

US Customs & Border Protection Enforces Forced Labor Prohibition in First Action Against Vessel

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A Taiwanese-owned, Vanuatu-flagged fishing vessel is the first known enforcement target of its kind by US Customs and Border Protection (“CBP”) in its efforts to halt the importation of goods produced with forced labor.

On February 4, 2019, CBP issued a Withhold Release Order (“WRO”) against tuna and tuna products from fishing vessel Tunago No. 61, based on information that the vessel’s tuna had been harvested with the use of forced labor.¹ The WRO requires that all tuna and merchandise manufactured wholly or in part by Tunago No. 61 be detained at US ports of entry. The owner of this perishable cargo now must decide whether to export the cargo at the US port, if that option is available, or to demonstrate, if possible, that no forced labor was used in the product aboard the vessel. CBP’s enforcement follows a 2016 change in law requiring importers to ensure that imported merchandise is not “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.”²

Separately, on February 22, 2019, and in response to recommendations from outside stakeholders, CBP published a forced labor mapping process.³ Companies importing goods to the United States should consider seriously the risk of forced labor in their supply chains, in particular companies involved in high-risk industries and/or countries. Development and implementation of due diligence policies and procedures is essential for ensuring supply-chain integrity and mitigating enforcement risk.

US Protections against Forced Labor

US law prohibits forced labor and trafficking in persons. According to the International Labor Organization, this generates USD \$150 billion in illegal profits per year in the private economy. CBP partners with US Immigration and Customs Enforcement (“ICE”) and other participating US government agencies to investigate forced labor allegations.

The February 4 WRO issued against Tunago No. 61 is the first known civil enforcement action by CBP alleging use of forced labor against a fishing vessel, and the seventh action CBP has taken since Congress removed a loophole in the US Tariff Act of 1930 (“[Tariff Act](#)”) for banning the importation of goods made with forced labor.

¹ CBP, National Media Release, CBP Issues Detention Order on Tuna Harvested by Forced Labor Aboard the Tunago No. 61, [available here](#); CBP’s Withhold Release Orders and Findings page, [available here](#), confirming WRO date.

² 19 U.S.C. § 1307, as amended by the Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. 114-125 § 910.

³ CBP, Forced Labor Process, [available here](#).

For nearly 90 years, the Tariff Act⁴ has prohibited the importation of goods mined, produced or manufactured in any foreign country by forced, indentured, convict or child labor.⁵ Although the prohibition has been in place for decades, prior to the US Trade Facilitation and Trade Enforcement Act of 2015 ("**TFTEA**"),⁶ US statutes made an exception for importing merchandise made with forced labor where the consumption of the goods in the United States exceeded the domestic production capacity. Congress eliminated this loophole by amending the Tariff Act in 2016 with the TFTEA, requiring importers to ensure that there was no forced labor in imported merchandise. The repeal of this so-called "consumptive demand clause" expanded the scope of CBP's enforcement capability and reduced WRO implementation time by removing consumptive demand considerations from the review process.

Although CBP does not generally publicize specific detentions, re-exportations, exclusions, or seizures of merchandise that may have resulted from WROs, following passage of the TFTEA, CBP published six WROs that it issued targeting the imports of various goods, the majority of which were from China, specifically: (i) soda ash, calcium chloride and caustic soda; (ii) potassium, potassium hydroxide and potassium nitrate; (iii) stevia and its derivatives; (iv) peeled garlic; (v) toys; and (vi) cotton from and products produced with Turkmenistan cotton.⁷

Enforcement Process

Forced labor violations can result in civil penalties by CBP, including exclusion and/or seizure of relevant goods. In addition to CBP's civil enforcement actions, ICE's Homeland Security Investigations ("HSI") may institute criminal investigations against individuals or companies for involvement in the importation of prohibited goods. Since 2017, ICE has initiated 54 international cases on forced labor, made 66 related international arrests, and seized 4,397 related goods domestically and internationally.⁸

As captured in a new Forced Labor Process map issued by CBP on February 22, 2019,⁹ the provisions of 19 C.F.R. § 12.42 detail who may submit information on forced labor violations and the initial steps of CBP enforcement. CBP may initiate investigations into forced labor violations involving specific manufacturers/exporters and specific merchandise based on internal allegations (through information such as that provided in a CBP Form 28 Request for Information, or by port directors) or on allegations from an outside source (such as a third-party).¹⁰

CBP generally does not target entire product lines or industries,¹¹ but CBP (and ICE) do consider information that companies make available during their efforts to address forced labor risks in their supply chains, as well as external reports. Where such information reasonably, but not conclusively, indicates that specific merchandise is being or is likely to be imported in violation of the Tariff Act's forced labor prohibition, the CBP Commissioner may issue a WRO.¹² In this case, the Tunago No. 61 vessel was the subject of a series of reports, including a Greenpeace report in May 2018 documenting the prevalence of labor violations in Taiwan's distant water fishing fleets.¹³ The report states that interviews with crew "paint a picture of inhumane working and living conditions on board Tunago No. 61, and the abusive treatment of the crew in the months leading up to the captain's death."

It was the "reasonable belief" that the imported tuna products were in breach of the forced labor prohibition that was used by CBP to issue the WRO against the Tunago No. 61. CBP has the power to detain the subject

⁴ 19 U.S.C. § 307.

⁵ "Forced labor" is defined in the Tariff Act as "all work or service which is exacted from any person under the menace of any penalty for its nonperformance and for which the worker does not offer himself voluntarily." It explicitly includes forced or indentured child labor.

⁶ Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. 114-125 § 910.

⁷ See CBP's Withhold Release Orders and Findings page, *available here*.

⁸ ICE, Forced Labor and Forced Child Labor Fiscal Year 2017 Report to Congress, *available here*.

⁹ CBP, Forced Labor Process, *available here*.

¹⁰ 19 C.F.R. § 12.42 (a)-(d).

¹¹ CBP, Programs Administration, Forced Labor, *available here*.

¹² 19 C.F.R. § 12.42(e); CBP, Programs Administration, Forced Labor, *available here*.

¹³ Greenpeace, "Misery at Sea," *available here*.

merchandise, instruct port directors to withhold release of the subject merchandise, and begin to detain all future shipments within the WRO's scope.

The enforcement process in the US depends on when the attempted importation occurs. Following detention, CBP must determine whether to formally exclude the merchandise, or deem it admissible and release it for importation into the United States. An importer may submit information demonstrating that the detained subject merchandise does not violate the Tariff Act.

CBP may revoke a WRO if evidence shows that the subject goods were not made with forced labor, are no longer being produced with forced labor, or if the goods are no longer being, or likely to be, imported into the United States.¹⁴

Addressing Forced Labor Risks

The forced labor import prohibition applies to all importers of goods to the United States. According to published guidance, importers have a general obligation to exercise "reasonable care" and to take all necessary and appropriate steps to ensure that goods imported to the United States comply with all laws and regulations, including the Tariff Act.¹⁵ CBP and ICE may consider a company's statements of commitment and due diligence efforts when considering enforcement.

Companies are advised to address the risks of forced labor and trafficking through various measures, including ongoing operational and supply chain due diligence, obtaining US import certifications, prospective administrative rulings and the inclusion of forced labor provisions in contract terms.¹⁶ Those companies operating in high-risk industries and geographies in particular should closely examine the length of their supply chain for evidence of forced labor and trafficking risks, remediate where impacts are found, and document their efforts.¹⁷

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¹⁴ See CBP, FAQs, Trade Facilitation and Trade Enforcement Act of 2015: Repeal of the Consumptive Demand Clause, available [here](#).

¹⁵ CBP, Informed Compliance Publication, "What Every Member of the Trade Community Should Know: Reasonable Care," at page 14, available [here](#).

¹⁶ See generally 19 C.F.R. part 177.

¹⁷ As recommended by the US Department of the Treasury's Office of Foreign Assets Control ("OFAC"), ICE, and CBP in their North Korea Sanctions & Enforcement Actions Advisory: Risks for Businesses with Supply Chain Links to North Korea," available [here](#).