



US prohibits imports made with forced labor: new law is a force to be reckoned with

International Trade Alert

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Your latest shipment of imports is detained at the border. You are told that your goods are not being allowed admission to the US because they were produced, in whole or in part, with forced labor. But these are the same products you've been importing, in pretty much the same way, for years. What is happening? Is this even possible?

The answer is yes. It is very possible. Companies are starting to feel the effects of a significant 2016 amendment to the Smoot-Hawley Tariff Act of 1930, and, in its wake, stepped up enforcement activity by Customs and Border Protection.

To help convey an understanding of how this change came about, this article explores how we arrived at this point and suggests some steps businesses may consider to address the new law's implications.

The prohibition on imports involving forced labor

Section 307 of the Tariff Act of 1930, as amended, essentially prohibits the importation into the US of any goods mined, produced or manufactured with the use of convict labor or "forced labor." What is very clear in the statute today regarding what is covered by the "forced labor" term of art actually was the subject of a long debate during

the course of legislating the amendments to this provision of the 1930 Tariff Act.

During that debate, the Senate amendments were accepted; but the House Conference responded by adding in the so-called “consumptive demand” exception, which was created to “prevent the application of these provisions to articles such as rubber and tea, which are not produced in the United States, and [for]... which our domestic production does not satisfy our consumptive needs.” As a result, the amendments to section 307 under the Tariff Act of 1930 expanded the scope of the definition of forced labor, *but at the same time created an exception that would swallow up the entire prohibition covered by the expanded definition.*

The 2016 removal of the exception

In February 2016, the legal loophole was finally closed when President Barack Obama signed into law the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA). Tucked away in the last title of the TFTEA, under a heading that reads *Title IX—Miscellaneous Provisions*, was Section 910, “Elimination of Consumptive Demand Exception to Prohibition on Importation of Goods Made With Convict Labor, Forced Labor, or Indentured Labor”; Report.” The title of the section, indeed, was longer than the legislative text itself, which reads: “Section 307 of the Tariff Act of 1930 is amended by striking ‘The provisions of this section’ and all that follows through ‘of the United States.’”

With these spare words, after 86 years, the original purpose of the 1930 Senate amendment could at last be realized.

Here comes CBP

As Customs and Border Protection now advises in its Forced Labor Enforcement Fact Sheet, “merchandise mined, produced or manufactured, wholly or in part, in any foreign country by forced labor – including forced child labor... is subject to exclusion and/or seizure, and may lead to criminal investigation of the importer(s).”

While it may be entirely coincidental, in the three months following the passage of TFTEA this year, CBP issued three Withhold Release Orders (WROs) covering the following goods coming from identified manufacturers in China: (a) soda ash- calcium chloride- caustic soda; (b) potassium- potassium hydroxide -potassium nitrate and (c) stevia and related products. Some observers may be wondering whether more WROs, involving other categories of imports, are coming soon.

This flurry of activity suggests that importers must begin to take notice and act. What can you do as an importer in the wake of the reinvigorated Forced Labor statute?

First, you can take steps to avoid products that already have been identified by CBP as being subject to a WRO. CBP has announced on its website that it does not target entire product lines or industries in problematic countries or regions, but rather acts on specific information relating to specific manufacturers/exporters and specific merchandise. CBP also publishes on its website a list of all WROs and “findings” (which also are published in the *Federal Register*) that have been issued by the Commissioner. *This is sufficient information on which to base precautionary measures for an importer to avoid the covered product.*

Second, even if you fail to identify goods that are covered by an outstanding WRO and they are detained by CBP at the ports of entry, there is still a chance that your goods may be allowed entry. Congress may have removed the consumptive demand exception with the amendment of the Forced Labor statute under TFTEA, but it did not otherwise amend the forced labor statute in such a way that voided pre-existing CBP Regulations which **allow importers of goods detained under a WRO to provide “proof of admissibility.”** 19 CFR 12.43 provides direct guidance on the information and evidence that one can provide to CBP for consideration as “proof of admissibility” of your detained shipment. Furthermore, if your proffered proof of admissibility (as outlined in the CBP Regulations) is not convincing to CBP, and the goods are finally denied admission, *i.e.*, “excluded” from entry into the US, you still may **appeal that decision by filing a protest.**

Third, you may **seek even further redress in the Court of International Trade** if CBP denies the protest under US Law and CBP Regulations (19 U.S.C. 1514 and 19 CFR Part 174).

Recommendations

So, in the wake of the revised Forced Labor statute (and possible fallout), we offer two suggestions for importers to consider:

1. **Avoid** the importation entirely by using the information that CBP publishes on its website in connection with products *already identified* as having been produced or manufactured with the use of forced labor; or
2. If avoidance is not possible, **defend** the importation using the legal tools provided in the CBP Regulations to support your position that your shipment was not produced with the use of forced labor as defined under section 307 of the Tariff Act.

If, however, you cannot follow or implement either of these two suggestions, you may find that, with the strikeout of a single sentence, the Forced Labor statute in the Tariff Act of 1930, as most recently amended by TFTEA, is now, indeed, a force to be reckoned with.

Find out more about the implications of the Forced Labor statute by contacting the author.

This article is an edited excerpt from "The U.S. Prohibition of Imports Made With Forced Labor: The New Law is a 'Force' to be Reckoned With," forthcoming in the Global Trade & Customs Journal, Volume 11, Issue 11 & 12 (2016).

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