

Senate Committee on Finance
Hearing on
Fighting Forced Labor: Closing Loopholes and Improving Customs
Enforcement to Mandate Clean Supply Chains and Protect Workers

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Chairman Wyden, Ranking Member Crapo, and Members of the Committee,

It is an honor to appear before you today to address the issue of forced labor in global supply chains. My name is Martina Vandenberg and I serve as president of the Human Trafficking Legal Center, a human rights non-governmental organization dedicated to the eradication of forced labor.

That goal, the eradication of forced labor, is a heavy lift.

My colleagues and I frequently say that forced labor is a feature, not a bug, in global supply chains. The issue requires system-wide solutions, not just isolated prosecutions against individual bad actors. Criminal prosecutions have failed to curb forced labor around the globe, largely because there are almost no prosecutions. According to the State Department's June 2020 Trafficking in Persons (TIP) report, there were just 1,024 forced labor prosecutions in the entire world. Based on International Labor Organization (ILO) global estimates of forced labor, that is one prosecution for every 20,410 victims held in forced labor.

The United States is no outlier. According to Department of Justice data, federal prosecutors indicted just 12 forced labor cases in the entire country in FY2019. And although extraterritorial jurisdiction has existed since 2008 to prosecute global supply chain forced labor cases with a nexus to the United States, federal prosecutors have never brought even one forced labor supply chain case that invoked extraterritorial jurisdiction.

The result of this enforcement vacuum? Impunity. Complacency. Immense human suffering.

A race to the bottom – to markets with the lowest wages – has cemented these abuses into global supply chains. Forced labor is not an aberration. It is a direct result of policy – and pricing – decisions made by corporations around the globe. The COVID-19 pandemic has only exacerbated the vulnerability of workers to conditions of forced labor. According to the ILO¹, the disparate effects of the global health crisis will bear most heavily on children held in child labor, victims of forced labor, and victims of human trafficking, particularly women and girls.

¹ COVID-19 impact on child labor and forced labor: the response of the IPEC+ flagship programme, https://www.ilo.org/wcmsp5/groups/public/@ed_norm/@ipec/documents/publication/wcms_745287

Pay to Work is the Norm for Migrant Workers

We now live in a world in which migrant workers must buy their jobs. They do not pay to play. Workers pay to work. Because they cannot afford to pay the recruitment fees outright, workers must borrow. Those loans wrack up massive interest payments, compounding workers' debts. And despite corporate "employer pays" policies, workers continue to drown in recruitment fee debts. Many find themselves trapped in debt bondage.

Tariff Act – A Game Changer since 2016

Until recently, corporate actors importing goods made with forced labor had little to fear. Governments seemed unlikely to prosecute them. Civil cases brought under the Alien Tort Statute or the private right of action under the Trafficking Victims Protection Reauthorization Act (TVPRA) took years to litigate. And the reputational harm of a forced labor allegation frequently dissipated after initial bursts of consumer outrage.

The closing of the U.S. Tariff Act of 1930's consumptive demand loophole in 2016 changed the game.

That amendment catapulted Section 307² from a moribund statutory relic to a valuable tool to combat forced labor. Finally, the use of forced labor in global supply chains could trigger meaningful accountability. Enforcement of the Tariff Act through a Withhold Release Order (WRO) or a Finding can have significant financial consequences for a supplier, as well as for an importer. Finally, corporations are sitting up and taking notice. The Tariff Act has made forced labor more than a corporate social responsibility issue. Forced labor is now a serious enforcement issue for corporations. At last, there is risk.

A Recent GAO Report Confirms the Impact of Section 307 of the Tariff Act

The recent Government Accountability Office (GAO) report³ on the Tariff Act underscores these conclusions:

Officials from federal agencies, NGOs, and private sector entities we spoke with generally described Section 307 as an effective mechanism to help prevent the importation of goods produced with forced labor. According to CBP officials, importers typically stop trying to import goods subject to a WRO about a month after it is issued, which demonstrates WROs' deterrent effect. Additionally, at a meeting with various NGOs, representatives told us they agreed that Section 307 was a helpful mechanism to eradicate forced labor. Further, according to State officials, Section 307 enforcement is a powerful tool to advance the U.S. government's mission to combat forced labor.

² 19 U.S.C. § 1307 states, "All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited[.]"

³ Government Accountability Office, Forced Labor: CBP Should Improve Communication to Strengthen Trade Enforcement, March 1, 2021, GAO-21-259 available at <https://www.gao.gov/products/gao-21-259>

A private sector representative said that Section 307 is an effective signal that all companies involved in supply chains need to address forced labor violations. In addition, representatives from a private sector entity commented that Section 307 is an important law, in part because it has intensified companies' focus on forced labor in their supply chains.

As we pause to review the success and challenges of Section 307 of the Tariff Act, I am reminded of the Foreign Corrupt Practices Act's (FCPA) evolution. In the 1970s, bribery was ubiquitous across the globe, just as forced labor is today. In Germany, bribes were tax-deductible. That all changed when the Department of Justice began prosecuting companies and individuals under the FCPA. Suddenly, bribery allegations went straight to the C Suite. What changed? The advent of risk. Risk compelled corporations to implement robust, comprehensive, and expensive compliance plans. Bribes were not the stuff of corporate social responsibility (CSR) backwaters; bribes became the province of internal investigations, outside counsel, and compliance monitors.

CBP's Enforcement Surge

We are a long way from FCPA anti-bribery regime levels for forced labor. But Customs and Border Protection (CBP)'s Section 307 enforcement is bringing us closer.

CBP issued 29 WROs between February 2016 and January 2021. In the prior eighty-plus years, CBP had issued just 33 WROs. According to the GAO Report issued in March 2021:

- Twenty WROs covered merchandise from specific manufacturers, such as hair products produced by Hetian Haolin Hair Accessories Co., Ltd., in China.
- Five WROs covered a type of good produced in a specific location, country, or region, such as cotton from Xinjiang, China.
- Four WROs covered seafood imports from fishing vessels, such as seafood from the Taiwan-flagged Yu Long No. 2.
- More than half of the WROs (16 of 29) pertained to products from China.
- The remaining 13 WROs pertained to products from Brazil, the Democratic Republic of the Congo, Malawi, Malaysia, Turkmenistan, and Zimbabwe and from four fishing vessels.

In October 2020, CBP issued its first Finding for imports produced with forced labor in 24 years. The agency collected \$575,000 in penalties from Pure Circle USA, Inc., for importing at least 20 shipments of stevia powder and its derivatives that were processed in China with prison labor.⁴ CBP had issued a WRO for these products in 2016.

And according to data recently released by CBP, in the first quarter of FY2021, the government detained 90 shipments of cargo covered under different WROs. The value of that cargo was

⁴ CBP Collects \$575,000 from Pure Circle U.S.A. for Stevia Imports Made with Forced Labor, <https://www.cbp.gov/newsroom/national-media-release/cbp-collects-575000-pure-circle-usa-stevia-imports-made-forced-labor>

\$20.8 million. In FY 2020, CBP detained a total of 324 shipments valued at \$55 million. CBP appears poised to shatter the FY2020 detention record, a welcome development.

Enforcement is Welcome, but Significant Gaps Remain

The Human Trafficking Legal Center and our NGO coalition partners have applauded CBP's increased enforcement. Indeed, non-governmental organizations are fundamental to this success.⁵ According to public records, NGOs have filed no fewer than ten petitions since 2016. Some of those petitions have resulted in Withhold Release Orders, such as the January 2021 region-wide WRO on Xinjiang cotton. That petition, filed in August 2020 by ten non-governmental organizations⁶, provides a telling example of the power – and lacunae – in Section 307 enforcement.

Two issues relating to this petition raise concerns:

- Communication and Transparency:

Once the Xinjiang cotton petition was filed, it was unclear how the CBP investigation was progressing or whether the agency was satisfied with the information provided by the petitioners. There were rumors⁷ in September 2020 that CBP was ready to issue a regional block on all cotton from Xinjiang. However, it appears that the announcement was rolled back soon thereafter. The agency resorted to issuing a narrower order against cotton imports from one entity – the Xinjiang Production and Construction Corps (XPCC) in December 2020. The region-wide WRO against all Xinjiang cotton (and tomatoes) was eventually issued on January 13, 2021. Throughout this saga, the petitioning organizations were not informed of when the investigation would conclude and a WRO would issue. This is despite the fact that in a press conference announcing the XPCC WRO in December 2020, CBP Acting Commissioner Mark A. Morgan thanked the coalition of non-governmental organizations for their Xinjiang cotton petition and noted the critical role played by NGOs in Tariff Act enforcement.

- Capacity to Enforce

As the GAO report pointed out:

⁵ Human Trafficking Legal Center published a practice guide on how to file petitions to CBP in June 2020. That guide, *Importing Freedom: Using the U.S. Tariff Act to Combat Forced Labor in Global Supply Chains*, has been translated into multiple languages and distributed to partners across the globe. The guide was authored by Human Trafficking Legal Center Human Rights and Trade Policy Advisor Anasuya Syam, https://www.htlegalcenter.org/wp-content/uploads/Importing-Freedom-Using-the-U.S.-Tariff-Act-to-Combat-Forced-Labor-in-Supply-Chains_FINAL.pdf

⁶ Human Rights Groups Call on U.S. for Regional Ban on Imports from China Made with Uyghur Forced Labor, <https://www.iccr.org/human-rights-groups-call-us-regional-ban-imports-china-made-uyghur-forced-labor>

⁷ U.S. readies bans on cotton, tomato imports from China's Xinjiang, <https://www.reuters.com/article/us-usa-trade-china-xinjiang/u-s-to-block-cotton-tomato-product-imports-from-chinas-xinjiang-over-forced-labor-cbp-idUSKBN25Z29N>

Forced Labor Division officials and representatives from several private sector entities and NGOs said that difficulty in tracing supply chains presents a challenge for Section 307 investigations and compliance. Forced Labor Division officials noted that CBP often cannot trace goods produced with forced labor overseas and imported into the United States because of the complexity of the goods' supply chains.

Issuing the WRO is only the first step. Robust and swift enforcement of the order must follow. CBP announced that despite the prohibition on all Xinjiang cotton, the agency would focus only on direct imports from the region, reflecting what the agency terms a 'scalpel approach' to enforcement.⁸ This is especially concerning considering that direct imports from Xinjiang represent only a fraction of all imports that contain Xinjiang cotton. Many goods containing the offending cotton are shipped via third countries. For the WRO to have the most impact, CBP should enforce the order broadly and without any limitations. It must cultivate internal capacity to trace these supply chains through training and use of cutting-edge tracing technology.

Annually, the United States imports billions of goods at risk of being produced by forced labor and child labor.⁹ However, as mentioned above, Tariff Act enforcement in the previous financial years have only netted a very small portion of this figure. It is critical that more shipments are detained at U.S. ports of entry. Non-governmental organizations are finding it difficult to assess the impact of WROs without knowing how CBP is enforcing the order and to what degree. CBP does not release enforcement data for each WRO. The agency recently began releasing data on total number of shipments detained each quarter (under all WROs), but that does not give us the full picture.

The Corporate Backlash Begins

The backlash against Tariff Act enforcement has throttled up in recent days, with lawsuits filed by corporations against non-governmental organizations and researchers. These retaliatory legal actions have a chilling effect on NGOs, which we can only surmise is the intent. Sime Darby, a Malaysian palm oil producer subject to a WRO, filed a lawsuit in U.S. federal court against Duncan Jepson, the director of Liberty Shared, seeking extensive discovery of the human rights organization's confidential investigation files.¹⁰ And Chinese corporations have filed a suit¹¹ in China against Adrian Zenz, a U.S.-based human rights researcher who has documented widespread forced labor and crimes against humanity against the Uyghur population in Xinjiang.

⁸ CBP's Smith says initial focus for Xinjiang WRO is direct connections, not goods finished elsewhere, <https://internationaltradetoday.com/news/2021/01/28/cbps-smith-says-initial-focus-for-xinjiang-wro-is-direct-connections-not-goods-finished-elsewhere-2101280025>

⁹ U.S. rapped over gaps in catching slave-made imports, <https://www.reuters.com/article/usa-imports-slavery/u-s-rapped-over-gaps-in-catching-slave-made-imports-idUSL8N2HJ3MH>

¹⁰ Civil Miscellaneous Case *In re* Application of Sime Darby Plantation Berhad, Pursuant to 28 U.S.C. § 1782 to conduct discovery for use in foreign proceedings, Case No. 1:21-mc-00006 (EDVA March 9, 2021).

¹¹ Chinese firms seek damages from foreign researcher over forced labor reports, <https://news.trust.org/item/20210309064206-17inv/>

Corporate response to WROs should include internal investigations, remediation, and corporate governance reform and internal controls to prevent forced labor in the future. Instead, some corporate actors have adopted a “shoot the messenger” strategy, seeking to embroil the petitioner in litigation. Facing universal outrage, Sime Darby dropped their lawsuit just a week after filing.¹²

Similarly, subtle, but increasingly loud, corporate voices seek to dismantle Section 307’s enforcement regime. Couched in the language of calls for “due process,” corporate advocates have suggested that CBP abandon the Section 307 petition regime to move to a tribunal-based system, such as that used in Section 337 enforcement. Rhetorical condemnation of forced labor notwithstanding, these critics truly come to bury Section 307, not to praise it.

Recommendations for Robust Enforcement of Section 307

The NGO community asks that Congress resist calls for a “grand re-envisioning” of the Tariff Act. Instead, there are concrete recommendations that will increase CBP’s effectiveness in implementing and enforcing Section 307. The Human Trafficking Legal Center serves as the secretariat to the Tariff Act Advisory Group (TAAG), a coalition of non-governmental organizations dedicated to enforcement under Section 307 of the Tariff Act of 1930. Many of the recommendations that I suggest today are discussed in greater depth in a series of letters TAAG has provided to CBP and the Department of Homeland Security:

- Letter to Secretary of Homeland Security Mayorkas on Effective Enforcement of the Tariff Act: <https://www.htlegalcenter.org/wp-content/uploads/Letter-to-Secretary-Mayorkas-March-4-2021.pdf>
- Letter to CBP on Reimbursement of Recruitment Fees: <https://www.htlegalcenter.org/wp-content/uploads/Letter-to-CBP-re.-Reimbursement-September-21-2020.pdf>
- Letter to CBP on Effective Enforcement of Section 307 of the Tariff Act: <https://www.htlegalcenter.org/wp-content/uploads/Letter-to-CBP-re.-Effective-Enforcement-November-19-2020.pdf>

Similarly, one of our partner organizations, Global Labor Justice/International Labor Rights Forum (GLJ/ILRF) has made important recommendations in a letter recently submitted to CBP on the enforcement of another palm oil WRO, this one against FGV. That letter may also be found online at:

<https://laborrights.org/sites/default/files/publications/Recommendations%20FGV%20WRO%20Letter%203%209%202021.pdf>

¹² Sime Darby withdraws lawsuit against activist,

<https://www.freemalaysiatoday.com/category/nation/2021/03/16/sime-darby-withdraws-lawsuit-against-activist/>

Recommendations for Enforcement:

Uphold freedom of association. Workers' rights and ability to unionize are central to any effort to eliminate forced labor in supply chains. Freedom of association is a necessary factor in remediating forced labor. Workers and worker representatives must be included in the Tariff Act process. CBP should ensure that affected workers, their unions, workers' rights organizations, and migrant workers' rights groups have a role in enforcement. Workers' agency to monitor and report on their working conditions must be respected and incorporated as part of an enforcement plan for each WRO.

Create an emergency fund for workers harmed by WROs. Workers can face dire consequences after the issuance of a WRO. As the March 2021 GAO report pointed out:

ILAB officials told us that, as an unintended consequence of the September 2019 WRO for disposable rubber gloves produced in Malaysia, many workers' employment was terminated, which had a negative effect on workers facing exploitation. The officials said that it is important that the U.S. government be prepared to support workers who are placed in a position of increased vulnerability as a result of enforcement actions to prevent forced labor.

The creation of an emergency fund for workers is essential to mitigate the harm to workers. There is the danger that U.S. companies will "cut-and-run," abandoning foreign suppliers instead of working to remediate forced labor. This emergency fund should be financed by fines levied against importers, as in the stevia case, or by funds created by the corporations themselves.

Punish companies that retaliate against workers or petitioners. If a corporate actor retaliates against a petitioner or witnesses, all negotiations on revocation or modification of the WRO should cease. Attacks on petitioners should be considered when corporations seek relief from CBP. Retaliation does not signal good faith efforts to remediate or eliminate forced labor.

Increase transparency. We agree with the GAO's recommendation that CBP better "communicate to stakeholders the types of information they could collect and submit to CBP to help it initiate and investigate forced labor cases..." There is still little clarity on the standards CBP applies or the evidence required. At a recent meeting, CBP informed the NGO community that the agency would soon publish guidance on types of information needed in a Section 307 allegation. CBP should work more closely with the Bureau of International Labor Affairs (ILAB) and the Bureau of Democracy, Human Rights, and Labor (DRL) to bring the definitions of forced labor, child labor and prison labor used by the agency in line with the International Labor Organization (ILO) core labor standard definitions.

Disclose shipments detained under a WRO. CBP's recent disclosures of the number and value of shipments detained in FY 2020 are encouraging, but these aggregated numbers are untethered to specific WROs. For example, we have no confirmation or data to indicate that CBP ever enforced the 2018 WRO against Turkmenistan cotton, although we do have credible information

that imports containing cotton from Turkmenistan have entered the United States. CBP should release enforcement updates on each WRO each quarter.

Increase enforcement and penalties. Enforcement of the Tariff Act should be ramped up with the issuance – and robust enforcement – of more WROs. U.S. importers that continue to source goods in violation of the U.S. Tariff Act should face penalties. We hope to see more WROs, more findings, more monetary penalties (for higher amounts), and criminal prosecutions for forced labor. We also encourage CBP to press more aggressively for fines and penalties. Pure Circle, which paid a \$575,000 fine for the importation of stevia manufactured by prisoners in China, bragged in a press release that this was less than 7 percent of the fine that CBP had originally sought to enforce.¹³

Prosecute forced labor in global supply chains. The U.S. Government has never prosecuted a case of forced labor in a global supply chain, despite the existence of extraterritorial jurisdiction under 18 USC §1596. Victims of forced labor in supply chains have brought civil suits in the federal courts under 18 USC §1595, but criminal prosecutions have not followed. We encourage DHS to ramp up investigations (and prosecutions) under Chapter 77 of Title 18, the Trafficking Victims Protection and Reauthorization Act (TVPRA). We are also concerned that the U.S. Government has not prosecuted even one case alleging the importation of goods made with forced labor. We urge the agency to work with the Department of Justice (DOJ) to prosecute violators.

Strengthen enforcement of WRO on cotton and cotton products from Xinjiang. Effective enforcement of this regional WRO is a key tool to end China’s widespread and systematic forced labor and other abuses against Uyghurs and Turkic Muslims. CBP’s recent announcement that enforcement would be done with a “scalpel” raises significant concerns. The WRO should be enforced broadly.

Diversify Tariff Act enforcement. More than 72 percent of WROs issued in the Tariff Act’s 90-year history have been against goods produced in China. The Chinese government’s systematic oppression of the Uyghur peoples and other ethnic minorities is reprehensible. But China should not be the sole target of Tariff Act enforcement under Section 307. Forced labor continues in many countries in East Asia, South and Central Asia, Africa, the Americas, the Middle East, and Europe.

Increase transparency on modifications and revocations. Non-governmental organizations and unions are left in the dark on the process leading to a WRO revocation. Without information about remediation claims, petitioners cannot verify whether conditions of forced labor have in fact been remediated. NGO/union involvement at each stage of the Tariff Act process is critical to ensure that workers affected by a WRO do not remain trapped in forced labor and involuntary servitude.

Establish cooperation and communication channels with U.S. allies. Goods made with forced labor – and subject to WROs – are routinely re-routed from U.S. ports to neighboring countries or other regions. Our own research has identified transshipment to Canada of goods subject to WROs in the United States. Mexico, the United States, and Canada should establish an infrastructure to

¹³ PureCircle and U.S. Customs and Border Protection Resolve 2014 Stevia Sourcing, <https://purecircle.com/news/purecircle-and-u-s-customs-and-border-protection-resolve-2014-stevia-sourcing/>

facilitate cooperation in combating forced labor, including identification and movement of goods produced using forced labor (Articles 23.12 (5)(c) and 23.6 of the United States–Mexico–Canada Agreement).

Incorporate Section 307 provisions into all trade agreements. There should be no safe harbor for goods made with forced labor anywhere in the world.

CONCLUSION

Section 307 has enormous potential to disrupt forced labor in global supply chains. The community of non-governmental organizations stands ready to cooperate with CBP, and with Congress, to maximize the effectiveness of this tool.