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Section of Administrative Law and Regulatory Practice

# **11<sup>th</sup> Annual Homeland Security Law Institute: The Supply Chain – The Weakest Link: Vulnerabilities and Solutions**

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## 1. Key Links: Recent Trade and Customs Legislation

Several major new pieces of trade and customs legislation were signed into law by President Obama in 2015 and 2016 including the Trade Promotion Authority (TPA), the Trade Preferences Extension Act (TPEA) and the Trade Facilitation and Trade Enforcement Act (TFTEA). Additional Information on this recent trade legislation may be found at the following links:

Trade Promotion Authority: <https://www.congress.gov/114/plaws/publ26/PLAW-114publ26.pdf>

Trade Preferences Extension Act of 2015:  
<https://www.congress.gov/114/plaws/publ27/PLAW-114publ27.pdf>

Trade Facilitation and Trade Enforcement Act (TFTEA) (which includes Title IV, the “Enforce and Protect Act”):  
<https://www.congress.gov/114/plaws/publ125/PLAW-114publ125.pdf>



## 2. Customs and Border Protection (CBP): Forced Labor Overview

Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307) prohibits the importation of merchandise mined, produced or manufactured, wholly or in part, in any foreign country by forced labor – including forced child labor. Such merchandise is subject to exclusion and/or seizure, and may lead to criminal investigation of the importer(s).

When information reasonably but not conclusively indicates that merchandise within the purview of this provision is being imported, the Commissioner of U.S. Customs and Border Protection (CBP) may issue withhold release orders pursuant to 19 C.F.R. § 12.42(e). If the Commissioner is provided with information sufficient to make a determination that the goods in question are subject to the provisions of 19 U.S.C. § 1307, the Commissioner will publish a formal finding to that effect in the Customs Bulletin and in the *Federal Register* pursuant to 19 C.F.R. § 12.42(f).

### How You Can Help

CBP regulations state that *any* person who has reason to believe that merchandise 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 (19 C.F.R. § 12.42). This may be accomplished by submitting detailed information to CBP which satisfies the requirements of 19 C.F.R. § 12.42(b).

Trade fraud violations may also be reported via the e-Allegations Online Trade Violation Reporting System at <https://apps.cbp.gov/eallegations>. Allegations may be reported anonymously. The more detailed and timely the information you provide, the more likely the enforcement action can be successful.

- If you are a member of the media, please visit the Office of Public Affairs at [www.cbp.gov/newsroom/press](http://www.cbp.gov/newsroom/press).
- If you would like information about CBP's Forced Labor program, please contact <https://help.cbp.gov/app/ask>.
- If you wish to report allegations of forced labor violations, please submit them to CBP at the following address:  
<https://eallegations.cbp.gov/Home/Index2>.



## Key Points

- The [Trade Facilitation and Trade Enforcement Act of 2015](#) was signed by the President on February 24, 2016. The law repealed the “consumptive demand” clause in 19 U.S.C. § 1307. The clause had allowed importation of certain forced labor-produced goods if the goods were not produced “in such quantities in the United States as to meet the consumptive demands of the United States.” Repeal of the consumptive demand exception should enhance CBP’s ability to prevent products made with forced labor from being imported into the United States.
- CBP acts on information concerning specific manufacturers/exporters and specific merchandise. The agency does not generally target entire product lines or industries in problematic countries or regions.
- CBP partners with U.S. Immigration and Customs Enforcement and other participating U.S. government agencies to investigate forced labor allegations.
- CBP encourages stakeholders in the trade community to closely examine their supply chains to ensure goods imported into the United States are not mined, produced or manufactured, wholly or in part, with prohibited forms of labor, i.e., slave, convict, forced child, or indentured labor.
- The list below shows all withhold release orders issued by the Commissioner and findings published in the *Federal Register*. CBP does not generally publicize specific detentions, re-exportations, exclusions, or seizures of the subject merchandise that may have resulted from the withhold release orders or findings.



### Forced Labor Enforcement, Withhold Release Orders, Findings, and Detention Procedures

#### CBP Forced Labor Enforcement

CBP acts on information concerning specific manufacturers/exporters and specific merchandise. The agency does not generally target entire product lines or industries in problematic countries or regions. CBP enforces Withhold Release Orders and Findings to prevent goods made with forced labor from entering the U.S. commerce.

#### Withhold Release Orders

When information reasonably but not conclusively indicates that merchandise within the purview of this provision is being imported, the Commissioner may issue withhold release orders (WROs), 19 C.F.R. § 12.42(e).

- CBP requires information that is reasonable but not conclusive for issuance of a WRO.

If your merchandise is withheld from release (detained):

- Importers may export the detained shipments or contend that the goods were not made with forced labor. Shipments subject to WROs may be subject to exclusion.
- To obtain release of shipments subject to WRO, importers must submit, within 3 months following the importation, a certificate of origin and a detailed statement demonstrating that the subject merchandise was not produced with forced labor, e.g., a supply chain audit report. Evidence will be evaluated on a case-by-case basis. If the proof submitted by the importer is deemed satisfactory, CBP will release the goods.
- If the proof submitted does not establish the admissibility of the merchandise, or if none is provided, CBP will exclude the shipment.

#### Findings

If the Commissioner is provided with information sufficient to make a determination that the goods in question are subject to the provisions of 19 U.S.C. § 1307, the Commissioner will publish a formal finding to that effect in the Customs Bulletin and in the Federal Register, 19 C.F.R. § 12.42(f).

- Findings require conclusive evidence, i.e., probable cause that the imported goods are made with forced labor.

If your imported merchandise is subject to a finding you may seek release by:

- Submitting, within 3 months following the importation, a certificate of origin and a detailed statement demonstrating that the subject merchandise was not produced with forced labor, e.g., a supply chain audit report. Evidence will be evaluated on a case-by-case basis. If the proof submitted by the importer is deemed satisfactory, CBP may release the goods.
- If the proof submitted does not establish the admissibility of the merchandise, or if none is provided, the merchandise shall be seized for violation of 19 U.S.C. §1307, for goods subject to a finding only.

#### WRO or Finding Modifications

- WROs/findings stay in effect until revoked; they may be revoked or modified if evidence shows the subject merchandise was not made with forced labor, is no longer being produced with forced labor, or is no longer being, or likely to be, imported into the U.S.

For additional information and a complete list of WROs and Findings, please visit:  
<https://www.cbp.gov/trade/trade-community/programs-outreach/convict-importations>



## U.S. Customs and Border Protection Forced Labor Enforcement, Points of Contact

### Forced Labor Law - 19 U.S.C. 1307

Section 307 of the Tariff Act of 1930 prohibits the importation of merchandise mined, produced or manufactured, wholly or in part, in any foreign country by forced labor – including forced child labor. Such merchandise is subject to exclusion and/or seizure, and may lead to criminal investigation of the importer(s).

CBP acts on information concerning specific manufacturers/exporters and specific merchandise. The agency does not generally target entire product lines or industries in problematic countries or regions.

### Forced Labor Enforcement

CBP partners with U.S. Immigration and Customs Enforcement and other participating U.S. government agencies to investigate forced labor allegations.

CBP encourages stakeholders in the trade community to closely examine their supply chains to ensure goods imported into the United States are not mined, produced or manufactured, wholly or in part, with prohibited forms of labor, i.e., slave, convict, forced child, or indentured labor.

You may visit CBP's website for a list of all Withhold Release Orders or Findings.  
<https://www.cbp.gov/trade/trade-community/programs-outreach/convict-importations>

### How You Can Help?

CBP regulations state that *any* person who has reason to believe that merchandise 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 (19 C.F.R. § 12.42). This may be accomplished by submitting detailed information to CBP which satisfies the requirements of 19 C.F.R. § 12.42(b).

### Who Do You Contact?

#### Media Inquiries

If you are a member of the media, please contact the Office of Public Affairs at [cbpmediarelations@cbp.dhs.gov](mailto:cbpmediarelations@cbp.dhs.gov).

### Forced Labor Information or Allegations

If you wish to meet with CBP to discuss CBP enforcement of the forced labor statute or to report allegations of forced labor violations, please contact the Office of Trade at [trade.enforcement@cbp.dhs.gov](mailto:trade.enforcement@cbp.dhs.gov) or you may send information to:

U.S. Customs and Border Protection  
1300 Pennsylvania Avenue NW  
Washington, DC 20229

### Trade Fraud Allegations

Other trade fraud violations may be reported via the e-Allegations Online Trade Violation Reporting System at <https://apps.cbp.gov/eallegations>. Allegations may be reported anonymously.

The more detailed and timely the information you provide, the more likely the enforcement action is to be successful.



# Trade Facilitation and Trade Enforcement Act of 2015

## *Repeal of the Consumptive Demand Clause*

### Background:

Section 307 of the **Tariff Act of 1930** (19 U.S.C. § 1307) prohibits the importation of merchandise that has been mined, produced, or manufactured, wholly or in part, in any foreign country by forced labor – including prison labor and forced child labor. Such merchandise is subject to exclusion and/or seizure, and may lead to criminal investigation of the importer(s).

The **Trade Facilitation and Trade Enforcement Act of 2015**, signed by the President on February 24, 2016, strengthens the capabilities of U.S. Customs and Border Protection (CBP) to enforce U.S. trade laws and regulations. More specifically, the new law repeals the “consumptive demand” clause in 19 U.S.C. § 1307, which allowed importation of forced-labor goods, “if the goods were not produced in such quantities in the United States as to meet the consumptive demands of the United States.”

The **repeal of the consumptive demand exception enhances CBP’s ability to prevent products made with forced labor** from being imported into the United States.

### How can you support CBP’s efforts to prevent forced labor imports?

CBP depends and acts on information. CBP encourages *anyone* with reason to believe that merchandise produced by forced labor is being, or is likely to be imported into the United States, to communicate his or her belief to any U.S. port director or the commissioner of CBP.

- ◆ Submit a **detailed information to CBP** that satisfies the requirements of 19 C.F.R. § 12.42(b)
- ◆ Instructions on how to submit information are provided at: <http://www.cbp.gov/trade/trade-community/programs-outreach/convict-importations>
- ◆ The above information is necessary as the law is **not an automatic ban** on whole categories of goods from specific countries

### The repeal of the consumptive demand clause will promote the following benefits:

- ◆ Enhanced ability for CBP to prevent products made by forced labor (i.e., slave, convict, forced child labor, or indentured labor) from being imported into the United States
- ◆ Leveled playing field for U.S. industry through a fair environment in which American manufacturers do not compete with foreign manufacturers or U.S. importers benefiting from the use of forced labor
- ◆ Increased ability to safeguard human rights and improve labor standards in the global supply chain through CBP’s enhanced authority to address violations and prevent future abuses from forced labor
- ◆ Expedited review; after CBP determines that sufficient information has been provided to warrant a withhold release order (WRO), consumptive demand considerations will no longer hinder issuance of the order

### CBP Next Steps:

- ◆ Amend the regulations at 19 CFR § 12.42(b), which require certain information pertaining to consumptive demand, in order to comport with the updated law
- ◆ Continue to collaborate with U.S. Immigration and Customs Enforcement and other agencies to vigorously enforce U.S. trade laws





# Trade Facilitation and Trade Enforcement Act of 2015

## *Repeal of the Consumptive Demand Clause - Frequently Asked Questions (FAQs)*

### **Q: How did the Trade Facilitation and Trade Enforcement Act (TFTEA) change forced labor enforcement?**

A: The law repeals the “consumptive demand” exception in 19 U.S.C. § 1307. The exception had allowed importation of certain forced labor-produced goods if the goods were not produced “in such quantities in the United States as to meet the consumptive demands of the United States.”

### **Q: Does the new law change the Withhold Release Order (WRO)/finding process?**

A: Yes and no. The process is essentially the same, although the submission of information related to consumptive demand issues is no longer required. The significant change is that CBP is no longer legally required to weigh consumptive demand considerations to process information concerning forced labor.

### **Q: Will CBP use the Department of Labor’s (DOL) forced labor lists to stop shipments?**

A: DOL produces forced labor lists pursuant to a statutory requirement and an executive order. DOL is required to use different standards to publish the commodities on its lists from the standards that CBP must follow to issue WROs/findings. Furthermore, CBP does not generally target entire product lines or industries in problematic countries or regions. However, CBP may use the DOL lists as source documents for research purposes.

### **Q: How will CBP update the regulations?**

A: CBP will update the regulations at 19 C.F.R. § 12.42-12.44 to implement the legislation and insert clarifying language.

### **Q: What happens after issuance of WROs or findings?**

A: Shipments of merchandise subject to WROs will be detained. Pursuant to 19 C.F.R. § 12.42, importers have the opportunity to either re-export the detained shipments or to submit information to CBP demonstrating that the goods are not in violation of 19 U.S.C. § 1307 – see regulation 19 C.F.R. § 12.43. Shipments subject to findings can be excluded or seized.

### **Q: Is the receipt of a forced labor petition sufficient to stop trade?**

A: No - just the receipt of a petition is not enough. Forced labor petitions are reviewed to ensure the information supplied in the petitions meets the standards outlined in CBP regulations prior to the issuance of a WRO or finding.

### **Q: How long do WROs/findings last?**

A: WROs/findings stay in place until revoked; WROs/findings may be revoked if evidence shows the subject merchandise was not made with forced labor; is no longer being produced with forced labor; or is no longer being, or likely to be, imported into the United States.

### **Q: Why had CBP enforced the forced labor statute only 39 (now 41) times in over 85 years?**

A: This list on [the CBP website](#) shows all WROs issued by the Commissioner and findings published in the Federal Register. CBP does not generally publicize specific detentions, re-exportations, exclusions, or seizures of the subject merchandise that may have resulted from the WROs or findings.

### **Q: Why hadn’t CBP issued WROs in nearly 15 years?**

A: CBP can only act when it obtains evidence regarding violation of section 1307 sufficient to warrant further activity. Additionally, the existence of the consumptive demand exception historically provided violators a defense to section 1307 enforcement action. Repeal of this exception provides CBP with a more robust ability to consider information and petitions alleging violations of 19 U.S.C. § 1307. Recent WRO’s issued were the result of petitions filed recently (within the past year) with CBP.

### **Q: How can an importer proactively avoid being affected by a WRO?**

A: Importers must exercise due diligence over their supply chains and understand where and how their products are manufactured or produced in whole or in part. The Department of Labor produces reports on forced labor and importers may also monitor CBP’s website which lists all foreign entities and their commodities subject to an active WRO.



## **7. US Customs Bill Addresses Trade Remedy Enforcement, IPR Protection and US Trade Agreements, by Scott S. Lincicome and Brian Picone, White & Case LLP**

**On February 24, 2016, President Obama signed into law the Trade Facilitation and Trade Enforcement Act ("the Act"), which covers, inter alia, US trade remedy law enforcement, intellectual property rights (IPR) protection by US trading partners, and US trade negotiations and agreements.**

Key features of the Act include (i) a new process for US Customs and Border Protection (CBP) to investigate claims of antidumping (AD) and countervailing duty (CVD) evasion; (ii) a requirement that the US Trade Representative (USTR) develop IPR "action plans" for countries placed on the Priority Watch List in its annual Special 301 report; (iii) provisions permitting the Trade Promotion Authority (TPA) law to apply, under certain circumstances, to US trade agreements with countries that allegedly do not provide sufficient protections against human trafficking; and (iv) the elimination of the "consumptive demand" exception to the general US prohibition on the importation of goods produced using forced or indentured labor. The Act also establishes new US trade negotiating objectives related to trade remedy law enforcement, fisheries, the environment, and immigration. These provisions, along with other sections of the Act summarized below, could have implications for US importers or foreign trading partners of the United States.

### **Trade Remedies**

#### **New procedures for AD/CVD evasion investigations**

Title IV of the Act establishes new procedures to be followed by CBP when CBP investigates claims of evasion of antidumping and countervailing duties. These provisions could impose new burdens on US importers, because CBP now has to initiate a formal investigation whenever information "reasonably" available to an interested party "reasonably" supports an allegation that a US importer's materially false or incomplete entry statements have resulted in an "evasion" of AD/CVD cash deposits or duty payments (a low threshold). Implementing Title IV could also pose challenges for CBP, which – unlike the US Department of Commerce (DOC), for example – is unaccustomed to following the formalities that Title IV will now impose on CBP's "evasion" investigations (e.g., deadlines, notices, questionnaires, verifications, administrative reviews, and judicial reviews). CBP must implement the new investigation procedures within 180 days after the date of enactment of the Act (i.e., by August 21, 2016).



The investigation procedures established by Title IV are as follows:

**Initiations.** CBP must initiate an evasion investigation within 15 business days after either (i) an "interested party" files an allegation (i.e., a claim that merchandise covered by an AD/CVD order has been entered into the United States through evasion) that is "reasonably" supported by information "reasonably" available to it; or (ii) any other federal agency provides CBP with information "reasonably" suggesting evasion.[1] Evasion is defined as entering merchandise subject to an AD/CVD order by means of material and false statements or material omissions that result in a lowering or elimination of an AD/CVD payment or cash deposit.

**Investigations.** During its investigation, CBP may issue questionnaires, conduct verifications, and draw adverse inferences for failures to cooperate. If CBP cannot determine whether the relevant AD/CVD order covers the merchandise to which an allegation refers, CBP may refer only this scope issue to DOC. (The Act also creates in DOC a new position for a Director of the Trade Remedy Law Enforcement Division, who liaises with CBP in preventing evasion.)

**Interim measures.** Within 90 days after initiating an investigation, CBP must determine whether there is a "reasonable suspicion" that the covered merchandise was entered into the United States through evasion. If CBP decides that there is such a reasonable suspicion, CBP must suspend liquidation of each unliquidated entry of the covered merchandise and, if CBP determines that they are necessary, require single transaction bonds or cash deposits.

**Determinations.** Within 300 calendar days after initiation, CBP must determine, based on "substantial evidence," whether the covered merchandise was entered through evasion. This deadline can be extended by 60 additional calendar days if CBP determines that the investigation is extraordinarily complicated. CBP must make the results of its determination available to interested parties and others within 5 days after it is issued.

**Effect of determinations.** If CBP makes an affirmative determination, it must (i) suspend (or continue to suspend) liquidation of the covered merchandise; (ii) notify DOC of the determination and ask DOC to determine the applicable cash deposit or AD/CVD rates; and (iii) require either cash deposits or duty payments based on those rates. CBP may also take additional enforcement measures as it deems



appropriate, such as initiating a 19 U.S.C. § 1592 or 1595a penalty proceeding or recommending that U.S. Immigration and Customs Enforcement (ICE) initiate a civil or criminal investigation. In addition, CBP may require the importer to deposit estimated duties at the time of entry for future importations.

**Administrative reviews.** Either the accused person or the interested party making the allegation may file an appeal for an administrative review of CBP's determination within 30 business days after the determination is made. This review is "de novo," meaning without deference to any part of the decision previously made in the matter. CBP must complete its administrative review within 60 business days after it receives the appeal.

**Judicial reviews.** The United States Court of International Trade (CIT) will review CBP's final determination if, within 30 business days after it, either the accused person or the person making the allegation challenges (i) whether CBP "fully" complied with required procedures; or (ii) whether CBP's decision was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

#### Cooperation agreements with foreign countries

Title IV also directs the US Treasury Department to negotiate bilateral agreements to combat trade remedy evasion, and makes it a principal trade negotiating objective of the United States to ensure that future US trade agreements contain anti-evasion provisions. Pursuant to Section 414 of the Act, the Secretary of the Treasury must seek to negotiate and enter into bilateral agreements with foreign customs authorities "for purposes of cooperation on preventing evasion of the trade remedy laws of the United States and the trade remedy laws of the other country." The Secretary must seek to include in such agreements provisions that allow (i) the sharing of information to determine if evasion has occurred; (ii) the verification of such information; and (iii) the participation of officials from the importing country in verification activities conducted by the exporting country, including through site visits. Another recommended provision of such agreements would state that, if the exporting country does not allow the importing country to participate in verification activities, the importing country may take this fact into consideration when assessing the compliance of the exporting country's exports with the importing country's trade remedy laws.

Furthermore, Section 415 makes it a principal trade negotiating objective of the United States to include the information sharing and verification provisions listed above in all future US trade agreements, including those currently under



negotiation. However, this principle trade negotiating objective is not an amendment to the TPA law, which contains most US trade negotiating objectives and is set to expire on July 1, 2018 (with an optional extension to July 1, 2021). Rather, this principal trade negotiating objective is a standalone measure separate from the TPA law, and will remain in effect unless it is repealed.

## Intellectual Property

### Intellectual property rights (IPR) action plans for Priority Watch List countries

Section 610 of the Act directs USTR to identify specific steps that certain foreign countries can take to improve their IPR environments, and authorizes the President to take actions – which may include formal investigations and penalties, such as suspension of duty-free treatment under trade preference programs – against countries that fail to implement USTR's recommendations.

## Background

The Act requires USTR to develop IPR "action plans" for certain countries that it places on the "Priority Watch List" in its annual "Special 301" report on IPR protection and enforcement by US trading partners. In accordance with the Special 301 provisions of the Trade Act of 1974 ("Trade Act"), USTR identifies in the Special 301 report any foreign countries that allegedly (i) deny adequate and effective protection of IPR; or (ii) deny fair and equitable market access to US persons that rely on IPR protection.[2] Within the Special 301 report, USTR places on the Priority Watch List those countries in which "particular problems" allegedly exist with respect to IPR protection, enforcement, or market access for persons relying on IPR.

## Action Plan Requirements

Pursuant to Section 610, USTR must, within 90 days after submitting its annual National Trade Estimate (NTE) report to Congress, develop an IPR "action plan" for any foreign country that has remained on the Priority Watch List for at least one year. The action plan must contain specific benchmarks, such as legislative, institutional, enforcement, or other actions that USTR deems necessary for the country to achieve adequate IPR protection and market access for persons relying on IPR. USTR must also provide an annual report to Congress describing each country's progress in meeting its action plan benchmarks. The Act does not require USTR to consult with foreign government representatives or other stakeholders when developing the action plan.



## Implications

If USTR determines that a country has not substantially complied with its action plan benchmarks within one year after the action plan is developed, the President is authorized to "take appropriate action" with respect to the country. The Act does not list specific "appropriate" actions that the President may take, leaving the President with discretion in the event that a country does not comply with its action plan. However, authorities available to the President include potential designation of the country as a "Priority Foreign Country" under the Special 301 provisions, triggering a Section 301 investigation of that country.[3] If USTR determines that the foreign government practices which warranted the PFC designation (and the resulting investigation) involve US rights under a trade agreement (e.g., the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPs")), USTR must initiate dispute settlement procedures under the applicable trade agreement and base the determination of its Section 301 investigation on the results of those proceedings.[4] If, however, USTR determines that the practices which warranted the PFC designation do not involve US rights under a trade agreement, USTR will conduct its own investigation under Section 301.[5] The investigation would seek to determine whether the country's IPR-related acts, policies, and practices are "unreasonable or discriminatory" and "burden or restrict United States commerce"[6] because (i) they deny provision of "adequate and effective protection of intellectual property rights" (notwithstanding the fact that the country may be in compliance with the TRIPs Agreement); or (ii) they deny provision of "non-discriminatory market access opportunities for United States persons that rely upon intellectual property protection[.]"[7] Section 301 investigations may result in the imposition of sanctions against a PFC, including withdrawal, limitation, or suspension of duty-free treatment afforded to the PFC under trade preference programs such as the Generalized System of Preferences (GSP).[8] Other sanctions authorized by the statute include import duties and fees or restrictions on the supply of services, but these provisions predate the WTO, have not been used against WTO Members, and are unlikely to be used in the future, as their use would raise concerns under the GATT and the GATS (in particular the most-favoured-nation (MFN) provisions of these agreements).

## Import-related protection of IPR

Section 302 of the Act requires CBP to provide IPR holders with undredacted images of imported merchandise that CBP suspects of violating a copyright or trademark, ending CBP's previous practice of redacting all identifying markings and codes before sending images to the IPR holder for authentication. Pursuant to



Section 302, if CBP (i) "suspects" that imported merchandise violates a copyright or trademark recorded with CBP; and (ii) determines that examination of the merchandise by the IPR holder would help CBP determine whether a violation exists, CBP must supply the IPR holder with unredacted images of the merchandise and its packaging and labels, and may also provide the IPR holder with unredacted samples of the merchandise.

#### [New Chief Trade Negotiator for IPR issues](#)

Section 609 establishes a new "Chief Innovation and Intellectual Property Negotiator" at USTR. This position will be responsible for conducting US trade negotiations and enforcing agreements related to intellectual property. This change reflects certain US lawmakers' increasing prioritization of IPR issues as a component of US trade agreements.

#### [Amendments to the Trade Promotion Authority law](#)

The Act makes several modifications to the TPA law enacted in June 2015, including new US trade negotiating objectives and a waiver process permitting the TPA law to apply to trade agreements with countries that allegedly do not provide sufficient protections against human trafficking. These changes will take effect as if they were included in the enactment of the TPA law, meaning that they will apply to agreements entered into (i.e., signed) by the President while the TPA law is in force. Although trade negotiating objectives are not binding on US trade negotiators, they are generally followed.

#### [Negotiating objectives on immigration, climate change, and fisheries](#)

Section 914 amends the TPA law by establishing two new trade negotiating objectives for US trade agreements with foreign countries: (i) to ensure that trade agreements do not require changes to the immigration laws of the United States or obligate the United States to grant access or expand access to visas; and (ii) to ensure that trade agreements do not establish obligations for the United States regarding greenhouse gas emissions measures, including obligations that require changes to United States laws or regulations. These objectives largely codify existing US practice, however, because the United States has avoided taking on commitments in these politically-sensitive areas in recent FTAs.

Section 914 further amends the TPA law by establishing new principal US negotiating objectives regarding fisheries: (i) to obtain competitive opportunities for United States exports of fish, seafood, and shellfish products in foreign markets, including by reducing or eliminating tariff and nontariff barriers; (ii) to



eliminate fisheries subsidies that distort trade; (iii) to pursue transparency in fisheries subsidies programs; and (iii) to address illegal, unreported, and unregulated fishing. The recently-signed Trans-Pacific Partnership (TPP) appears to reflect these objectives, as it includes both transparency measures and commitments to eliminate certain fisheries subsidies.

### Waiver process for "Tier 3" countries

Section 914 permits the TPA law to apply, under certain circumstances, to US FTAs with "Tier 3" countries (i.e., countries whose governments, according to the US State Department's annual Trafficking in Persons (TIP) Report, do not comply with certain "minimum standards" that pertain to the elimination of human trafficking). Though the exception could be used to facilitate congressional consideration of future US trade agreements with Tier 3 countries, invoking the inception would likely be politically contentious in the United States.

The TPA law provides that legislation to implement trade agreements between the United States and Tier 3 countries shall be ineligible for the expedited (i.e., "fast-track") legislative procedures established by TPA, thus diminishing (i) any such trade agreement's likelihood of being approved by Congress; and (ii) a Tier 3 country's willingness to sign a trade agreement with the United States.[9] Section 914 amends this provision of the TPA law by providing that trade agreements with Tier 3 countries shall be eligible for fast-track consideration if the President submits a letter to the appropriate congressional committees stating that the Tier 3 country "has taken concrete actions to implement the principal recommendations with respect to that country" in the State Department's most recent TIP report. The letter must be accompanied by supporting documentation providing "credible evidence of each such concrete action, including copies of relevant laws or regulations adopted or modified, and any enforcement actions taken[.]" Though this exception to the general prohibition would allow FTAs with Tier 3 countries to be considered under TPA procedures, invoking the exception would be politically contentious and would invite congressional and public scrutiny of the Tier 3 country's laws, policies, and enforcement actions.

Section 914 also requires the President to justify the removal of any country from the Tier 3 list by providing supporting documentation to Congress. Such documentation must include "a detailed description of the credible evidence supporting the change in listing of the country, accompanied by copies of documents providing such evidence[.]" This reporting requirement could make it more burdensome to justify changes in the TIP report's designation of potential FTA partners.





## Other significant provisions

### Engagement on currency exchange rate policies

Section 701 directs the Treasury Department to hold bilateral discussions with countries whose currencies are allegedly undervalued, and, in the event that the country does not take steps to rectify the undervaluation, requires the President to take remedial actions against the country unless doing so would be detrimental to US interests. The remedial actions authorized by Section 701 are limited, however, to restrictions on development financing and government procurement, increased IMF surveillance, and reconsideration of the relevant country's suitability as a potential FTA partner.

Under Section 701, the US Treasury Department is required to submit biannual reports to Congress containing analyses of the macroeconomic and exchange rate policies of major US trading partners – expanding on the existing biannual reporting requirement established by the Omnibus Trade and Competitiveness Act of 1988. The new reports must provide "enhanced analyses" of the policies of any major US trading partner that: (i) has a significant bilateral trade surplus with the United States; (ii) has a material current account surplus; and (iii) has engaged in "persistent one-sided intervention in the foreign exchange market." Treasury is required to initiate "enhanced bilateral engagement" with each country meeting these criteria to express the concern of the United States, to urge policy reforms, and to advise the country that the United States may take remedial actions. However, the Treasury Secretary may waive the requirement to commence enhanced bilateral engagement if doing so would adversely impact the US economy or national security.

If, within one year after enhanced bilateral engagement begins, Treasury determines that the country has failed to adopt appropriate policies to correct the alleged undervaluation and surpluses, the President is required to take one or more of the following actions: (i) prohibit the Overseas Private Investment Corporation (OPIC) from approving any new financing with respect to a project located in that country; (ii) prohibit the US federal government from procuring goods or services from that country (except where such action would be inconsistent with US obligations under international agreements); (iii) instruct the US Executive Director of the IMF to call for rigorous surveillance of the macroeconomic and exchange rate policies of that country (and, as appropriate, formal consultations on findings of currency manipulation); and/or (iv) instruct USTR to take into account the country's alleged failure to cooperate when assessing whether to enter into a



bilateral or regional trade agreement with that country. The President may choose not to take any remedial action, however, if doing so would adversely impact the US economy or national security.

### Repeal of the "consumptive demand" exception for goods produced using forced labor

Section 902 of the Act repeals the "consumptive demand" exception to the Tariff Act of 1930's general prohibition on the importation into the United States of "[a]ll 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[.][10] The consumptive demand exception provided that such goods might be imported into the United States – despite being the product of forced, indentured, or convict labor – if similar goods were not produced in the United States in sufficient quantities to satisfy US consumer demand.

The repeal of the consumptive exception took effect on March 10, 2016. As a result, if CBP orders that imported merchandise be denied entry on the grounds that the merchandise is allegedly the product of forced, indentured, or convict labor, US importers will no longer be able to invoke the consumptive demand exception to challenge CBP's order. CBP may only impose such orders following a formal investigation under Section 307 of the Tariff Act, which CBP may initiate in response to a petition by an interested party or a claim from a CBP official. CBP's orders under Section 307 are company- and product-specific, meaning that they apply only to the companies and products identified in the petition and investigated by CBP, rather than all products of the same kind from the exporting country.

### Negotiating objectives related to Israel

Section 909 establishes three new principal trade negotiating objectives designed to discourage US trading partners from boycotting, divesting from, or imposing sanctions against Israel. These new objectives are (i) to discourage actions by potential trading partners that directly or indirectly prejudice or otherwise discourage commercial activity solely between the United States and Israel; (ii) to discourage politically motivated boycotts of, divestment from, and sanctions against Israel and to seek the elimination of politically motivated nontariff barriers on Israeli goods, services, or other commerce imposed on Israel; and (iii) to seek the elimination of state-sponsored unsanctioned foreign boycotts of Israel, or



compliance with the Arab League Boycott of Israel, by prospective trading partners.

These objectives apply to negotiations commenced before, on, or after the date of the enactment of the Customs bill (i.e., February 24). However, the above provision is not an amendment to the TPA law, which contains most US trade negotiating objectives and will remain in force for a limited time. Rather, the above provision will exist as a standalone measure separate from the TPA law, and thus will remain in force permanently unless it is repealed.

### Trade preference program for Nepal

Section 915 creates trade preferences allowing for duty-free entry of certain luggage, travel goods, textiles, and apparel exported by Nepal to the United States. Trade preferences for these items will take effect on March 25, 2016, contingent upon a determination by the President that Nepal meets the eligibility criteria of the African Growth and Opportunity Act (AGOA). The trade preferences established by Section 915 may remain in effect until December 31, 2025 unless the President graduates Nepal from the program before that date.

### Increased de minimis threshold

Section 902 provides that individuals may import up to USD 800 in merchandise free of duties into the United States – a substantial increase over the previous de minimis threshold of USD 200. This increase took effect on March 10, 2016. The Act also encourages USTR to advocate that other countries establish "commercially meaningful" de minimis thresholds.

[1] - An "interested party" means (i) a foreign manufacturer, producer, or exporter, or the United States importer, of covered merchandise (or a trade or business association in which such entities comprise a majority of the membership); (ii) a manufacturer, producer, or wholesaler in the United States of a domestic like product; (iii) a certified union or recognized union or group of workers that is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a domestic like product; (iv) a trade or business association a majority of the members of which manufacture, produce, or wholesale a domestic like product in the United States; (v) an association a majority of the members of which is composed of interested parties described in items (ii), (iii), or (iv) with respect to a domestic like product; and (vi) if the covered merchandise is a processed agricultural product, a coalition or trade association that is



representative of either processors, processors and producers, or processors and growers.

[2] - 19 U.S.C. § 2242(a)

[3] - 19 U.S.C. § 2242(b)

[4] - 19 U.S.C. § 2413(a) and 19 U.S.C. § 2414(a)(1)

[5] - 19 U.S.C. § 2414(a)(2).

[6] - 19 U.S.C. § 2411(b)(1)

[7] - 19 U.S.C. § 2411(d)(3)(B)

[8] - 19 U.S.C. § 2411(c)

[9] - 19 U.S.C. § 4205(b)(6)

[10] - 19 U.S.C. § 1307

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**8. A Loophole in CBP’s Forced Labor Statute Just Closed, and Every U.S. Importer Should Take Note**, by Lars-Erik A. Hjelm, Bernd G. Janzen, Daniel F. Feldman & Christopher T. Timura, Akin Gump Strauss Hauer & Feld LLP

**The Forced Labor Statute and the Amendment**

In February, the U.S. Congress passed, and President Obama enacted, the Trade Facilitation and Enforcement Act of 2015 (TFEA). Among its provisions is an amendment to the customs laws—The Tariff Act of 1930, Section 307 (the “Forced Labor Statute” or “Section 307”). This statute provides that “[a]ll goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country” by convict, forced or indentured labor “shall not be entitled to entry . . . and the importation thereof is hereby prohibited.” Prior to the amendment, this prohibition on entry and importation only applied if the merchandise was also available in the United States and in sufficient quantities to meet U.S. consumptive demand. CBP sometimes relied upon the theory that the goods were not available in the United States and not in sufficient quantities to meet U.S. consumptive demand. Now, CBP is precluded from relying on this exception as a basis not to enforce the statute.

**Enforcement Background**

For many decades, CBP has implemented the Forced Labor Statute by regulations. The regulations mandate that CBP follow strict investigative and evidentiary procedures before issuing a detention order (called “an order to withhold release”) or a broader finding, which is published in the *Customs Bulletin* and the *Federal Register*. Basically, while anyone can make a referral to CBP for investigation (or it can be self-generated), CBP must have demonstrable evidence that ties the prohibited labor to the production and importation of the concerned merchandise. Even after a detention order or finding, the importer still has the opportunity to prove admissibility and has the right to challenge CBP in court, if appropriate. On the other hand, if the importer is unsuccessful, significant enforcement action can follow—including seizure, forfeiture and other civil/criminal penalties—not to mention crippling reputational harm.



CBP has often been criticized for using its prosecutorial discretion not to investigate or pursue cases, particularly those decisions based on the consumptive demand exception. The courts even affirmed CBP's authority to rely upon this exception, most recently in 2005 in a case involving cocoa production in Cote d'Ivoire (*International Labor Rights Fund, et al. v. United States*), which may have been decided differently today. However, CBP has been applauded when it brings to bear its significant resources to issue a finding and to defend it in court. For example, the result of *China Diesel Imports v. United States* was the prohibition from importation of diesel engines manufactured in China with prison labor.

With the elimination of the exception, and congressional and public pressure mounting to remove prohibited labor from supply chains, the expectation is that CBP and its investigative partners (e.g., Homeland Security and the Department of State) will devote ever more resources to enforcing this important statute.

### **Recent Surge in CBP Enforcement**

Until the end of March 2016, CBP had not issued a detention order or finding barring the entry of goods since 2000. Since that time, however, given increased awareness about corporate social responsibility and related legal developments, there has been an escalation in Section 307 interest and enforcement activity.

On March 29, 2016, following on the heels of the elimination of the consumptive demand exception, CBP issued two detention orders based on information obtained by CBP indicating that a Chinese company and its subsidiaries utilize convict labor in the production of certain commodities. The commodities barred from import by these orders are soda ash, calcium chloride, caustic soda, viscose/rayon fiber, potassium, potassium hydroxide and potassium nitrate. The expectation is that CBP will follow these orders with published findings.

On April 6, 2016, the International Labor Rights Forum's Cotton Campaign and Ruslan Myatiyev, a Turkmenistan national, filed a petition requesting that CBP bar the entry of certain specified cotton products into the United States that are allegedly being produced, wholly or in part, with cotton produced with forced labor in Turkmenistan. CBP has not, to date, acted on this petition and it is not clear if there is sufficient evidence in these referrals for investigation to allow CBP



to issue detention orders that would withstand an importer’s challenge—or judicial scrutiny.

Most recently, CBP created a trade enforcement task force that will focus on several areas, including shipments of items produced with forced or child labor. In its May 2, 2016, press release, CBP explains that the task force will “harness the agency’s collective trade enforcement expertise as a focal point for coordination with other government agency partners, including the Department of Commerce and U.S. Immigration and Customs Enforcement’s Homeland Security Investigations.”

#### **Four Reasons Why We Expect Increased Use of Section 307 Authority**

For several reasons, we think importers can expect more petitions and ensuing CBP enforcement activity in the near future.

First, amending Section 307 to close the consumptive demand loophole has been a regular target of many different stakeholder groups with an interest in barring imports of such items from the United States. These groups include domestic producers and their trade associations seeking to bar competition from foreign producers of the same goods, as well as religious, labor and human rights organizations, and consumer groups who seek to use Section 307 to combat human trafficking worldwide. Indeed, the original legislative purpose of the Forced Labor Statute was not to advance corporate social responsibility per se but to protect domestic industry from unfair competition. For several of these stakeholders, and especially when compared to such initiatives as civil litigation and reporting regimes like the California Transparency in Supply Chains Act and the UK Modern Slavery Act, the amended Section 307 is a stronger and more precise tool they can use to place unwanted pressure on governments and commercial interests that benefit from trafficked labor.

Second, Section 307 allows “any person who has a reason to believe” that merchandise is being produced with forced labor to file petitions with CBP. In contrast to other administrative proceedings, the phrasing of Section 307 confers standing on any person, regardless of whether the person has a demonstrated interest, property-based or otherwise, in the items being imported. Compare this with other trade remedies; for example, antidumping and countervailing duty



proceedings, where interested party status is more circumscribed. Section 307's broad standing requirement is an invitation for stakeholders with no direct economic stake in the matter to file Section 307 petitions.

Third, in part due to the advocacy described above, the State Department, Department of Labor and the International Labor Organization, among other international organizations, now make available detailed reports on labor and human rights condition around the world, including detailed listings of specific commodities being produced using coerced labor in different countries. The public availability of these reports makes it easier for petitioners to assert and CBP officials to investigate whether particular goods can be barred entry under Section 307.

Fourth, CBP itself has issued press releases and guidance to the public on Section 307, which provides a roadmap for petitioners seeking to avail themselves of the Section 307 process. CBP also has its own public policy interests in marshalling its resources to pursue cases more forcefully than it has in the past. The recently enacted TFEA also introduced a requirement for CBP to file an annual report with Congress detailing its activity under Section 307. This additional level of congressional oversight and accountability, coupled with continued advocacy from human rights and other groups, will likely further incent CBP to take action on further Section 307 petitions.

With this trend of rising Section 307 enforcement activity, U.S. importers would be well-served to examine their supply chains to ensure that they are adequately guarding against the economic and reputational damage that could arise from Section 307 action targeting their imports.