narrowly applied to out-of-state corporations as well. In *Bristol-Myers Squibb v. Superior Court of California*, the court held that the mere fact that a foreign defendant's medication was prescribed and sold in the forum state did not give rise to specific jurisdiction when the plaintiffs' claims related to the purchase and use of those drugs in another state. In reaching this decision, the court noted that although it must weigh a variety of interests in making jurisdictional determinations, the primary concern is the burden on the defendant. US courts are thus constitutionally limited in their authority to hear claims against foreign corporations.

In sum, while the reach of US courts remains long, it is not unlimited. Foreign companies confronted with coronavirus-related disputes should, therefore, analyze the precise forum contacts alleged by the plaintiff. In a growing number of cases, multinational corporations may be able to challenge the nature and extent of those contacts, and avoid cross-border litigation in the US.

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GLOBAL SUPPLY CHAIN LAW BLOG

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Coronavirus as Force Majeure?

By Squire Patton Boggs on March 12, 2020
Posted in International

The situation concerning the novel coronavirus (officially known as COVID-19) is rapidly evolving. The landscape of the virus' spread and its impacts continues to change dramatically, with hundreds, sometimes thousands, of new cases being confirmed every day and new countries—far from the likely origin of the virus in Wuhan, China—being added to the map of the virus' spread.

Concern, and some panic, is expanding and beginning to impact commerce across the globe. The Financial Times recently reported that China has issued a record number of force majeure certificates purporting to exempt exporters there, including steel, electronic and auto parts suppliers, from fulfilling supply contracts overseas. Fears surrounding the coronavirus' impact on global supply chains have been driving radical stock market fluctuations. On February 28, 2020, the Dow Jones Industrial Average ended its worst week since 2008 as U.S. investors became increasingly concerned about the virus' spread to other Asian and European countries.

Our colleagues Jonathan M. Taunton, Lily C. Geyer, and Steven A. Friedman have prepared an insightful article on the factors that construction project owners should be considering as they face the possibility of force majeure claims and disruptions arising from COVID-19. Click here to read more.

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GLOBAL SUPPLY CHAIN LAW BLOG

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Federal Focus on Forced Labor in Xinjiang: Supply Chain Risks

By Sarah Rathke and Ludmilla Kasulke on November 21, 2019
Posted in International

There have been longstanding tensions in the Xinjiang province of China between the Chinese government and the Uyghurs, a predominately Muslim ethnic group. The UN estimates that there are more than 1 million Uyghurs in detention camps, and there are reports of pervasive surveillance, wide-spread forced-labor, and "re-education" programs.

These human rights abuses present significant risks for companies whose supply chains include products from Xinjiang. Xinjiang produces the majority of China's cotton, and cotton from Xinjiang may be mixed with cotton from other regions (or not be labeled as being from Xinjiang). Because of this, some companies, such as Target Australia, have reported that they will no longer source cotton from China. Several other products that may be integrated into global supply chains are produced in Xinjiang, including tomato paste and sugar.

Recent actions at the U.S. federal level reflect serious concerns about the treatment of Uyghurs in Xinjiang, and concerns about the effects of forced labor, in Xinjiang and elsewhere, on global supply chains.

On October 1, 2019, U.S. Customs and Border Protection (CBP) issued a Withhold Release Order (WRO) for garments produced in Xinjiang by Hetian Taida Apparel Co., which were produced with prison or forced labor. The CBP issued four other WROs for products mined or produced with forced labor in Malaysia, Democratic Republic of the Congo, Zimbabwe, and Brazil. The CBP Press Release announcing these WROs may be read here.

On October 17, 2019, the Congressional Executive Commission on China (CECC) held a hearing titled "Forced Labor, Mass Interment, and Social Control in Xinjiang." Members of the CECC recognized the human rights abuses occurring in Xinjiang and expressed concerns that U.S. imports are tainted by forced labor. Representative Thomas Suozzi (D-New York) specifically identified several companies whose products include materials from the region which may be produced by forced labor: Adidas; Campbell Soup; Kraft Heinz; Coca-Cola; Gap, Inc.; H&M; Espirit; Calvin Klein; Tommy Hilfiger; Nike; and Patagonia. Members of the CECC also expressed their support for the Uyghur Human Rights Policy Act of 2019 (H.R. 649), which would direct U.S. government bodies to report on China's treatment of the Uyghurs.

On October 31, 2019, the Co-Chairs of the CECC, Representatives James McGovern (D-Massachusetts) and Marco Rubio (R-Florida), wrote to the Acting Commissioner of the U.S. Customs and Border Protection (CBP), asking CBP "to use its authority under 19 U.S.C. § 1307 to investigate and block imports made with forced labor in the [Xinjiang Uyghur Autonomous Region] from entering the U.S. market and, where appropriate, pursue criminal investigations related to the use of forced labor to produce goods being imported into the United States." A copy of that letter may be read here.

On November 4, 2019, Senators Sherrod Brown (D-Ohio), Ron Wyden (D-Oregon), and Richard Blumenthal (D-Connecticut) wrote to Attorney General, Secretary of State, Secretary of the Department of Labor, and the Acting Secretary of the Department of Homeland Security to request information about U.S. government actions "to ensure the federal procurement process is not complicit in human trafficking or forced labor." A copy of that letter may be read here. While the Senators did not specifically name concerns about products from the Xinjiang region in this letter, it further demonstrates that concerns about forced labor in supply chains are receiving consistent attention at the federal level.

U.S. trade law prohibits the importation of goods made, in whole or in part, with forced labor. Businesses in affected industries should closely scrutinize their supply chains and compliance programs to avoid any supply chain disruptions and establish programs to identify and mitigate forced labor that may exist. Squire Patton Boggs can assist clients in reviewing their supply chains, and navigating the enforcement of current and potential future WROs.

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GLOBAL SUPPLY CHAIN LAW BLOG

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Free For All, or All For One? The Medical Supply Chain and COVID-19

By Squire Patton Boggs on March 23, 2020
Posted in Legal Analysis

The impact of the COVID-19 pandemic on the global economy needs not restating. The saying "desperate times call for desperate measures" fits the current environment well. Governments throughout the world have instituted or are considering unprecedented measures to keep up with the demand for the medical products necessary to combat COVID-19. Several such developments come from Russia, including (1) the suspension of competitive bidding in government procurement, (2) allowing foreign companies to bid on government contracts, and (3) a zero customs duty for imports of medicines and medical devices along with other essential goods. The second—gaining momentum in the United States through endorsements by several governors—urges President Trump to nationalize the medical supply chains to stymie shortages and price gauging and decrease lead-time of medical products. However, President Trump has expressed reluctance to follow this path, instead relying on other measures to fight shortages and their associated behaviors.

As countries continue to promulgate new restrictions, confines, and regulations in an effort to thwart the commercial effects of COVID-19, supply chain stakeholders are advised to keep an ear to the ground not only to ensure they are optimally positioned to adhere to the new rules, but also to appropriately pivot so as to find favorable business opportunity.

Russia Relaxes State Procurement Rules

On March 19, 2020, Russia's Ministry of Finance amended the state procurement rules, citing state of emergency amidst the COVID-19 pandemic. Under the new rules, the state of emergency allows state purchasers to buy goods and services from a single contractor, bypassing the mandatory competition requirements for government purchases. The Russian government, citing force majeure, reasoned that the time-consuming state acquisition rules may not allow for the expeditious purchase of necessary goods. While the Ministry of Finance cited medical supplies and services as an example of items that may fall under the new rule, it also referred to "*any* goods, works and services" that relate to COVID-19.

The March 19 announcement is a significant departure from Russia's state procurement rules. Federal Law No. 44-FZ on Placing Orders for Provision of Goods, Works, and Services for State and Municipal Needs governs the state procurement system in Russia. Amended over a dozen times since going into effect, the law

establishes mandatory procedures for all federal, provincial, and municipal institutions that enter into government contracts. These procedures include calls for bids and auctions, which seek to ensure companies awarded government contracts offer "best conditions" for the performance of the contract or the lowest price.

The new relaxed rules on competition effectively do away with the "best conditions" and lowest price requirements in Russia's state procurement system, at least with regard to medical supplies. The government is already discussing the possibility of creating a single mask supplier for all medical and pharmacy institutions in the country. Already in the two days since the relaxed procurement rules went into effect, the Russian Government has allocated more than 23 billion rubles (or about USD 290 million) to support medical and pharmaceutical producers. The funds will be used for public procurement of thermal imagers, contactless thermometers, air decontamination plants, and other medical devices.

Additionally, on March 17, 2020, Prime Minister Mishustin signed Plan No 2182p-FZ on priority actions related to COVID-19. The plan, in addition to already existing and other proposed measures, addresses provisions for government procurement contracts, including the suspension of the prohibition against foreign companies bidding on government contracts. This change is expected to go into effect on March 25, 2020. Once in place, the new rule will temporarily allow foreign companies to bid for government procurement of medicines and medical devices.

Related Trade Measures in Russia

Russia has also introduced amendments to its trade and customs rules in relation to COVID-19. As of March 20, all trade and customs restrictions on the supply of the essential goods, including medicines and medical devices, have been lifted for one month. Additionally, to speed up delivery to hospitals, certain medical supply items have become eligible for special registration procedure in Russia.

US Governors Urge President Trump to Nationalize Medical Supply Acquisitions

In the past week, the United States has enacted two COVID-19-related packages and the third one—topping $2 trillion—is imminent. On March 18, 2020, President Trump issued an Executive Order on prioritizing and allocating health and medical resources to respond to the spread of COVID-19 in the US, citing the Defense Production Act of 1950 ("DPA").

The DPA provides for a broad set of authorities to ensure domestic industry can meet national defense requirements. While the Department of Defense (DoD), Department of Homeland Security (DHS), and Federal Emergency Management Agency (FEMA) have used the DPA to acquire spare parts, protective equipment and supplies in times of natural disasters, its application in a global pandemic is novel. DPA permits the federal government to impose some control over private-sector industry to ensure the production of material that is deemed necessary for national defense. For example, the DPA would permit the federal government to alter the order in which companies fulfill their contractual obligations. As New York Governor Andrew Cuomo put it, the federal government would tell companies: "stop making dresses," start making masks instead.

However, President Trump has not yet invoked the DPA to order companies to switch their manufacturing priorities to medical supplies. Several state governors, most notably New York's Governor, have urged President Trump to do so. Further, Governor Cuomo and other states' governors urge the federal government to nationalize the acquisition of medical supplies. These governors describe the medical supply chain

as the "wild west" because states cannot get organized allocations of necessary medical products from the federal government. Rather, they are forced to compete with one another and globally on the open market for critical medical supplies. This not only has resulted in price gauging by sellers, but the decentralized approach is also failing to meet the ever growing demand in the US.

In response to this plea, President Trump responded, saying "[w]e're a country not based on nationalizing business…." Rather, President Trump signed an Executive Order (not yet publicly released at this time) to combat price gauging of items considered integral to the nation's fight against the coronavirus pandemic, including masks and ventilators. According to US Attorney General William Barr, under the new law, "if you're sitting on a warehouse with surgical masks, you will be hearing a knock on your door." Finally, FEMA has enacted a Supply Chain Stabilization Task Force, charged with scouring the US and abroad for necessary supplies and handling its import and subsequent distribution to critical demand spots in the US.

What Does This Means for Companies?

The situation in the US has been changing by the hour. Whether President Trump will go along with the state governors' pleas remains to be seen. As the spread of the virus across the country continues to progress, the likelihood of him doing so may increase. To prepare for this possibility, in the US, companies manufacturing products with potential medical applications should develop a continuity plan in the event that their production is requisitioned in support of combating COVID-19. In addition, such companies should ensure they understand their rights to compensation, purchase guarantees, and available loans in the event that they are selected in support of the effort to boost medical supplies in the US.

Following the lead of the newly established Supply Chain Stabilization Task Force, companies should also assess their medical supply capabilities. Companies should review their existing supplies not only for direct sale opportunities, but also to ascertain whether their products can be sold in support of other medical supply chains. In addition, companies should also assess their ability to convert their manufacturing processes to the manufacturing of medical supplies, including personal protective equipment, ventilators, and respirators.

In Russia, companies wanting to take advantage of the relaxed state procurement rules should clearly articulate how their goods and services advance the government's response to COVID-19 pandemic. Smaller and medium-sized businesses with lines of business that directly relate to medical and other emergency needs should also be prepared for the possibility their operations may be taken over by larger state and private companies entering the COVID-19 market.

Foreign companies in the medical supply chain should take notice of Russia's new rules on bidding as they will be allowed to bid on government contracts, even if there are two or more domestic or EAEU bidders. Finally, companies should take advantage of the special registration procedures now in place for thirty-six medical supplies.

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GLOBAL SUPPLY CHAIN LAW BLOG

SQUIRE PATTON BOGGS

Germany Considers Enacting First-Ever Law Requiring Companies To Both Monitor And Control Supply Chain Practices

By Sarah Rathke and Daniel Lonergan on March 8, 2021
Posted in supply chain

Earlier this month, the German government resolved to approve a new supply chain law that would impose unprecedented obligations on German companies to control labor and control practices – not only of their own operations, but within their supplier as well. Determining that "voluntary compliance" supply chain laws, which require companies to monitor and report but not control or correct labor and environmental abuses in their supply chains, are not effective, Germany's new law (*Lieferkettensgesetz*, in German) promises to impose substantial fines on companies whose suppliers engage in pernicious labor or environmental practices.

To date, no other country has imposed such a law, which is expected to be formally approved in the coming months, and to come into force in 2023.

The *Lieferkettensgesetz* will require affected companies to establish systems for regulating their supply chains. Companies will be obligated to monitor their supply chains for any potential labor and environmental abuses and develop secure reporting systems for potential victims. If a company became aware of any abuses, it would have a responsibility to respond and correct them. Penalties are set to be relatively harsh, with companies making more than 400 million euros a year subject to fines as high as 2 percent of their annual sales, and be barred from receiving government contracts for as many as three years.

For now, only companies with more than 3000 employees will be subject to the requirements. Smaller companies should still be aware however, as the bill is set to expand to companies with 1000 employees after one year.

This is, of course, a real game-changer (*wirklich bahnbrechend*, in German) for supply chain investigatory and compliance work. Long thought to be an auditing company's function, this law will inevitably bring supply chain mapping into the legal department. And with good reason: With substantial legal penalties at issue, legal risk is better managed if preliminary investigative work can be performed under the attorney-client privilege umbrella.

And of course, like most compliance laws, this is unlikely to stay in German. Calls have already begun to expand for *Lieferkettensgesetz*-like laws to be adopted in the remainder of the EU. We will continue to monitor this law – and similar initiatives – with analyses of how best to prepare for compliance and manage the associated risks.

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GLOBAL SUPPLY CHAIN LAW BLOG

SQUIRE PATTON BOGGS

Preparing Your Business For the Coronavirus

By Squire Patton Boggs on February 24, 2020
Posted in International

The coronavirus is fast becoming a global concern, with the potential to significantly impact supply chains on a global scale. Over the last few days, our Labor & Employment and Intellectual Property & Technology teams have produced a series of blog posts to help you navigate any potential risks to your business:

Coronavirus and Trade – The World Health Organization has the power to make non-binding recommendations as to how countries can successfully contain coronavirus, and this can include advice relating to trade.

Coronavirus and Contractual Penalties – The coronavirus outbreak may result in increased force majeure-related claims under commercial contracts, as well as a further risk of customers seeking to enforce various penalties in connection with supplier failure or delays arising from coronavirus-related issues. We provide a reminder of the UK law in that area, looking at the enforceability of penalties and/or limiting liability, and the difference between a breach and a right.

Coronavirus and Force Majeure – A force majeure provision seeks to exclude the liability of one or more parties for events beyond their reasonable control. The impact of the coronavirus outbreak on global supply chains is likely to bring such provisions into sharp focus. We look at the top 10 issues to be aware of under UK law for anyone seeking to rely on force majeure protection, or who is at the receiving end of a force majeure defense.

Pandemic or Pandemonium? US Employers Brace for the Coronavirus – Despite (at the time of writing) only a few confirmed cases of coronavirus in the US, there is widespread panic – and paranoia – that the virus will spread. As a result, many employers are preparing for the possibly of employee absences. We highlight some of the steps that employers and human resources professionals can implement to avoid employment-related risk to their business.

Travel Ban Updates: Temporary Ban of Foreign Nationals Traveling From Mainland China Per Novel Coronavirus Outbreak; Additional Countries Added To Travel Ban 3.0 – The US, in particular, has effected various measures to circumvent the risk of a coronavirus outbreak, including a travel ban on certain foreign nationals. We provide an update on the fast-moving developments and travel restrictions related to travel to the US.

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GLOBAL SUPPLY CHAIN LAW BLOG

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Trend Alert: Federal Oversight of Unaccompanied Minor Labor Trafficking Targets Agricultural Sector

By Lauryn Durham and Sarah Rathke on September 21, 2021
Posted in supply chain

Companies based or doing business in agricultural areas in the U.S. could soon be under increased scrutiny from the federal government, including Congressional investigators, stemming from labor trafficking of unaccompanied migrant children and teens.

This year alone, over 90,000 minors attempted to cross the U.S. When stopped at or near the border, the children are placed in shelters managed by the U.S. Department of Health and Human Services (HHS) while arrangements are made for their placement. To avoid overcrowding and decrease the time spent in HHS custody, the department quickly works to find placement for the children with relatives, foster programs, or other U.S. sponsors.

Unaccompanied migrant teens are at a heightened risk of being subjected to labor trafficking. Many teens are coerced into leaving their native countries by promises of a better life in the U.S only to face harsh working conditions. To illustrate – in 2015, a federal indictment revealed that HHS released several children to traffickers who forced them to work at egg farms in Ohio after promising the children good jobs and the chance to attend school.

HHS Office of Refugee Resettlement recently stopped releasing children to both Enterprise, Alabama and Woodburn, Oregon, out of concern for the wellbeing of the children released into the area. This moratorium was prompted by HHS' awareness of an influx in sponsorships coming from agriculture-dense areas – Enterprise is populated with chicken slaughterhouses and Woodburn is filed with agricultural land.

The Department of Justice Human Prosecution Unit also uncovered that dozens of unaccompanied teens were being released to the same sponsor and forced to work in poultry processing industries and similar facilities in other jurisdictions.

As the federal government become aware of these practices and grow concerned with what happens after the children are released from HHS custody, companies could be subjected to increased federal oversight from both HHS and DOJ, and possibly auditing to make sure they are not involved in the labor trafficking.

Companies should also be aware of the potential for increased scrutiny from Congress. Congressional investigators at the Senate Permanent Subcommittee on Investigations have focused on labor trafficking of mi-

grant children, and have issued several reports calling for changes to the oversight and monitoring of migrant children to prevent these abuses.

There is also some risk that companies may someday be held liable for producing goods with the use of the forced labor of migrant children.

Similar to the proposed Uyghur Forced Labor Prevention Act, the influx in unaccompanied minors being sponsored in high agricultural areas could create a rebuttable presumption that the goods were produced by trafficked migrant children, resulting in heightened scrutiny and auditing.

As federal oversight in this area increases, companies should assess their workforce and supply chain to ensure that they are taking adequate steps to guard against abuses of migrant children, and to prepare to address questions from federal regulators and Congress about their practices.

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GLOBAL SUPPLY CHAIN LAW BLOG

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Trend Alert: Increased US Oversight of Forced Labor in Supply Chains

By Ericka Johnson, Marisa Darden and Sarah Rathke on March 17, 2021
Posted in supply chain

Continuing the trend toward increased oversight of forced labor in supply chains (see our post from last week on groundbreaking German legislation in this space), on March 18, 2021, the US Senate Finance Committee will hold a hearing on "fighting forced labor." Specifically, the hearing will focus on "[c]losing the loopholes and improving customs enforcement to mandate clean supply chains and protect workers." This may signal a continued trend in the US to combat forced labor in the supply chains of domestically imported products.

This trend began in February 2016, when President Obama signed the Trade Facilitation and Trade Enforcement Act (TFTA) of 2015. This law repealed the "consumptive demand" loophole in the Tariff Act of 1930, which allowed the importation of certain forced labor-produced goods if the goods were not produced "in such quantities in the United States as to meet the consumptive demands of the United States."

By closing this loophole, the TFTA strengthened U.S. Customs and Border Protection's (CBP) ability to target, restrict, and issue Withhold Release Orders (WRO) to detain or exclude suspect shipments – and the statistics show that this is happening. From 2000 and 2015, no WROs or formal findings were issued. Today, there are a total of 47 active WROs and 7 formal findings.

In general, CPB has the authority to issue a WRO when information "reasonably" indicates merchandise was mined, produced or manufactured, wholly or in part, in any foreign country by forced or indentured labor – including forced child labor. If the CPB determines that this relatively low standard of proof has been met, the burden then shifts to the importer to prove that the goods in question were not made using prohibited labor. Furthermore, upon sufficient evidence of forced labor, CPB will publish their formal findings on the Customs Bulletin and in the Federal Register.

Notwithstanding this increased authority, it is unclear what exact "loopholes" or "improvements to customs enforcement" will be discussed during the upcoming hearing. At a minimum, we can anticipate a continued trend to combat forced labor in the supply chain of domestically imported products. Last month the Finance Committee Chairman Ron Wyden (D-OR) stated that the panel would "put a special focus on ending the import of goods produced with forced labor."

To that end, while no government witness will appear, at least four industry and NGO witnesses will testify, including representatives of the United Steelworkers, the Human Trafficking Law Center, the United States Fashion Industry Association, and Sourcemap, which is a supply chain tracking company.

As such, in anticipation of increased legislative oversight, companies should consider revisiting a few best practices for global supply chains, including: (1) developing a comprehensive supply chain map and profile to understand the entirety of the chain of production, from raw materials to finished goods; (2) requiring a written code of conduct for all suppliers, including minimum labor standards; and (3) conducting regular risk assessments and audits to detect and deter the use of forced labor. While some or all of these practices have traditionally been auditing functions in many companies, now may be an opportune time to transfer their management to the legal department, to ensure compliance with the developing laws in this area, and to receive the protection afforded by the attorney-client privilege.

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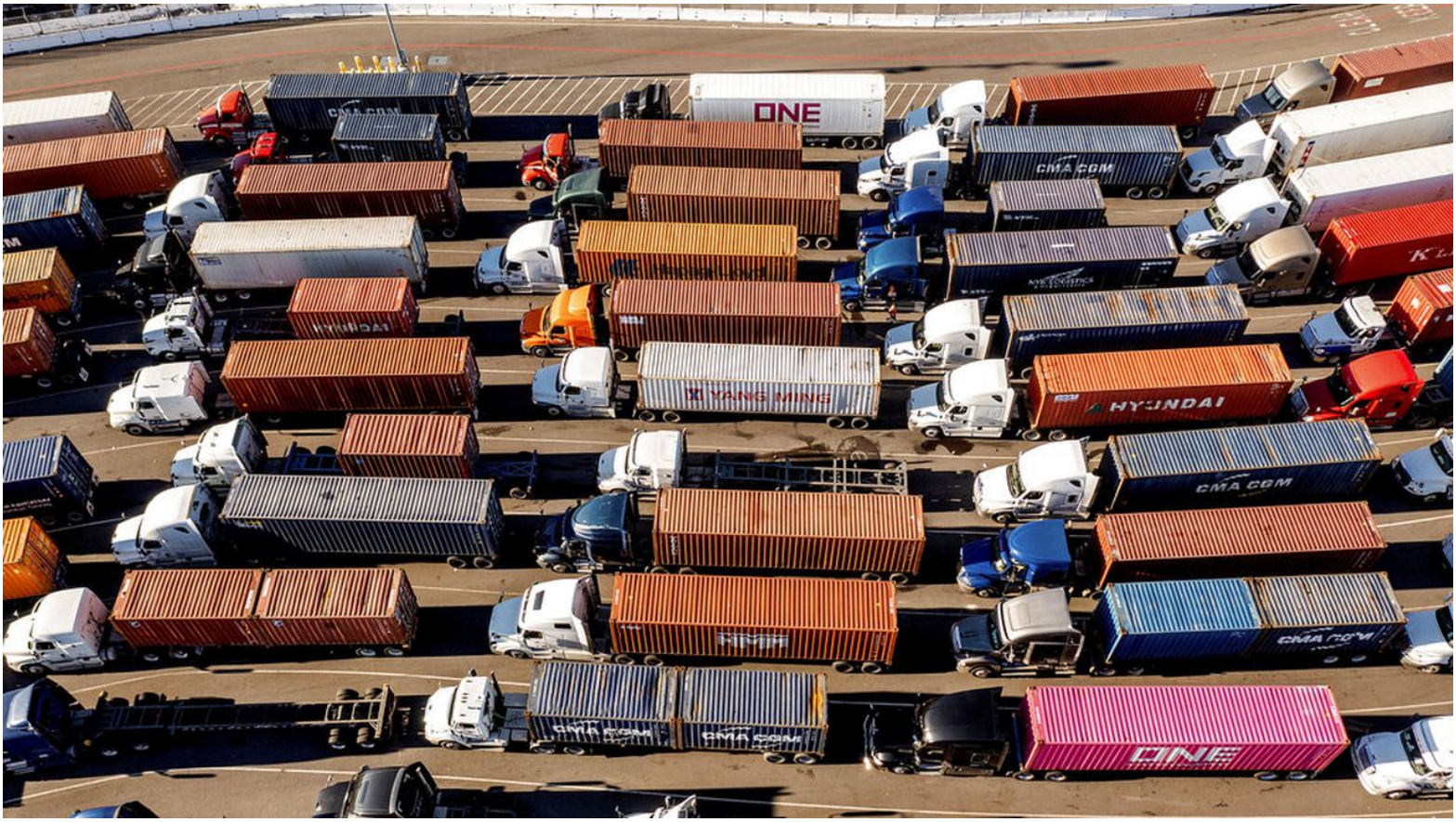
Opinion

Why are supply chains broken? Blame the ‘black swan’ tsunami: Sarah K. Rathke

Updated: Dec. 08, 2021, 5:35 a.m. | Published: Dec. 08, 2021, 5:35 a.m.



Trucks line up to enter a Port of Oakland shipping terminal on Wednesday, Nov. 10, 2021, in Oakland, California. Intense demand for products has led to a backlog of container ships outside the nation's two largest ports along the Southern California coast. But intensified demand and port backups are not all that's causing the supply-chain disruptions, writes Cleveland lawyer Sarah K. Rathke, an expert in supply chain issues and litigation, in a guest column today. Try the tsunami of overlapping "black swan" events precipitated by the pandemic. (AP Photo/Noah Berger) AP

By Guest Columnist, cleveland.com

CLEVELAND -- It is 2021, and the lingering question of our age might well be, “Where is my patio furniture?” American consumers know that everything feels broken, but may not have a complete understanding as to why. Indeed, President Joe Biden stated as much publicly last month, when he encouraged the media to improve their coverage of supply chain issues.

We are in the middle of a supply-chain “black swan” tsunami. A black swan event is defined as a negative occurrence that is virtually impossible to predict, even by knowledgeable experts. COVID-19 has produced multiple black swan events – all happening at the same time – that have fundamentally upended the seamless operation of global supply chains.

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Pre-COVID, supply chains were predicated on two separate operating preconditions. The first was “just-in-time manufacturing,” under which firms maximized their economic output by eliminating excess inventory everywhere in their supply chains. Generally, companies could determine how much of anything was needed with reference to historical analytics that were reliable and stable over time.

The second pre-COVID supply chain operating precondition was the prevalence of relatively harmonious worldwide free trade, which developed following the end of the Cold War. Free trade explains why consumers today are able to buy more of nearly everything at cheaper prices than ever before.

The COVID-19 black swan tsunami has disrupted both of these operating preconditions, leaving us in uncharted and dysfunctional territory.

The first black swan disruption is the fundamentally changed consumption patterns, caused mainly by people spending more time at home. This change has shifted the cost of the last mile of product deliveries to retailers – but with consumers expecting that product prices will nevertheless stay the same.

The second black swan disruption relates to changed labor resources. When COVID-19 hit, the United States was partway through the retirement of the baby boomers, and most of the way through a transition to a services-based economy. COVID-19 hastened both of these transitions. In addition, with child care becoming less reliable, COVID-19 forced a mass retreat of parents and particularly women from the workforce.

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COVID-19 has also put dramatic strain on our worldwide logistics networks – the third COVID-19 black swan disruption – from unprecedented port congestion, to a record-breaking need for transportation workers, to insufficient warehouse space.

Sarah K. Rathke is a partner at the international law firm of Squire Patton Boggs whose practice focuses on supply chain and litigation issues.

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The final black swan disruption is to the United States' diplomatic relationships, and particularly with China. And while the United States has undergone periodic chilly spells with China, this one is likely to be more permanent.

China's rise to manufacturing dominance since the 1980s has enabled it to improve the economic well-being of its population. However, China engages in certain behaviors that the United States does not – and should not – like. Meanwhile, China's economic prosperity has driven up its labor costs, making it less competitive as a foreign manufacturer. On the other hand, China's successes have created a robust consumer market of China's own, and China's president, Xi Jinping, has made clear that China intends to begin prioritizing its own consumers – undermining the notion that we will ever get back to "normal" with China post-pandemic.

It is not often that people at the precipice of a historical inflection point know that they are at the precipice of a historical inflection point, but now we do seem to have that awareness. Getting back to functionality with our supply chains will necessitate improvements to automation, likely starting in the warehousing sector, and increased end-to-end supply chain information transparency. The technological underpinnings already exist for both of these developments, and the cascading effects of these improvements will likely be substantial – and will likely produce black swan impacts of their own.

Sarah K. Rathke is a partner in the Cleveland office of the international law firm of Squire Patton Boggs whose practice focuses on supply chain and litigation issues.

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