As the (Customs and Trade) World Turns: April 2024

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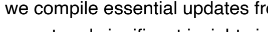

Welcome to the April 2024 issue of "As the (Customs and Trade) World Turns," our monthly newsletter where we compile essential updates from the customs and trade world over the past month. We bring you the most recent and significant insights in an accessible format, concluding with our main takeaways — aka "And the Fox Says…" — on what you need to know.
This edition offers critical insights for industries including Automotive, Beverage & Food, Electric Mobility, Fashion & Retail, Energy & Cleantech, and Life Sciences, as well as Compliance Professionals and Customs Brokers.

IN THIS APRIL 2024 EDITION, WE COVER:

1. The US Department of Homeland Security's (DHS) plans for additions to the Uyghur Forced Labor Prevention Act (UFLPA) entity list.
2. Reports of forced labor in the Indian shrimp industry.
3. A US Customs and Border Protection (CBP) ruling involving the valuation of clinical trial imports.
4. The Enforce and Protect Act (EAPA) final rule and new statistics dashboard.
5. DHS's textiles trade enforcement strategy.
6. Ford Motor Company's $365 million settlement on claims of customs violations related to cargo vans.
7. Changes to bankruptcy law eliminating clawback provisions on customs pass-through payments to brokers.

1. DHS Confirms "Many More" Entities Will Be Added to the UFLPA Entity List

During CBP's Trade Facilitation and Cargo Security Summit, representatives from DHS confirmed that "many more" entities will be added to the UFLPA Entity List, thereby prohibiting them from entering the United States. Dr. Laura Murphy, formerly a professor at Sheffield Hallam University before joining DHS and the Forced Labor Enforcement Task Force (FLETF) as a special advisor, stated that this would mean more than 10 new entities will be added in the next few months. Merchandise produced or sourced from these entities is presumed to be made with forced labor and therefore will be prohibited from entering into the United States.

DHS will also be publishing a new UFLPA implementation strategy, which will include additional high-priority sectors on top of those already specifically referenced in the UFLPA — cotton, tomatoes, and polysilicon. According to DHS, the new sectors may include those highlighted in reports published by nongovernmental organizations (NGOs) and other outlets.

And the Fox Says…: As we predicted in our 2024 Forced Labor Guide, Dr. Murphy joining as a special advisor to DHS and FLETF will likely contribute to an increase in UFLPA enforcement and additions to the UFLPA Entity List in 2024. DHS's statements also signal that the FLETF will continue to lean on NGOs and other public reports to assist in UFLPA enforcement. Other new sectors that may see increased enforcement scrutiny include, but are not limited to, aluminum and its downstream products; electronics; seafood; steel products and its downstream products; copper products and its downstream products; tires and other automobile components, including batteries; and polyvinyl chloride. As we anticipate an uptick in enforcement, companies should continue to monitor forced labor developments and implement internal controls, such as robust supply chain mapping and due diligence procedures.

2. Recent NGO Reporting of Forced Labor in the Indian Shrimp Industry Will Likely Prompt CBP to Take Action

Last month, the Corporate Accountability Lab (CAL), an independent nonprofit organization, issued a report entitled, "Hidden Harvest: Human Rights and Environmental Abuses in India's Shrimp Industry." Among other things, the report examined evidence of forced labor and poor living and working conditions for workers in the Indian supply chain. CAL describes the Indian shrimp sector as being "rife with discrimination, dangerous working conditions, hazardous child labor, sexual harassment, debt bondage, threats and intimidation, toxic sewage, false and misleading certification schemes, and a general lack of oversight."

The publication of this report prompted the Southern Shrimp Alliance (SSA), which represents the US domestic shrimp sector, to request that the US Department of Labor (DOL) add Indian shrimp to the Department's 2024 List of Goods Produced by Child Labor or Forced Labor. Public reports also indicate that members of US Congress are investigating the human rights abuses alleged to be occurring at particular processing facilities in India.

And the Fox Says…: Importers should expect an uptick in CBP's enforcement of Indian shrimp and prepare accordingly. As we explained in our Forced Labor Guide, CBP depends on NGOs, such as CAL, to provide critical information and details for forced labor allegations. Historically, we have seen an increase in detentions of goods following the issuance of NGO reports covering those goods and suppliers. The congressional scrutiny placed on particular shrimp suppliers from India also increases the likelihood of enforcement in this sector in the near future.

According to estimates, Indian shrimp accounts for 40% of the shrimp consumed in the United States. Therefore, any enforcement action could significantly impact product availability.

3. Fallback Valuation is Acceptable for Clinical Trial Imports, CBP Says

Navigating customs valuation for clinical trial drugs has long been a complex challenge for importers, especially when those products are not yet commercially available. On February 28, CBP issued a ruling that offers much-needed clarity and guidance for these entities. The ruling focused on an importer involved in bringing active pharmaceutical ingredients (APIs), clinical drug products, and comparators for use in clinical trials into the country. The drug products or materials were manufactured either by the importer's parent company or by external third-party manufacturers.

Given that these products are usually not sold prior to (or after) importation and considering the importer's lack of access to detailed cost information, traditional valuation methods — e.g., transaction value, deductive value, and computed value — were deemed inapplicable. CBP concluded that the fallback method is the appropriate valuation mechanism in this context, allowing for the use of a modified computed value. This approach relies on average costs, inclusive of assist values and any necessary packaging costs, to establish the value of clinical trial products.

And The Fox Says…: This ruling is particularly significant for supply chain solution providers and contract manufacturers in the biotech industry, especially those that focus on biologics and gene/cell therapy products in the trial phase and rely on cold chain logistics and time-sensitive delivery. These entities often face similar challenges as the importer in this ruling, lacking detailed cost information for clinical or comparator products. The permissible use of the fallback method facilitates a smoother customs valuation process, which is crucial for timely delivery of clinical trial products to their intended destinations without regulatory complications. Importers will continue to need detailed documentation to support value calculations under this method.

4. CBP Improves Due Process and Transparency in EAPA Enforcement

Last month marked two critical developments in the administration of the EAPA, the mechanism by which CBP investigates allegations of antidumping (AD) and countervailing duty (CVD) evasion. Evasion can take a variety of forms, including failure to pay AD/CVD duties, misclassification of a product that should be subject to AD/CVD duties, transshipment of a product to mask the country of origin, or use of the wrong AD/CVD rate.

First, CBP's March 18 EAPA final rule now establishes an administrative protective order (APO) process, stemming from the 2023 US Court of Appeals' ruling in *Royal Brush Mfg. v. United States* that EAPA proceedings lacked due process relating to access to confidential information on which CBP relied for its determination of evasion. Under the APO provision, representatives of interested parties will have access to business confidential information, enabling parties to identify and submit rebuttal information and arguments more effectively, which should lead to more informed decisions by CBP. This change to the EAPA process marks the most significant departure from CBP's 2016 interim rule, which the final rule broadly adopts.

Also in March, CBP launched a new resource referred to as the EAPA statistics "dashboard." The online tool increases transparency around CBP's EAPA activities by providing information on the volume, types, and geographic locations of AD/CVD evasion allegations. The data shows that since the inception of the EAPA program in 2016, transshipment is by far the most common source of an evasion scheme, with Malaysia serving as the most frequent location from which transshipment is suspected to occur.

And the Fox Says...: These updates represent significant developments in EAPA enforcement, which under the former process had proven challenging for investigated parties to navigate. The new APO process, in particular, empowers parties in EAPA proceedings to more effectively contest CBP decisions, which should improve due process and transparency. In addition, the EAPA statistics dashboard, launched alongside the new e-Allegations dashboard, provides valuable insight that may be useful to policymakers and the international trade law enforcement and compliance community as they seek to understand where evasion risks emerge.

5. Textile Companies Should Prepare for Increased Customs Scrutiny and Enforcement Actions

DHS has announced a multi-agency enforcement strategy aimed at bolstering enforcement efforts against illicit trade in the textile industry. This confirms that textiles enforcement will continue to be a government priority trade issue.

Key components of the strategy include: (1) enhanced screening of Section 321 shipments under $800 to better target for possible contraband in response to increasing criticism of the *de minimis* program; (2) additional reviews to ensure cargo compliance, along with civil penalties and Homeland Security Investigations criminal investigations for violations; (3) expansion of audits and Free Trade Agreement (FTA) Verifications to enhance risk assessment; and (4) addition of textile companies to the UFLPA Entity List.

And the Fox Says…: Textile importers should expect an increase in Requests for Information (CF-28's), FTA verifications, forced labor detentions, and audits. To avoid entry delays or customs violations and penalties, companies should conduct supply chain due diligence to reduce the risk of forced labor detentions and review compliance procedures to ensure that imports declarations are accurate.

6. Ford Motors Settles for $365 Million in Customs Dispute Over Cargo Van Classifications

Ford Motor Company has agreed to a hefty $365 million settlement with the US Department of Justice (DOJ), resolving claims that it misclassified and understated the value of hundreds of thousands of cargo vans imported from Turkey. This settlement addresses allegations that Ford attempted to classify its Transit Connect vehicles as passenger vans, which are subject to a lower duty rate of 2.5%, by outfitting them with temporary rear seats removed post-importation, rather than as cargo vans dutiable at 25%.

The controversy, stretching back over a decade, centered on Ford's tariff engineering strategies for classification of these vehicles to benefit from lower tariffs. The US Court of Appeals for the Federal Circuit sided with CBP, calling the temporary seats a mere "artifice," not qualifying for tariff engineering.

The settlement breakdown is notable: $183.5 million for the restitution of unpaid duties, with the remaining sum covering penalties. Furthermore, Ford must seek CBP's classification rulings for new or redesigned vehicles not previously imported into the United States over the next five years.

And the Fox Says…: Acting CBP Commissioner Troy Miller emphasized the settlement's significance in enforcing customs laws uniformly across all importers, regardless of their size. With one of the largest customs penalty settlements in history, this case highlights the consequences of misclassifying imported goods to benefit from lower tariffs. Ford, while settling, maintains its disagreement with the DOJ's characterizations and admits no liability in this dispute going back over a decade. Importers should see this as a cautionary tale, especially with respect to more aggressive approaches to tariff engineering.

7. A Win for Customs Brokers

For several years, through the National Customs Brokers & Freight Forwarders Association of America (NCBFAA), customs brokers have lobbied for protection from bankruptcy laws that required a customs broker that collected duties and fees within the past 90 days from a bankrupt importer to return the funds to the courts, even if the funds had already been tendered to CBP. On March 9, brokers prevailed, and the Customs Business Fairness Act (H.R. 1453) was included in the Consolidated Appropriations Act, 2024 (H.R. 4366). This legislation modified bankruptcy laws to allow brokers subrogation rights to CBPs priority rights and eliminated the bankruptcy clawback provisions associated with funds that importers pay their customs brokers to cover customs duties.

And the Fox Says: In the past, an importer's bankruptcy could drive a broker captured by the clawback provision to bankruptcy itself. This modification addresses the significant liability exposure faced by brokers regarding customs pass-through payments.

Kimia Pourshadi, William G. Stroupe II, Sisi Liu, and David Llorente also contributed to this article.

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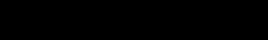

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