



# Combating Forced Labor and Enforcing Workers' Rights Using the Tariff Act

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## I. Introduction

The International Labour Organization (ILO) estimates that 25 million people are living in forced labor situations.<sup>1</sup> An estimated \$150 billion dollars in profits a year are generated off the backs of the men, women, and children who are forced to work.<sup>2</sup> The trafficking of men and boys into the seafood industry is well documented.<sup>3</sup> Recent reports revealed mounting evidence of the system of forced labor in camps<sup>4</sup> in Xinjiang, China. Meanwhile, in Malawi's tobacco and Indonesia's palm oil sectors, families are trafficked across their country only to be trapped in debt bondage. Entire families are trapped in forced labor, trying to buy their way out:

“I worked for a coconut plantation in my village and made enough money to meet my basic needs. The recruiter said that if I moved to work for the palm plantation, the company would provide me with everything I needed – even housing, water and electricity. He told me that on top of this I would be paid a monthly salary [...] All that Piet Jogo promised came to nothing.[...] My life was much better in my home village than here [...] I want to take my family home, but we are trapped here unless I can earn enough money.”<sup>5</sup>

Tomo<sup>6</sup> is a thirty-two year old man trafficked with fifty others by a labor recruiter under false promises.<sup>7</sup> The International Labor Rights Forum (ILRF) and our partner Sawit Watch conducted investigations of palm oil plantations in Indonesia, where we learned of Tomo's plight.<sup>8</sup> In neighboring Malaysia, migrant workers also become trapped, and in August 2019 ILRF filed an allegation under Section 307 of the U.S. Tariff Act to stop the importation of palm oil and palm oil products manufactured by FGV Holdings Berhad, one of the country's largest palm oil producers.<sup>9</sup> Palm oil is used in about fifty percent of all packaged goods.<sup>10</sup>

For ninety years, Section 307 of the U.S. Tariff Act has prohibited the import into the United States of goods made with forced labor.<sup>11</sup> Lack of clear evidence standards and transparency on enforcement actions by Customs and Border Protection (CBP) are seriously hindering the effectiveness of Section 307. Since 2013, ILRF has filed five petitions to CBP and joined advocacy efforts to make the law more effective.

This paper will discuss how U.S. trade policy, embodied in Section 307, can help prevent Americans' complicity with the forced labor economy. It will primarily focus on how to prevent the importation of forced labor-made goods into the United States. The recommendations lay out key steps to improve the enforcement and implementation of the Tariff Act and motivate more effective prevention measures within the business community.

## II. Background

The actual number of people in forced labor is likely much higher than 25 million. While the ILO's number is the most credible one available, the ILO considers it a minimum estimate because it relies on data from national governments, which is scarce in some countries.<sup>12</sup> The ILO defines forced labor as:

“[...]forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”<sup>13</sup>

U.S. Congress sought to address the issue of forced labor by passing Section 307 of the Tariff Act of 1930, making “all goods, wares, articles and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor, forced labor, or 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.”<sup>14</sup> However, a loophole in the law known as “consumptive demand” made exceptions for products made with forced labor when domestic products could not meet the demands of consumers in the United States. This exception was the result of Congressional intent primarily focused on protecting U.S. domestic industry and lead to the law rarely being enforced.

On February 26, 2016, Congress closed the loophole with The Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA).<sup>15</sup> Before then, Customs officials issued thirty-two “withhold release orders” (WROs), an average of one every two years.<sup>16</sup> However, during the ten years directly preceding the passage of TFTEA, the agency did not issue a single WRO. Since the passage of the 2015 Act, CBP has issued an accelerating number of WROs; thirteen in all, with seven coming in 2019 alone.<sup>17</sup>

Since 1986, ILRF has worked to help achieve dignity and justice for workers worldwide, and particularly in the global economy. ILRF aims to ensure that social change is led by workers and their community partners with the support of global solidarity. We work with trade unions, faith, and community-based groups and NGOs around the world to expose worker rights abuses and develop and promote solutions. ILRF seeks to end forced labor by attacking its root causes. We coordinate with worker organizations to document cases and to help ensure that workers are protected and empowered to demand dignified, just working conditions.

ILRF has long advocated for improvements to the Tariff Act, helping to win an amendment in 2000 to explicitly include goods made with forced child labor among those prohibited at ports of entry. More recently, ILRF successfully pressed to close the consumptive demand loophole in 2016. In addition to advocating for improvements, ILRF has filed allegations to protect victims of forced labor in Malaysia's palm oil industry,<sup>18</sup> the cotton industry in Turkmenistan<sup>19</sup> and Uzbekistan,<sup>20</sup> South Asia's carpet sector, and the Ivory Coast's cocoa industry.

### III. How Section 307 Combats Forced Labor in Practice

The U.S. Department of Homeland Security's largest agency, Customs and Border Protection (CBP), is responsible for enforcement of Section 307 and taking actions to prevent goods entering the U.S. which are made with forced labor. CBP is responsible for the application of relevant civil penalties, which include the detention and possible forfeiture of goods made with prohibited forms of forced labor. Enforcement of Section 307 can be self-initiated by CBP<sup>21</sup> or outside parties can petition CBP for an investigation.<sup>22</sup>

If CBP finds that the information available "reasonably but not conclusively" indicates that the merchandise has been produced with forced labor, they issue a WRO to detain the goods at port pending further investigation.<sup>23</sup> Once issued, a WRO is published on CBP's website.<sup>24</sup> During its investigations, CBP may share information with Immigration and Customs Enforcement (ICE). ICE can also initiate investigations and pursue criminal charges against corporations and corporate officials importing goods produced with forced labor under 18 U.S.C. § 1589 and 18 U.S.C. § 1761.<sup>25</sup> While the evidence threshold is higher for criminal charges, they can result in a sentence of 20 years in prison, which could be a powerful incentive for companies to take steps to ensure due diligence to combat forced labor in their supply chain.<sup>26</sup>

Importers of goods detained have ninety days after the WRO is issued to petition CBP for the release of the goods.<sup>27</sup> An importer has two options: re-export the goods to a third country, or provide "satisfactory evidence" to CBP that the goods in question were not produced with forced labor.<sup>28</sup> While the goods are detained, CBP may continue the investigation. If CBP finds sufficient evidence to meet the higher threshold of probable cause that the imported goods are made with forced labor, then it can issue a finding and is mandated to publish it in the Federal Register.<sup>29</sup>

CBP's requirements for submissions of allegations by the public are laid out in 19 C.F.R. § 12.42(b). Advocates can seek enforcement of any product that may be produced by forced labor:

"[...] is being, or is likely to be, imported into the United States may communicate his belief to any port director or the Commissioner of CBP. Every such communication shall contain, or be accompanied by:

- (1) A full statement of the reasons for the belief;
- (2) A detailed description or sample of the merchandise; and
- (3) All pertinent facts obtainable as to the production of the merchandise abroad."<sup>30</sup>

## IV. Challenges for Enforcement

### **Inadequate guidance for petitioners**

CBP has relied heavily on the public to file allegations but has not yet issued adequate public guidance on its standards for enforcement of Section 307. “Reasonably and not conclusively” is the evidence standard in 19 C.F.R. § 12.42 of the CBP regulations for implementation of Section 307. However, it is a unique evidentiary standard for which there is little guidance that potential petitioners can reference to ensure their petitions include the necessary information.

One example of the challenges of inadequate guidance is when in 2016 CBP requested additional information for an allegation ILRF submitted in 2016 on Turkmen cotton.<sup>31</sup> In a letter to ILRF, CBP requested additional information such as first-hand worker or witness accounts and detailed supply chain information from crop to U.S. importation. This request for first-hand accounts is not required by statute or regulations. This presented a serious challenge in a country where human rights monitors are jailed for reporting abuses. It put a high evidentiary burden on ILRF to provide accounts by victims of forced labor or witnesses, even though there was no official guidance by CBP to provide such documentation. Fortunately, ILRF was able to argue that forced labor was systematic and state-run, thus meriting a countrywide WRO in May 2018.<sup>32</sup>

Petitioners also need to know what protections there might be for witnesses and how they might secure remediation for the victims. CBP investigators have been clear when speaking with petitioners about their willingness to not name names or reveal to host governments who they interview, but there are limits on what protections they can provide. Additionally, CBP’s coordination with civil society U.S. initiatives to support victims or hold global corporations accountable, are not yet clear. CBP’s forthcoming implementation regulations could help orient other actors working to end forced labor, civil society, and government agencies, understand how to engage with CBP.

### **Lack of transparency**

CBP provides very limited information on enforcement of Section 307 of the Tariff Act. Currently, CBP publishes WROs on its website, although this is not mandated by the regulations. The publications only include the class of goods prohibited and the exporter and/or region. There is no public explanation or justification for the issuance of the enforcement order, which could be valuable in establishing a standard for petitioners like ILRF. However, CBP does not publicize specific detentions, re-exportations, exclusions, or seizures of the subject merchandise that may have resulted from WROs.<sup>33</sup> § 12.42(f) requires that findings, which require a higher evidentiary threshold and after the approval of the Secretary of the Treasury, be published in the Customs Bulletin and in the Federal Register.

The 2015 TFTEA amendment included an annual reporting requirement for CBP to the Committee on Finance of the Senate and the Committee on Ways and Means in the House.<sup>34</sup>

These reports must include the number of actions taken and a description of the goods detained. This requirement can be interpreted to mean that Congress too is looking for more transparency in CBP's enforcement of Section 307. However, the annual reports to Congress are not publicly accessible. Congress should make these reports available. If there are privacy or other concerns about making the reports public, then redacted versions should be released.

Another example of a challenge resulting from the lack of transparency is that CBP is not required to provide petitioners with updates on the status of the case. CBP is also not required to provide a response within a designated timeline on the merits of the petitions submitted. ILRF believes that petitioners should have updates on the status of cases and a response on the merits of the petitions submitted within a designated timeline. Petitioners are expending resources and time to submit petitions and should receive timely updates and responses.

In 2013 ILRF filed an allegation with CBP seeking the enforcement of Section 307 of the Tariff Act to prevent the importation of goods made with cotton from Uzbekistan.<sup>35</sup> The case for excluding cotton from Uzbekistan was particularly strong at that time because it was being produced in a closed, state-run system, which even the Uzbek government has since acknowledged to have been the case. At that time all cotton from Uzbekistan, regardless of which particular farm it came from, was produced with the forced labor of Uzbek citizens.<sup>36</sup> Yet, despite the strength of the petition, CBP never issued a detention order and refused to share any information regarding its investigation or if any enforcement measures have been taken. In response to a Freedom of Information Act (FOIA) request filed by ILRF, the agency declined to share anything about the Uzbek cotton case, citing a FOIA exemption for "ongoing law enforcement investigations."<sup>37</sup>

Lack of transparency by CBP is limiting the effectiveness of enforcement of Section 307 because it limits the number of petitioners able to submit allegations due to lack of understanding of the standards by which they should abide. Petitioners should be updated because they are working hard to submit petitions to help CBP fight forced labor.

### **Focus on individual producers**

One potential reason for its low number of enforcement actions is that CBP has focused mostly on targeting individual overseas producers. This means CBP or petitioners must establish forced labor is taking place in a particular facility or farm and trace where those exports are likely to be entering U.S. ports. This type of information is extremely difficult for civil society organizations filing petitions or even the U.S. government to acquire with regard to an enterprise operating overseas.

Traceability is particularly difficult for commodities such as cocoa, tobacco, or cotton and, according to the ILO, 11% of forced labor happens in the agricultural sector.<sup>38</sup> If CBP required importers from high-risk production sectors to release the names and addresses of suppliers, it could be useful for traceability. High-risk sectors could be identified using the list by Bureau of International Labor Affairs, which is congressionally mandated and includes a list of goods that

it reasonably believes are produced by child labor and/or forced labor.<sup>39</sup> Currently the list includes 139 goods from 76 countries.<sup>40</sup> Civil society organizations can also be relied upon to identify high-risk sectors.

According to the most recent reports by the ILO, an estimated 16 million people were in forced labor in the private economy in 2016.<sup>41</sup> That means the majority of cases of forced labor are in the private sector, in the factories, farms, and fishing boats that produce for the global supply chains that deliver so many of the products we buy. Modern supply chains are increasingly large and include many different suppliers which can make ensuring products are not the result of forced labor a challenge, especially when enforcement of Section 307 is limited to individual producers.

Multinational corporations, many of them U.S.-based, are comprised of complex global supply chains that often include dozens or even hundreds of suppliers from countries around the globe. Industries like seafood from Thailand, cocoa from West Africa, and palm oil from Malaysia and Indonesia use widespread informal subcontracting, often of migrant workers. This makes it extremely difficult to trace products back to the factory or farm using forced labor. This practice is known as “global outsourcing,” and is infamous for forced labor abuses.<sup>42</sup> CBP needs to change its enforcement approach to target these difficult-to-trace subcontractors. In some cases, to combat forced labor in high-risk sectors, CBP should take enforcement actions at the national level when there is substantial evidence of widespread forced labor in a country.

CBP has made some strides to conduct more enforcement on high-risk sectors. In May 2018, based on a petition filed by ILRF and Alternative Turkmenistan News (ATN),<sup>43</sup> CBP issued a WRO against all shipments of cotton from Turkmenistan. This marked the first time CBP had issued a WRO which banned the import of a product from a country.<sup>44</sup> Notably, Turkmenistan had years of warning before this WRO was issued. Years of international pressure by the Cotton Campaign<sup>45</sup> and numerous Trafficking in Persons Reports by the U.S. State Department<sup>46</sup> called attention to forced labor in the sector, but the Turkmen government failed to take sufficient action.

The Turkmen case was also significant, because in it CBP exercised greater scope of its authority under Section 307 to stop goods that contain any inputs made with forced labor, no matter how small or removed from the final stage of production. Therefore, not only was cotton from Turkmenistan banned, which is produced with state-sponsored forced labor, but also included in the ban was any product that contains Turkmen cotton, such as thread, fabrics and t-shirts. On November 1, 2019 CBP issued an additional industry-wide WRO on tobacco from Malawi and products containing tobacco from Malawi.<sup>47</sup> These industry-wide enforcement actions are important steps; however, it is unclear how successful they have been because, as noted above, CBP does not publicize specific detentions or exclusions that may have resulted from the withhold release orders or findings.

The focus on individual producers approach could be useful if it is combined with a new CBP policy requiring companies that import goods produced in high-risk sectors to release the names

and addresses of suppliers along with the steps they are taking to prevent and mitigate risks of forced labor. Increased transparency and traceability can aid civil society organizations filing petitions and for the U.S. government's future enforcement.

## **V. Recommendations**

### **1. CBP should issue clearer guidance on evidence standards**

Public guidance on the evidentiary standards can help ensure that petitioners provide the required evidence to trigger enforcement actions of Section 307. Clearer guidance will demystify the process for the public and can lead to an increase in allegations submitted. Lack of clarity on standards of enforcement and the implementation process creates uncertainty for petitioners and can discourage others from submitting information to CBP. Above all, this type of guidance will ensure consistent application of the law and enable victim protection organizations to more effectively interface with CBP.

### **2. CBP should increase enforcement transparency of Section 307**

Lack of transparency by CBP is limiting enforcement of Section 307. CBP should continue to publish WROs and findings. However, these publications should include reasoning for the enforcement order, the number of shipments detained and the value of the goods. Making this information public would help petitioners understand the evidentiary standards and their application. CBP should also provide petitioners updates on the status of cases and give a response within a designated timeline on the merits of the petitions submitted.

### **3. Increase enforcement for high-risk sectors and shift the burden of mitigating the risk of forced labor to importers**

If CBP increases its enforcement efforts to high-risk sectors and requires transparency, it could mean an increased number of petitions and enforcement actions. CBP should work with civil society to develop supply chain accountability criteria for importers. This could result in importers taking proactive steps to ensure effective due diligence and develop risk mitigation measures to prevent forced labor in their supply chains.

### **4. Congress should increase resources for enforcement of Section 307 and conduct oversight**

Combatting forced labor has bipartisan support from Congress. Congress should increase resources for enforcement of Section 307, and to pursue criminal charges against corporations and corporate officials importing goods produced with forced labor. Congress should require the annual reports by CBP on enforcement of Section 307 to include justifications for enforcement actions on the goods detained and hold oversight hearings with CBP. Congress should publish the annual reports, redacted versions if necessary, for the public.

## VI. Conclusion

The U.S. Tariff Act has the potential to be one of the strongest laws for punishing and thereby discouraging companies from profiting from the use of forced labor in their supply chains. Enforcement of Section 307 can be a powerful incentive for corporations at home and abroad to clean up their supply chains and end the use of forced labor, but only if it is enforced. In spite of the challenges, ILRF has seen firsthand the value of Section 307 in combatting forced labor. The countrywide WRO on Turkmen cotton is a clear example of what can be done.

CBP has not yet taken action on ILRF's allegation in the FGV palm oil case in Malaysia. But the simple act of filing a petition with CBP helps advance the position of local worker rights groups and drive better enforcement of labor rights protections by a government and more effective worker protection policies within a company, as well as its competitors in the industry.<sup>48</sup>

CBP and Congress should work to increase the enforcement of Section 307 and combat forced labor. The United States has the capacity and laws in place to make a difference worldwide in combatting forced labor and hold corporations to account. ILRF looks forward to working with CBP and with allies and partners in finding creative new uses of the Section 307 petitioning and enforcement process.

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## Endnotes

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