

HOMELAND SECURITY PROJECT | JANUARY 2023

Combating Forced Labor in Global Supply Chains

U.S. Enforcement Efforts

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Executive Summary

In recent years, the U.S. Government has accelerated its efforts to eradicate forced labor from global supply chains. Those efforts have been led primarily by U.S. Customs and Border Protection (CBP), which has been actively enforcing a long-standing statutory prohibition on the importation of goods made with forced labor, bolstered by recent legislation that has provided it with more substantial regulatory authority. CBP's evolving enforcement regime suffers, however, from certain shortcomings, including a lack of adequate incentives and legal protections for importers and their suppliers to work collaboratively with the government to craft remediation programs that address the root causes of forced labor.

This paper outlines several recommendations for enhancing the effectiveness of U.S. Government efforts to counter forced labor in global supply chains. First, CBP should enhance the transparency of its forced labor investigative and enforcement activities to better enable the private sector to direct resources to due diligence and remediation. Second, CBP should develop a voluntary disclosure regime with meaningful incentives for importers to report potential issues in their supply chains and undertake proactive corrective action. Finally, the U.S. Government should establish channels for regular communication and information-sharing with foreign governments concerning forced labor enforcement efforts. These recommendations are geared to promote the development of a cross-border, public-private regulatory and enforcement framework within which companies can build more ethical and resilient supply chains.

Background

Although the statutory prohibition on the importation into the United States of goods made with forced labor has been in force for more than nine decades, enforcement was largely non-existent until relatively recently. The present surge in enforcement activity was precipitated by two recent legislative changes: (1) congressional repeal of a significant exemption that had permitted the importation of goods needed to meet U.S. “consumptive demand,” notwithstanding the presence of forced labor; and (2) the passage of the Uyghur Forced Labor Prevention Act (“UFLPA”), which expands CBP’s enforcement authority with respect to products produced in whole or in part in the Xinjiang Uyghur Autonomous Region in China (the “XUAR”) or by an entity on a new UFLPA entity list maintained by the Department of Homeland Security.

Origins of the Forced Labor Import Prohibition

The import ban on goods made with forced labor originated in Section 307 of the Tariff Act of 1930, also known as the Smoot-Hawley Tariff Act. Section 307 prohibits the importation of any goods “mined, produced, or manufactured wholly or in part” using prohibited labor, including forced labor. Forced labor is defined as “all work or service which is exacted from any person under the menace of any penalty for its non-performance and for which the worker does not offer himself voluntarily.”ⁱ

In its original form, the Section 307 prohibition contained an exception known as the consumptive demand clause, which permitted entry of goods made with forced labor “if the goods were not produced in such quantities in the United States as to meet the consumptive demands of the United States.”ⁱⁱ That provision reflected the primary policy of the 1930 Tariff Act to shield the domestic U.S. market from external competition: if a domestic industry was non-existent or too small to meet the demand of U.S. consumers for a particular product, then goods made by foreign manufacturers with forced labor could be imported. This clause significantly undermined enforcement efforts in the decades to come, particularly as supply chains globalized and manufacturing moved overseas.

In 2015, Congress repealed the consumptive demand exemption. The repeal of this exemption meant that all goods made wholly or in part with forced labor were now prohibited from importation. The repeal marked a significant shift in policy from protecting domestic U.S. industry to protecting workers in overseas supply chains serving the U.S. market.

Enforcement Mechanisms

In 2016, CBP began to increase its enforcement of Section 307. The pattern and pace of enforcement has since then been striking in its bipartisan continuity across the Trump and Biden Administrations. It is likely to continue to intensify in the coming years.

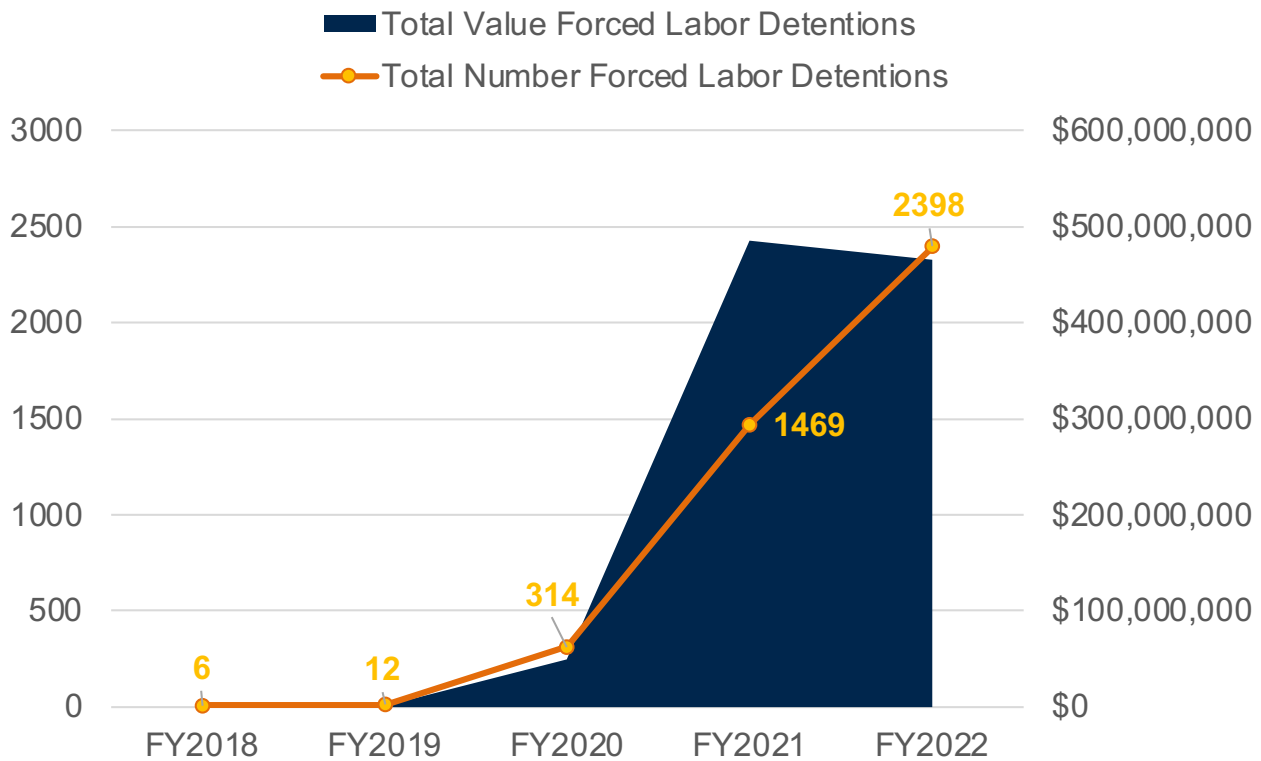
The principal tool used to enforce the prohibition is the withhold release order, or WRO. Where information “reasonably but not conclusively indicates” that goods were produced with forced labor,¹ CBP may issue a WRO instructing all U.S. ports of entry to detain the goods. The scope of WROs has varied: some have targeted individual manufacturers, while others have targeted specific products from a region or country, such as a sweeping WRO issued in January 2021 on all cotton and tomato products from the XUAR.ⁱⁱⁱ Where goods are detained pursuant to a WRO, the importer may elect either to re-export the goods or to submit evidence of admissibility. This evidence may show either that the goods are beyond the scope of the WRO, or, if they fall within the WRO’s scope, that they were not made with forced labor. Any interested party may petition CBP to revoke or modify a WRO by presenting evidence that the forced labor indicators underlying the WRO have been remediated.^{iv}

Following the issuance of a WRO, if CBP continues its investigation and concludes that there is “probable cause” to believe that the goods were made with forced labor, the Commissioner of CBP may publish a Finding. Where goods are detained pursuant to a Finding, importers lose the right to export goods—which become subject to seizure and forfeiture—but may still submit evidence of admissibility (i.e. evidence that the goods were not produced by forced labor) to avoid that outcome. CBP historically has issued many more WROs than Findings, but the agency may issue more Findings going forward as it hires new personnel to expand its enforcement capacity.^v

The current list of WROs and Findings is posted on CBP’s website;^{vi} and the latest data on WRO and UFLPA detentions are shown in **Figure 1**.

1 CBP refers to the eleven indicators of Forced Labor published by the International Labor Organization in enforcing the statute. These are (1) abuse of vulnerability, (2) deception, (3) restriction of movement, (4) isolation, (5) physical and sexual violence, (6) intimidation and threats, (7) retention of identity documents, (8) withholding of wages, (9) debt bondage, (10) abusive working and living conditions, and (11) excessive overtime.

Figure 1.



CBP fiscal years run from October 1 through September 30. FY2022 data includes detentions under the UFLPA.

Beyond the risk of detained shipments, importers may face heightened scrutiny in CBP audits relating to supply chain due diligence requirements, and a failure to address forced labor risks could lead to civil penalties or criminal investigations. In 2020, CBP for the first time (based on public reports) imposed civil penalties in connection with the importation of goods made with forced labor.^{vii} CBP is also incorporating forced labor modules into audits and asking importers whether they mitigate forced labor risk through written policies, supply chain due diligence, and other compliance practices.

Finally, CBP is integrating forced labor elements into its Customs Trade Partnership Against Terrorism (CTPAT) “trusted trader” program requirements. CTPAT was formed after 9/11 and initially focused exclusively on counterterrorism and promoting security in supply chains. Its mission was later expanded to cover and deter narcotics trafficking. In exchange for implementing the program’s required security protocols and procedures, CTPAT members receive various benefits, such as expedited trade clearance at U.S. ports of entry.^{viii} These benefits can be of significant value to major U.S. importers.

In 2016, CTPAT launched its Trusted Trader Strategy, designed to integrate existing security requirements with trade compliance elements from the Importer Self-Assessment (ISA) program,

a voluntary self-audit program. In August 2022, CBP announced that the trade compliance requirements would be updated to include six mandatory requirements related to the prevention of forced labor in supply chains.² These requirements are: (1) risk-based mapping of supply chains; (2) a code of conduct, with related policies and procedures, prohibiting forced labor in the company’s supply chains; (3) evidence of implementation of a social and labor compliance program pursuant to the code; (4) design and implementation of due diligence mechanisms, such as audits and inspections, and training programs for the company’s suppliers; (5) remediation planning in the event that forced labor is identified within the supply network, including a process for advising CBP through CTPAT of any violations and plans to remedy them; and (6) sharing best practices with the CTPAT Trade Compliance Office.^{ix}

The Uyghur Forced Labor Prevention Act

The UFLPA is the latest weapon in CBP’s forced labor enforcement arsenal. It marks a critical inflection point in efforts to combat the importation of goods made with forced labor.

The UFLPA was passed on a near unanimous basis by both chambers of Congress and was signed into law by President Biden in December 2021. It took effect on June 21, 2022. The law creates a “rebuttable presumption” that goods made wholly or in part in the XUAR, or by entities on a new UFLPA entity list maintained by DHS,^x are prohibited from entering the United States. In other words, CBP can now presume that covered products are made with forced labor and no longer needs to conduct an investigation to assess whether there is a “reasonable indication” of forced labor, as it would to issue a WRO.³ Instead, CBP can automatically detain such goods pursuant to the UFLPA and shift an arduous burden of proof to importers of record to demonstrate that their goods should not be detained under the law.^{xi}

If CBP detains a shipment under the UFLPA, importers can pursue one of two paths to establish admissibility. First, they can seek to rebut the statutory presumption by providing “clear and convincing evidence” that goods subject to the UFLPA were not in fact made with forced labor. Second, and alternatively, they can seek to show that the detained goods are beyond the scope of the UFLPA because they have no supply chain nexus with the XUAR or a listed entity.^{xiii} The first path is unlikely to be viable in most cases, primarily on account of the difficulty of obtaining reliable information and conducting audits in the XUAR. The second path is comparatively more likely to be feasible but still requires companies to compile and produce extensive documentation evidencing all steps of the imported product’s supply chain, from the raw materials to the finished goods.

2 The new requirements applied to new member applications from August 2022. The compliance deadline for existing CTPAT members is August 2023.

3 When the UFLPA took effect in June 2022, it superseded the eleven previously issued WROs focused on goods produced in the XUAR. Accordingly, any CBP detention related to the XUAR is now subject to the UFLPA process.

Nascent Multi-Agency Enforcement Infrastructure

The U.S. Government's forced labor enforcement infrastructure has evolved rapidly in recent years and is expected to continue to mature and expand.

Given its border management responsibilities, CBP will continue to play the leading role in enforcing Section 307 and the UFLPA. CBP is currently working on building its capacity to target and detain goods subject to Section 307 or the UFLPA—the agency has estimated that 300 additional officers will be required to effectively implement these laws.

Early steps have also been taken to bolster the roles of other U.S. government agencies involved in efforts to counter forced labor. In 2020, the U.S. Forced Labor Enforcement Task Force (FLETF) was created pursuant to the U.S.-Mexico-Canada Agreement (USMCA) to monitor enforcement of Section 307. It has since issued guidance regarding UFLPA implementation.^{xiii} The FLETF is comprised of seven member agencies, including the Office of the United States Trade Representative and the Departments of Labor, State, Treasury, Justice, Commerce, and Homeland Security (which serves as chair). These agencies also have issued coordinated business advisories outlining the human rights risks associated with conducting business in particular regions, including the XUAR.^{xiv}

Analysis

Limited Transparency at CBP

At present, importers frequently lack visibility into forced labor allegations under review by CBP. Although CBP press releases announcing the issuance of WROs and Findings typically identify the forced labor indicator(s) supporting the agency's determination, the press releases do not describe the evidentiary bases underlying the regulatory action. Further, the agency does not disclose the pendency of an investigation before it issues a WRO. Similarly, when detaining goods under the UFLPA, CBP does not inform importers of the reason the shipment was targeted, leaving importers to try to infer what risk factors may have led to the detention of particular shipments. The lack of transparency concerning potential risks CBP has identified impairs importers' ability to conduct targeted due diligence and engage in proactive remediation efforts to address those specific risks and, hopefully, improve the lives of workers who may be victims of forced labor.

CBP's position—from a strict law enforcement perspective—is that at-risk products are subject to detention regardless of whether the importer has actual knowledge of forced labor risks. In practice this means that the WRO and UFLPA frameworks effectively operate as strict liability standards, under which an import can be detained at the U.S. border based on suspicion that a single raw material input or component may have been made with forced labor, regardless of the amount of good faith diligence that the importer may have undertaken and without direction on how the importer may begin to remediate the issue. While industry has expressed concerns about transparency and due process, no public, formal challenges to CBP's detention procedures have been lodged through litigation. Collaborating with importers to address and remediate identified risks in advance of enforcement at the border would be more likely to support the ultimate policy objective—namely, effective and sustained remediation of forced labor around the globe.

Import Restrictions as a Blunt Tool

Although import restrictions have undoubtedly pushed the U.S. business community to increase its focus on forced labor risks, the extent to which those restrictions are accomplishing the goal of remediating forced labor risks in supply chains remains to be seen. As noted above, importers are often able to re-export detained goods within an allotted timeframe. While re-exportation is certainly not a concession of the presence of forced labor (importers often opt to re-export due to CBP's rigorous evidentiary standards and the difficulty of obtaining adequate supply chain documentation), the existence of the right to re-export means that in many cases, the root problem of forced labor may go unaddressed, while U.S. borders become increasingly closed to global

trade. In short, CBP's approach may undermine its policy goals in that it may fail to effectively address forced labor while simultaneously inflicting damage on U.S. trade and an economy already grappling with inflation and the impacts of supply chain disruptions unrelated to forced labor risks. A more agile enforcement model, incorporating greater transparency and consultation with importers, could enable regulators to leverage the industry's shared desire to stop forced labor at its source rather than merely blocking goods at the border.

Need for Inter-Agency and International Partnerships

In addition to enhancing public/private sector cooperation, more could be done to bolster cooperation and information-sharing, both within the U.S. Government and across national borders. In the domestic sphere, both the formation of the FLETF and the inter-agency business advisories noted above reflect a promising start. On the international stage, there are signs of policy alignment with allies. For example, the USMCA obligates Canada and Mexico to ban the importation of goods made with forced labor. In 2021, Canada began detaining suspect shipments, though enforcement appears to have been relatively limited to date. And the European Commission has recently proposed restrictions on the import, export, and sale of goods made with forced labor—in addition to its proposal requiring companies to conduct human rights due diligence in their supply chains—though these proposals will likely not take effect for several years. We also understand from public comments that the U.S. Government is undertaking some level of coordination with its international allies, including with G7 partners, to address these issues. But there remains a substantial need for broader and more systematic international collaboration to tackle forced labor issues, which are truly global in scale.

Recommendations

Recommendation 1: CBP should bolster the transparency of its forced labor investigations and enforcement activities.

CBP should implement a more transparent investigative and enforcement process with more clearly defined procedural standards. This recommendation, which could be implemented through regulatory amendments,⁴ would afford the trade community with defined opportunities to participate in the investigatory process and to understand and respond to CBP's assessments and underlying reasoning, including in the period before goods are detained at the border. Where CBP issues WROs and Findings, publishing more detailed information on the reasons for doing so would provide interested parties with an opportunity to better target remediation efforts or to submit comments and rebuttal information, as appropriate. Similarly, in the context of UFLPA enforcement, CBP could provide additional explanation for the reasons underlying shipment detentions, enabling importers to identify problematic direct or sub-tier suppliers and better focus their broader supply chain mapping, risk assessment, and mitigation efforts.

Recommendation 2: CBP should expand the trade facilitation benefits conferred on CTPAT members to provide for a more collaborative approach to resolving forced labor compliance issues.

In November 2022, CTPAT announced the addition of three benefits for its Trade Compliance Partners: (1) front of the line review to prioritize, relative to other importers, consideration and decision of admissibility submissions regarding shipments that have been detained by CBP on forced labor grounds; (2) a redelivery hold waiver to permit shipments delivered to an importer's facility and subsequently recalled due to forced labor concerns, to be stored at the importer's facility rather than transported back to the CBP port of entry; and (c) allowing the storage of detained WRO shipments at a bonded facility, pending an admissibility determination, to permit importers to avoid the substantial expense of custody by CBP.^{xv}

These measures embody a positive step, but CBP could incentivize further cooperation from importers—and thus increase the number of companies complying with its forced labor compliance requirements—by offering more substantial benefits. CTPAT members make a substantial financial commitment to maintain and implement the required CTPAT program procedures and will be required to make further investments to comply with the new forced labor requirements described

⁴ Current regulations implementing Section 307 provide for the issuance of WROs and Findings but do not include detail on CBP's investigative process. See 19 C.F.R. §§ 12.42-12.45.

above. But many importers view CBP's current enforcement posture as a zero-tolerance regime with substantial opacity, onerous documentation requirements to establish admissibility, and limited channels for collaboration and feedback with the trade community, and the proposed benefits do not speak to those concerns. If the perceived costs of CTPAT participation outweigh the benefits, then importers may choose not to join the program or to stop participating, and as a result, they would not be covered by the CTPAT forced labor due diligence standards, which are currently the most comprehensive requirements in place in the United States.

To maintain and grow participation, CBP should consider extending additional benefits to CTPAT Trade Compliance members, such as greater flexibility in proving admissibility, enhanced CBP assistance in developing and qualifying remediation programs, and creating a process for disclosing and remedying violations in collaboration with CBP, as has been the case in the counter-terror and narcotics contexts. This would include but not be limited to the prior disclosure mechanism set forth below in Recommendation 3.

It remains clear that the U.S. Government's goal of containing and ultimately eliminating forced labor from global supply chains can be accomplished only by enlisting the full support and cooperation of the private sector trade community. These recommended steps, implemented within CBP's trusted trader/authorized economic operator program, would promote this result and inure to the benefit of both importers and the agency.

Recommendation 3: CBP should implement a prior disclosure mechanism to incentivize private sector collaboration.

Where an entity involved in importation discloses to CBP instances of potential forced labor discovered through proactive supply chain due diligence and undertakes good faith efforts to require remediation on the part of its suppliers, CBP should afford the disclosing entity a defined opportunity to commence and/or complete remediation. CBP's existing prior disclosure regime confers upon importers a pre-investigation right to disclose errors and tender any underpaid duties, in return for mitigated penalties; however, this regime does not presently extend to forced labor violations. As such, it does not authorize CBP to refrain from WRO issuance in the interest of promoting remediation, or to offer other potential enforcement benefits with a view to encouraging importers to voluntarily disclose potential concerns in the UFLPA context (for example, a presumption against imposing civil penalties where the importer has disclosed the issue, cooperated with any follow-up investigation, and remediated the issue in its supply chain). Although CBP could implement many elements of a forced labor disclosure mechanism through rulemaking or policy guidance, explicit legislative amendments to Section 307 could

help secure CBP's authority to administer the disclosure regime and would be consistent with the Congressional authorization of CBP's current prior disclosure program.

To be clear, any prior disclosure mechanism should not be used to permit the importation of goods produced with forced labor. However, by removing the administrative and technical requirements associated with the modification and/or revocation of WROs, which remains a complex and largely opaque process, a prior disclosure procedure would allow CBP and importers to focus on collaborative efforts aimed at remediating instances of forced labor in global supply chains. A prior disclosure mechanism, if coupled with sufficient enforcement benefits, may also enable importers acting in good faith who identify potential UFLPA risks in their supply chains to disclose potential risks they identify during their due diligence processes. Such prior disclosure measures have been effective at furthering the U.S. government's policy goals in other areas of law enforcement.

Recommendation 4: The U.S. Government should establish bilateral and multilateral channels for regular communication and information-sharing with foreign governments and enable public stakeholder input.

New public channels for exchange with other governments can promote a more effective and cohesive international response. Beyond sharing intelligence regarding known bad actors, governments could cooperate to map supply chains using technology and analytics solutions, thereby facilitating joint enforcement when risks materialize. In addition, industry and civil society groups across jurisdictions should be afforded opportunities to provide input and help shape dialogues. Potentially promising emerging fora include the U.S.-EU Trade and Technology Council and the G7, as well as collaboration pursuant to the U.S.-Mexico-Canada Agreement.

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5 The authors express their gratitude to former Covington Associate Victor Ban and Covington Associate Erin Biel for their contributions to this article.

Endnotes

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iii U.S. Customs and Border Protection, “CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang,” press release, Jan. 13, 2021.

iv U.S. Customs and Border Protection, “WRO Modification/Revocation Process Overview,” CBP Publication # 1394-0321.

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ix U.S. Customs and Border Protection, Customs Trade Partnership Against Terrorism: Trade Compliance Handbook (Oct. 2022), at 14-15.

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xi See Public Law No. 117-78, § 3.

xii Office of Strategy, Policy, and Plans, U.S. Department of Homeland Security, Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People’s Republic of China [“DHS Forced Labor in China Strategy”] (June 17, 2022), at 40, 49-51; U.S. Customs and Border Protection, “Uyghur Forced Labor Prevention Act: Operational Guidance for Importers,” CBP Publication # 1793-0522 (June 13, 2022), at 13-15.

xiii See Office of Strategy, Policy, and Plan, DHS Forced Labor in China Strategy.

xiv See, e.g., U.S. Department of State et al., Xinjiang Supply Chain Business Advisory (last updated July 13, 2021).

xv Public statement of Manuel A. Garza, Jr., Director of CTPAT, U.S. Customs and Border Protection, “A Message from CTPAT Director Manuel A. Garza, Jr.,” Nov. 2022.