



NOTE

Closed Loophole, Open Ports: Section 307 of the Tariff Act and the Ongoing Importation of Goods Made Using Forced Labor

Matthew M. Higgins*

Abstract. Forced labor is a scourge that affects millions of people worldwide and poisons global supply chains. Products harvested, mined, manufactured, or packaged by forced laborers and enslaved persons line the shelves of American stores, even though section 307 of the Tariff Act has banned the import of these products for nearly 100 years. But this prohibition has virtually never been enforced due to a massive exception known as the consumptive demand loophole. That loophole was finally closed in early 2016.

This Note evaluates U.S. Customs and Border Protection's (CBP) efforts to enforce section 307 following the closing of the consumptive demand loophole. It shows that, although there has been a slight uptick in enforcement actions, the overwhelming majority of high-risk goods continue to be freely imported into the United States; though the loophole has been closed, access to U.S. ports remains open.

This Note then argues that continued underenforcement of the forced-labor ban is driven by several factors: CBP's decision to initiate narrow enforcement actions; significant identification issues and lack of access to information; insufficient funding; and the general nonreviewability of discretionary nonenforcement decisions. It then identifies two enforcement strategies employed by the recently enacted Uyghur Forced Labor Prevention Act—shifting enforcement efforts away from individual entities in favor of more sweeping orders that cover more goods and shifting the evidentiary burden onto importers—and argues that CBP should use both tools more broadly in its global enforcement efforts. Doing so will bring the agency closer to fulfilling its mandate of preventing the importation of goods made using forced labor.

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Introduction

A few years ago, we asked a slave newly freed on a cocoa farm in West Africa if he knew what happened to the cocoa he harvested. “No,” he said. . . .

So we asked him, what would you say to those millions of people who eat the chocolate made from the cocoa you have grown in slavery? “Tell them,” he said, “when they eat chocolate, they are eating my flesh.”¹

Products harvested, mined, manufactured, or packaged by forced laborers and enslaved persons inundate global supply chains and line the shelves of American stores. “[I]t’s virtually impossible to get dressed, drive to work, talk on the phone, or eat a meal without touching products tainted by forced labor.”² An estimated 27.6 million people worldwide are subjected to forced labor.³ This is considered a conservative estimate,⁴ and it is significantly higher than previous estimates made during recent decades.⁵

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1. Brief of Members of Congress Senator Blumenthal, Representative Smith, et al., as Amici Curiae Supporting Respondents at 14-15, *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021) (Nos. 19-416 & 19-453), 2020 WL 6322316 (quoting *The Ongoing Tragedy of International Slavery and Human Trafficking: An Overview: Hearing Before the Subcomm. on Hum. Rts. and Wellness of the Comm. on Gov’t Reform*, 108th Cong. 109 (2003) (statement of Kevin Bales, President, Free the Slaves)).
 2. Press Release, Rep. Carolyn B. Maloney, *Maloney Introduces Bipartisan Bill to Fight Human Trafficking* (Aug. 3, 2011), <https://perma.cc/MJ85-TKX6>.
 3. INT’L LABOUR ORG., WALK FREE & INT’L ORG. FOR MIGRATION, *GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE* 17 tbl.1 (2022) [hereinafter ILO 2022]. This Note focuses on forced labor in global commodity supply chains, including agriculture, fishing, mining, and manufacturing. The estimate of 27.6 million people includes 6.3 million victims of forced sexual exploitation and 3.9 million victims of state-imposed forced labor, for example in prisons. *Id.* Eliminating forced labor in these contexts requires different legal and regulatory interventions and warrants its own research. See, e.g., Sara Sun Beale, *Prosecuting Sexual Exploitation and Trafficking Abroad: Congress, the Courts, and the Constitution*, 27 DUKE J. GENDER L. & POL’Y 25, 26-28 (2020) (describing interventions to combat child sexual exploitation); Aaron Littman, *Free-World Law Behind Bars*, 131 YALE L.J. 1385, 1391, 1437-38 (2022) (arguing that applying “free-world regulatory law” to prisons “would hold promise as a tool for ameliorating” poor prison conditions, including the use of forced labor). Modern slavery is an umbrella term that includes both forced labor and forced marriage. See ILO 2022, *supra*, at 13. Forced marriage is beyond the scope of this Note.
 4. See INT’L LABOUR OFF. & WALK FREE FOUND., *GLOBAL ESTIMATES OF MODERN SLAVERY: FORCED LABOUR AND FORCED MARRIAGE* 9 (2017) [hereinafter ILO 2017]; ILO 2022, *supra* note 3, at 109 (noting the methodology used for both estimates was virtually identical).
 5. See, e.g., ILO 2017, *supra* note 4, at 9-10 (estimating that 24.9 million people were subjected to forced labor in 2016); SPECIAL ACTION PROGRAMME TO COMBAT FORCED LABOUR, INT’L LABOUR ORG., *ILO GLOBAL ESTIMATE OF FORCED LABOUR: RESULTS AND METHODOLOGY* 13 (2012) (estimating, based on data from 2002-2011, that 20.9 million people were subjected to forced labor); INT’L LABOUR OFF., *A GLOBAL ALLIANCE AGAINST FORCED LABOUR: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK* 10 (2005) (“Today, at least 12.3 million people are
footnote continued on next page”).

A significant amount of forced labor is used to produce goods that are ultimately consumed in the United States. The United States imports at least \$144 billion worth of “at-risk” goods every year,⁶ representing more than 40% of all such goods imported by G20 countries.⁷ This \$144 billion figure includes only the top five at-risk imports: laptops, computers, and mobile phones; garments; fish; cocoa; and sugarcane.⁸ Accordingly, it is likely an underestimate, and perhaps drastically so: Other estimates of the amount of at-risk goods that enter the United States each year approach \$400 billion.⁹ Though this Note focuses on forced labor that occurs outside the United States, forced labor within the United States is also a major problem: “[O]n any given day in 2016 there were 403,000 people living in conditions of modern slavery in the United States.”¹⁰

victims of forced labour worldwide.”). The current estimate is higher than previous estimates both on an absolute and per capita basis. ILO 2022, *supra* note 3, at 23 fig.3.

6. WALK FREE FOUND., *THE GLOBAL SLAVERY INDEX 2018*, at 137 (2018). Identification challenges make it difficult to identify exactly which goods are produced using forced labor, a difficulty discussed in Part I below. To deal with this challenge, anti-forced labor advocates have developed the concept of “at-risk” goods, which are goods produced under conditions and in locations that put them at risk of being produced by forced labor. *See id.* at 220-21. To reach its estimate that \$144 billion worth of at-risk goods are imported into the United States each year, *id.* at 137, the Walk Free Foundation combined multiple data sources, *see id.* at 220-22. It developed a list of at-risk goods by combining data from the U.S. Department of Labor’s *List of Goods Produced by Child Labor or Forced Labor* with its own findings based on a literature review of peer-reviewed publications and reports from governments, nongovernmental organizations, international organizations, and other sources. *Id.*; *see also* BUREAU OF INT’L LAB. AFFS., U.S. DEP’T OF LAB., *LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR* (2016), <https://perma.cc/DK32-36UP>. It then aggregated international trade data for these goods to estimate the amount of at-risk goods imported into the United States on an annual basis. WALK FREE FOUND., *supra*, at 222-23.
7. *See* WALK FREE FOUND., *supra* note 6, at 137. G20 member states account for roughly 75% of global trade. *About G20, G20*, <https://perma.cc/E3RS-AAD8> (archived Mar. 1, 2023).
8. WALK FREE FOUND., *supra* note 6, at iv.
9. *See* Jason Fields, *U.S. Ban on Slave-Made Goods Nets Tiny Fraction of \$400 Billion Threat*, REUTERS (Apr. 7, 2019, 11:28 PM), <https://perma.cc/FTD2-PTPZ> (citing an estimate from the Human Trafficking Institute); *see also infra* notes 56-58 and accompanying text (describing estimate challenges).
10. *United States*, WALK FREE GLOB. SLAVERY INDEX, <https://perma.cc/3X5X-S6U7> (archived Mar. 1, 2023). In addition, the Thirteenth Amendment permits slavery and involuntary servitude “as a punishment for crime whereof the party shall have been duly convicted.” *See* U.S. CONST. amend. XIII; *see also* Raja Raghunath, *A Promise the Nation Cannot Keep: What Prevents the Application of the Thirteenth Amendment in Prison?*, 18 WM. & MARY BILL RTS. J. 395, 417-19 (2009) (noting courts have consistently rejected Thirteenth Amendment challenges to forced labor in prisons).

Forced labor causes many harms.¹¹ Most obviously, victims of forced labor experience significant trauma. Many are subjected to inhumane living conditions¹² and have their movement severely restricted.¹³ Many are physically isolated from their families, communities, and houses of worship,¹⁴ and are given insufficient access to food, water, sanitation, and news media.¹⁵ Many are forced to work extreme hours¹⁶ and are physically and emotionally abused.¹⁷ Many are paid little or nothing at all, see their wages withheld, and incur debts they are unable to pay off, forcing them to work in perpetuity.¹⁸ Still others are forced to perform hazardous jobs without adequate safety

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11. See generally SPECIAL ACTION PROGRAMME TO COMBAT FORCED LABOUR, INT'L LABOUR ORG., ILO INDICATORS OF FORCED LABOR (2012) [hereinafter ILO INDICATORS], <https://perma.cc/YCB3-AAPV> (describing eleven indicators of forced labor); see also *infra* notes 82-83 (collecting cases involving forced labor).
 12. See ILO INDICATORS, *supra* note 11 (“Forced labour victims are likely to endure living and working conditions that workers would never freely accept.”); *I Was Enslaved for 40 Days*, CNN: FREEDOM PROJECT (Apr. 5, 2011), <https://perma.cc/Z7Y6-HKZL> (“I was forced to work 18 hours a day . . . I was forced to sleep at the factory in a storage room . . . I was forbidden to talk to anyone . . . I was given only one meal a day . . .”).
 13. See ILO INDICATORS, *supra* note 11 (“Forced labourers may have their movements controlled inside the workplace, through the use of surveillance cameras or guards, and outside the workplace by agents of their employer who accompany them when they leave the site.”).
 14. See *id.* (“Victims of forced labour are often isolated in remote locations, denied contact with the outside world.”).
 15. See *id.*; *I Was Enslaved for 40 Days*, *supra* note 12 (“I was given only one meal a day . . .”); see also Sophia Eckert, Note, *The Business Transparency on Trafficking and Slavery Act: Fighting Forced Labor in Complex Global Supply Chains*, 12 J. INT'L BUS. & L. 383, 384-85 (2013) (noting forced laborers often reside “where they have no access to drinking water, sanitation, waste management, and news media”).
 16. See ILO INDICATORS, *supra* note 11 (“Forced labourers may be obliged to work excessive hours or days . . .”); see also *I Was Enslaved for 40 Days*, *supra* note 12 (“I was forced to work 18 hours a day . . .”); VERITÉ, RESEARCH ON INDICATORS OF FORCED LABOR IN THE SUPPLY CHAIN OF FISH IN INDONESIA: PLATFORM (*JERMAL*) FISHING, SMALL-BOAT ANCHOVY FISHING, AND BLAST FISHING 35, 41 (2012) (noting workdays of 18-24 hours during harvest periods).
 17. See ILO INDICATORS, *supra* note 11 (identifying threats of violence and actual physical violence as two indicators of forced labor); HUM. RTS. WATCH, HIDDEN CHAINS: RIGHTS ABUSES AND FORCED LABOR IN THAILAND'S FISHING INDUSTRY 43, 71-87 (2018) (describing many different “abusive employment practices and working conditions” in Thailand's fishing industry, including continual surveillance and illegal detention, intimidation and violence, and dangerous working conditions (capitalization altered)).
 18. See ILO INDICATORS, *supra* note 11; *What Is Bonded Labour?*, ANTI-SLAVERY INT'L, <https://perma.cc/NL9Z-NUUE4> (archived Mar. 1, 2023) (“In some societies, debt is shared by whole families who have to work to pay off debts taken on by a relative. Sometimes, the debt can even be inherited by children, who are then held in slavery because of a loan their parents took out decades ago.”).

precautions, risking serious injury and exposure to toxic chemicals.¹⁹ Child victims of forced labor, some as young as three years old, are often deprived of the ability to attend school, play, and experience childhood.²⁰

The harm caused by forced labor extends beyond its victims. Forced labor limits the competitiveness of businesses that pay full labor costs²¹ and damages the reputations of those associated with it.²² Consumers can suffer cognizable injuries after discovering that they unwittingly purchased tainted goods.²³ And efforts to combat forced labor can strain international relations.²⁴

Though the problem of forced labor in global supply chains persists, federal courts—seemingly driven by the desire to promote separation of powers, international comity, and the interests of defendants—have grown increasingly wary of adjudicating cases that span international borders.²⁵ To

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19. See ILO INDICATORS, *supra* note 11; Eleonora Tria, *The Impact of Covid-19 on Child Labour in Cobalt Mines in the DRC*, HUMANIUM (May 4, 2021), <https://perma.cc/DCD9-V7JX> (noting that children forced to work in cobalt mines in the Democratic Republic of the Congo are frequently barefoot and lack helmets and masks).
 20. See VERITÉ, ASSESSMENT OF FORCED LABOR RISK IN THE COCOA SECTOR OF CÔTE D'IVOIRE 44-47 (2019), <https://perma.cc/XZM7-AK22>; Tria, *supra* note 19 (“It is estimated that 20% of the mines in the DRC are small-scale and use mostly child workers. These children, aged between 3 and 17, have to work in appalling and dangerous conditions, usually barefoot.”).
 21. See, e.g., Brief of Small and Mid-Size Cocoa and Chocolate Companies as Amici Curiae in Support of Respondents at 11-12, *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021) (Nos. 19-416 & 19-453), 2020 WL 6291304 (“By externalizing their costs, [some companies] benefit financially from buying cocoa that is produced with forced labor. Companies that comply with international human rights norms face unfair competition from these companies, as they have higher production costs [C]heaper cocoa produced with forced labor distorts the market and undercuts amici’s ability to compete.”).
 22. See Donna L. Bade, *Corporate Responsibility and U.S. Import Regulations Against Forced Labor*, 8 TULSA J. COMPAR. & INT’L L. 5, 5 (2000) (“Recent protests demanding corporate accountability for the use of forced child labor and the associated adverse publicity is more feared than any potential monetary penalty assessed by a government agency.”); ETHICAL TRADING INITIATIVE & ERGON ASSOCS., *MANAGING RISKS ASSOCIATED WITH MODERN SLAVERY: A GOOD PRACTICE NOTE FOR THE PRIVATE SECTOR* 22 (2018), <https://perma.cc/K599-6YSM> (“Companies may suffer significant reputational damage if they are linked to cases of modern slavery . . .”).
 23. See Sarah Dadush, *Identity Harm*, 89 U. COLO. L. REV. 863, 897 (2018) (“[D]eep psychic harm can attach to discovering that one’s purchase is linked to human, social, and labor rights abuses.”); see also *Dana v. Hershey Co.*, 180 F. Supp. 3d 652, 661 (N.D. Cal. 2016) (finding that a plaintiff had suffered an Article III injury in fact where she “would have either not purchased or paid less for [a product] if she had known that the supply chain involved the labor abuses at issue” (emphasis omitted)).
 24. See, e.g., Press Release, Ministry of Foreign Affs. of China, Foreign Ministry Spokesperson’s Statement on US’ Signing of the So-Called Uyghur Forced Labor Prevention Act (Dec. 24, 2021), <https://perma.cc/KS7U-HP87> (accusing the United States of “engaging in political manipulation and economic coercion”).
 25. See Pamela K. Bookman, *Litigation Isolationism*, 67 STAN. L. REV. 1081, 1099-1100 (2015).

facilitate this wariness, a set of doctrines—known as “transnational litigation avoidance doctrines”—has emerged over the last few decades.²⁶ The avoidance doctrines—personal jurisdiction, *forum non conveniens*, abstention comity, and the presumption against extraterritoriality—each restrict federal courts’ capacity to remedy harms caused by forced labor abroad.²⁷ Altogether, they have the effect of excluding “substantial amounts of litigation” from federal courts, including much litigation that the United States may have an interest in adjudicating.²⁸

With the federal courts receding from view, renewed attention is due to other tools capable of addressing forced labor. One such tool is trade law: The importation of goods made using forced labor has been barred for nearly 100 years under section 307 of the Tariff Act of 1930.²⁹ For most of this time, however, enforcement by U.S. Customs and Border Protection (CBP) has been minimal or nonexistent.³⁰ Recent legislative enactments, specifically the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) and the Uyghur Forced Labor Prevention Act (UFLPA), seek to increase CBP enforcement of section 307.

This Note investigates why existing efforts to end the importation of products made using forced labor have been inadequate. It proceeds in five parts. Part I begins by providing background information on forced labor in global supply chains. Part II then describes the legal regime before the enactment of TFTEA, including the disappearance of federal courts as a potential avenue for relief and the expansive “consumptive demand loophole” that limited CBP enforcement of section 307. It also discusses how TFTEA changed section 307 and details the procedures through which CBP enforces the ban on importing forced-labor-made goods.

This Note then makes a unique contribution to the existing literature. Part III evaluates CBP’s early enforcement of section 307 following the modifications made by TFTEA. It shows that, although there has been a minor uptick in enforcement actions, significant quantities of at-risk goods continue to be imported into the United States.³¹ Part IV argues that continued underenforcement of the forced-labor ban is driven by multiple key factors: CBP’s decision to initiate narrow enforcement actions; significant identification challenges and lack of access to information; insufficient funding; and the general nonreviewability of discretionary

26. *Id.* at 1084-86.

27. *See id.* at 1084-85.

28. *Id.* at 1086.

29. *See* 19 U.S.C. § 1307.

30. *See infra* Part III.B.

31. *See infra* Part III.C.

nonenforcement decisions. Part V then proposes two possible solutions to decrease the importation of forced-labor-made goods.

I. Forced Labor in Global Supply Chains

Forced labor is defined by the International Labour Organization (ILO) as “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.”³² U.S. law has adopted a nearly identical definition.³³ The scourge of forced labor is a global challenge: An estimated 27.6 million people worldwide are subjected to forced labor.³⁴ Though victims are found on every inhabited continent,³⁵ the number of individuals subjected to forced labor is highest in the Asia-Pacific region on an absolute basis and in the Arab States on a per capita basis.³⁶

Scholarship by Genevieve LeBaron, Neil Howard, Cameron Thibos, and Penelope Kyritsis has identified multiple root causes of forced labor.³⁷ People are pushed into forced labor due to underlying poverty,³⁸ discrimination against marginalized groups,³⁹ a lack of labor protections,⁴⁰ and restrictive governance regimes.⁴¹ In addition, specific features of the global economy make forced labor more likely. Concentrated corporate ownership has consolidated market power and created monopolies, allowing companies to “accrue huge profits while squeezing ever-lower margins down along their supply chains.”⁴² Some corporations outsource their manufacturing and other

32. Convention Concerning Forced or Compulsory Labour art. 2, *adopted* June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932).

33. *See* 19 U.S.C. § 1307 (defining forced labor 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”).

34. ILO 2022, *supra* note 3, at 17 tbl.1.

35. *See id.* at 18 tbl.2.

36. *Id.*

37. *See generally* GENEVIEVE LEBARON, NEIL HOWARD, CAMERON THIBOS & PENELOPE KYRITSIS, *CONFRONTING ROOT CAUSES: FORCED LABOUR IN GLOBAL SUPPLY CHAINS* (2018), <https://perma.cc/7Z4Z-TVLF> (identifying eight root causes of forced labor).

38. *Id.* at 20-24 (“Lacking money, huge swathes of the world’s population never enjoy the effective power to say no to coercion or exploitation, and so are systematically vulnerable to forced labour.”).

39. *Id.* at 25-29.

40. *Id.* at 30-34.

41. *See id.* at 35 (“To be on the wrong side of [the rules governing the mobility of people within the global economy] is to substantially lose one’s freedom to say no to exploitative labour conditions.”).

42. *Id.* at 41; *see also id.* at 42-43 (“As labour is usually a factory’s biggest cost . . . the most obvious option for remaining profitable is to further squeeze workers in turn.”).

processes to subcontractors, which “allows labour exploitation to take place without tarnishing the reputation or credibility of [multinational corporations].”⁴³ Moreover, organizations get away with having forced labor in their supply chains because laws designed to combat forced labor are “spottily enforced.”⁴⁴ Combined, these factors have created conditions under which forced labor has thrived.

This Note focuses on improving the enforcement of section 307 of the Tariff Act, which is just one of many laws worldwide that address forced labor.⁴⁵ While greater enforcement of section 307 is important, it is also critical to recognize that lasting success in reducing the incidence of forced labor will require addressing each of its root causes.

Forced labor is particularly pervasive in global supply chains. “[R]ather than being an artifact of isolated ‘bad apples,’ worker exploitation is an integral feature of global supply chains”⁴⁶ This is a consequence of modern supply-chain design: “The supply chains of modern multi-national corporations have developed into complex and opaque webs that extend across the globe.”⁴⁷ Many of these supply chains “cut across transnational borders to take advantage of lower labour costs and weaker labour protections in other countries,” giving multinational corporations access to “a vast army of people so poor and lacking in state protections that they epitomise the inability to say no to exploitation.”⁴⁸

In the agricultural and natural resources sectors, forced labor poses unique challenges. Businesses seeking to bring goods to American shelves often rely on multiple suppliers, subcontractors, middlemen, processors, and transporters.⁴⁹ Many major companies purchase significant quantities of goods from third

43. *Id.* at 45-46.

44. *See id.* at 55. Similarly, section 307 suffers from chronic underenforcement. *See infra* Part III.C.

45. *See* LEBARON ET AL., *supra* note 37, at 55-58. For a discussion of other laws that have been used to address forced labor, see Part II.A below. *See also Human Trafficking Laws & Regulations*, U.S. DEP’T HOMELAND SEC., <https://perma.cc/XFE9-H7GH> (archived Mar. 1, 2023).

46. Melissa de Witte, *Stanford Project Details How to Reimagine Global Supply Chains to Be More Equitable, Fair*, STAN. NEWS SERV. (Dec. 20, 2021), <https://perma.cc/LMN2-XTU3> (quoting University of Michigan Law School professor from practice Luis C.deBaca).

47. Eckert, *supra* note 15, at 386.

48. *See* LEBARON ET AL., *supra* note 37, at 17-18.

49. *See, e.g.*, Joann F. de Zegher, Dan A. Iancu & Erica Plambeck, *Sustaining Rainforests and Smallholders by Eliminating Payment Delay in a Commodity Supply Chain—It Takes a Village 27* (Stanford Graduate Sch. of Bus., Working Paper No. 3648, 2018) (“Both financial middlemen and transportation middlemen create additional links in the supply chain between farmer and buyer, and thereby exacerbate the difficulties for buyers attempting to trace fruit to the farm . . .”).

parties and cannot trace those goods back to their place of origin.⁵⁰ Even where a corporation is not acting nefariously, the opacity of supply chains can make it difficult to monitor the conditions under which goods are produced or even trace where they are coming from.⁵¹ If products cannot be traced, a corporation cannot confirm that they were produced without forced labor.

The challenge of tracing supply chains also makes forced labor difficult to detect.⁵² Because “[v]ictims of forced labour are often isolated in remote locations, [and] denied contact with the outside world,” it is “very difficult for law enforcement or other agencies” to know when forced labor is occurring.⁵³ To combat this challenge, the ILO has developed a list of eleven indicators of forced labor that “represent the most common signs or ‘clues’ that point to the possible existence of a forced labour case.”⁵⁴ The list includes: the presence of “[a]busive working and living conditions”; physical violence; intimidation; isolation; “[r]estriction of movement”; and other factors.⁵⁵

Identification challenges also make it difficult for investigators to produce exact statistics about global forced labor.⁵⁶ “It is widely acknowledged that measuring modern slavery is a difficult undertaking, not least because no single source provides suitable and reliable data on all forms of modern slavery.”⁵⁷ As a result, the figures presented in this Note are estimates, intended

50. See, e.g., Liz Warren, *69 Percent of Denim Brands Don't Know Their Cotton's Origin, Study Finds*, SOURCING J: RIVET (Dec. 9, 2021, 3:31 PM), <https://perma.cc/XZN4-G3W6>; *Traceability to the Mill and Plantation by Market*, CARGILL, <https://perma.cc/6552-G2XX> (archived Mar. 1, 2023) (finding that the company cannot trace one-third of its palm and kernel products down to the plantation level).

51. See Joss Lyons-White & Andrew T. Knight, *Palm Oil Supply Chain Complexity Impedes Implementation of Corporate No-Deforestation Commitments*, 50 GLOB. ENV'T CHANGE 303, 306-08 (2018); Hannes Hofmann, Martin C. Schleper & Constantin Blome, *Conflict Minerals and Supply Chain Due Diligence: An Exploratory Study of Multi-Tier Supply Chains*, 147 J. BUS. ETHICS 115, 120 (2018).

52. See SEDEX, *RECOGNISING FORCED LABOUR RISKS IN GLOBAL SUPPLY CHAINS: SEDEX FINDINGS FROM 100,000 SOCIAL AUDITS 11* (2021), <https://perma.cc/NHR6-N66E>. Other common aspects of forced labor, including that workers may fear speaking with investigators or auditors and that tangible evidence of forced labor is seldom available, contribute to this difficulty. *Id.*

53. ILO INDICATORS, *supra* note 11.

54. *Id.*

55. *Id.*; see also *supra* notes 11-20 and accompanying text (describing common characteristics of forced labor).

56. See, e.g., SPECIAL ACTION PROGRAMME TO COMBAT FORCED LABOUR & INT'L PROGRAMME ON THE ELIMINATION OF CHILD LABOUR, INT'L LABOUR ORG., *HARD TO SEE, HARDER TO COUNT: SURVEY GUIDELINES TO ESTIMATE FORCED LABOUR OF ADULTS AND CHILDREN 7-8* (2d ed. 2012) (noting forced labor and human trafficking are “difficult phenomena to survey for a variety of reasons”).

57. WALK FREE FOUND., *supra* note 6, at 27.

to give a sense of the scope of the problem rather than provide exact values. That said, the numbers presented herein are both conservative and the most reliable to date.⁵⁸

II. Legal Background

The U.S. legal system has developed multiple tools to address forced labor abroad, including civil and criminal enforcement mechanisms. This Note focuses on civil enforcement, in part because criminal enforcement is extremely limited: In 2019, there were only thirty-one active criminal forced-labor cases in the entire country.⁵⁹ Part II begins by discussing mechanisms victims might use to bring suits for damages themselves and how recent developments in the federal court system have substantially limited such suits' chances of success. It then considers an alternate form of civil enforcement: U.S. trade law, specifically section 307 of the Tariff Act, which purports to ban the importation of goods made using forced labor.

A. Federal Courts' Shrinking Capacity to Redress Labor Abuses Abroad

As global supply chains expanded over the last several decades, so too did concern over the number of transnational disputes filed in federal courts.⁶⁰ Scholars and advocates sounded the alarm, claiming there had been an "exposive growth of transnational litigation."⁶¹ While more recent research has cast significant doubt on this premise,⁶² the perception of an increasing number of such cases had a significant impact. In response, corporate defendants employed a set of doctrines that "permit or require a court to dismiss a case because it is too 'foreign.'"⁶³ These "transnational litigation avoidance doctrines" include personal jurisdiction, *forum non conveniens*, abstention comity, and the presumption against extraterritoriality.⁶⁴ Though

58. *See id.*; *see also supra* note 8 and accompanying text (explaining why the estimated value of at-risk imports is considered to be an underestimate).

59. KYLEIGH FEEHS & ALYSSA CURRIER, HUM. TRAFFICKING INST., 2019 FEDERAL HUMAN TRAFFICKING REPORT 3 (Lindsey N. Roberson ed., 2020).

60. *See* Christopher A. Whytock, *Transnational Litigation in U.S. Courts: A Theoretical and Empirical Reassessment*, 19 J. EMPIRICAL LEGAL STUD. 4, 5 (2022).

61. *Id.* at 7 (quoting Spencer Weber Waller, *A Unified Theory of Transnational Procedure*, 26 CORNELL INT'L L.J. 101, 102 (1993)); *see also id.* (collecting citations).

62. *See id.* at 26-48 (presenting evidence that shows transnational diversity filings "have decreased overall since at least the mid-1980s" and "that foreign plaintiffs are not primarily responsible for transnational diversity litigation in the U.S. District Courts"); *see also id.* at 9 (collecting citations).

63. Bookman, *supra* note 25, at 1084.

64. *Id.*

each doctrine developed separately, “all speak to the nexus between the United States, the parties, and a given suit.”⁶⁵

These doctrines developed into “powerful tools for courts to avoid adjudicating transnational disputes”⁶⁶ and have had an outsized impact in the context of forced labor. Because only a miniscule fraction of instances of forced labor are federally prosecuted,⁶⁷ “the civil cause of action has proven particularly critical to survivors of forced labor.”⁶⁸ It offers redress in the form of damages, which “may provide the only means by which [they] may be ‘made whole.’”⁶⁹ In addition, money damages can force corporations to internalize the costs of forced labor, incentivizing them “to prevent human rights abuses in their operations and contractual relations in the first place.”⁷⁰ “The prospect of a large attorneys’ fees award stemming from civil litigation may also have a significant deterrent effect on the [human] trafficker.”⁷¹

This Subpart considers three of the most prominent tools in civil litigation for remedying the harms caused by forced labor and recent limitations on their effectiveness.

1. Alien Tort Statute

The Alien Tort Statute (ATS), 28 U.S.C. § 1350, “bec[a]me the main engine for transnational human rights litigation in the United States” toward the end of the twentieth century.⁷² Enacted in 1789, the ATS gives federal district courts jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁷³ The statute

65. *See id.* at 1084 n.18, 1089.

66. Bookman, *supra* note 25, at 1089.

67. *See* FEEHS & CURRIER, *supra* note 59, at 13; *supra* note 10 and accompanying text.

68. ALEXANDRA F. LEVY, HUM. TRAFFICKING LEGAL CTR., FEDERAL HUMAN TRAFFICKING CIVIL LITIGATION: 15 YEARS OF THE PRIVATE RIGHT OF ACTION 7 (Martina E. Vandenberg & Andrew B. Cherry eds., 2018).

69. DANIEL WERNER & KATHLEEN KIM, S. POVERTY L. CTR., CIVIL LITIGATION ON BEHALF OF VICTIMS OF HUMAN TRAFFICKING 1 (3d ed. 2008), <https://perma.cc/6TTU-9WZR>.

70. *See* Lindsey Roberson & Johanna Lee, *The Road to Recovery After Nestlé: Exploring the TVPA as a Promising Tool for Corporate Accountability*, 6 COLUM. HUM. RTS. L. REV. ONLINE 1, 16-17 (2021).

71. WERNER & KIM, *supra* note 69, at 2. “Human trafficking” and “modern slavery” are umbrella terms that refer to both forced labor and sex trafficking. U.S. DEP’T OF STATE, TRAFFICKING IN PERSONS REPORT 31 (2022), <https://perma.cc/9QP4-Z52L>.

72. *See* Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT’L L. 601, 601 & n.2 (2013).

73. 28 U.S.C. § 1350; William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 HASTINGS INT’L & COMPAR. L. REV. 221, 222 (1996) (noting that the ATS was first enacted as part of the Judiciary Act of 1789). For a more thorough review of the history of the ATS, see generally *id.* at 221-58.

lay dormant until 1980, when it “sprang into judicial and academic prominence”⁷⁴ after the Second Circuit issued its landmark decision *Filartiga v. Pena-Irala*.⁷⁵ There, Paraguayan plaintiffs sought redress for the wrongful death of their son, who they alleged had been kidnapped and tortured to death in retaliation for the family’s opposition to the government.⁷⁶ The plaintiffs brought an ATS claim against a Paraguayan government official who had since moved to the United States.⁷⁷ The Second Circuit, reversing the district court, found that the district court had jurisdiction under the ATS.⁷⁸

The Second Circuit’s holding that foreign plaintiffs could assert claims in U.S. courts for human rights violations that occurred abroad “breathed new life” into the ATS and transformed it into a primary vehicle to redress those harms.⁷⁹ In the three decades following *Filartiga*, courts issued nearly 180 opinions in cases brought under the ATS.⁸⁰ The vast majority of these suits were filed against corporations,⁸¹ and many involved allegations of forced labor and other labor abuses occurring both within the United States⁸² and overseas.⁸³

74. STEPHEN P. MULLIGAN, CONG. RSCH. SERV., R44947, *THE ALIEN TORT STATUTE: A PRIMER* 6 (2022).

75. 630 F.2d 876 (2d Cir. 1980).

76. *Id.* at 878-79.

77. *Id.*

78. *Id.* at 880, 889. The suit was remanded to the district court for further proceedings, in which the plaintiffs won a \$10.39 million judgment. *Filartiga v. Pena-Irala*, 577 F. Supp. 860, 861, 867 (E.D.N.Y. 1984).

79. Anne-Marie Burley, *The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor*, 83 AM. J. INT’L L. 461, 461-62 (1989); see also Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT’L L. 385, 388 (2010) (“There has been an explosion of ATS litigation centered almost exclusively on human rights violations.”).

80. See Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: A Flawed System of Judicial Lawmaking*, 51 VA. J. INT’L L. 353, 357 (2011).

81. See Donald Earl Childress III, *The Alien Tort Statute, Federalism, and the Next Wave of Transnational Litigation*, 100 GEO. L.J. 709, 713 (2012) (noting that 155 of 173 ATS lawsuits were filed against corporations).

82. See, e.g., *Aragon v. Che Ku*, 277 F. Supp. 3d 1055, 1068 (D. Minn. 2017) (“Plaintiffs allege that they were subjected to physical violence, periodic physical restraint and confinement, and threats including but not limited to threats of deportation.”); *Magnifico v. Villanueva*, 783 F. Supp. 2d 1217, 1222 (S.D. Fla. 2011) (“Plaintiffs allege that defendants forced them to live in severely crowded housing and to work long hours”); *Jane Doe I v. Reddy*, No. C 02-05570, 2003 WL 23893010, at *1 (N.D. Cal. Aug. 4, 2003) (“Plaintiffs claim defendants fraudulently induced them to come to the United States from India on false promises . . . then forced them to work long hours under arduous conditions for pay far below minimum wage and in violation of overtime laws, and sexually abused and physical [sic] beat them.”).

83. See, e.g., *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931, 1935 (2021) (“Respondents are six individuals from Mali who allege that they were trafficked into Ivory Coast as child slaves to produce cocoa.”); *Flomo v. Firestone Nat. Rubber Co.*, 643 F.3d 1013, 1015 (7th

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In the twenty-first century, the reach of the ATS has been sharply curtailed, in part by the avoidance doctrines. In 2013, the Supreme Court concluded in *Kiobel v. Royal Dutch Petroleum Co.* “that the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption,” thus barring suits, like *Filartiga*, concerning conduct that occurred entirely outside the United States.⁸⁴ *Kiobel* precludes ATS claims in “so-called ‘foreign cubed’ cases in which a foreign plaintiff sues a foreign defendant for conduct and injuries that occurred in a foreign nation.”⁸⁵ The Court left open the possibility, however, that the presumption against extraterritoriality might be displaced in a future case “where the claims touch and concern the territory of the United States . . . with sufficient force.”⁸⁶

In 2018, the Court further narrowed the scope of ATS jurisdiction in *Jesner v. Arab Bank, PLC*, ruling that foreign corporations could never be sued under the ATS.⁸⁷ But the Court did not reach the question of whether a U.S. corporation could be sued under the ATS.⁸⁸

Two years later, the Court granted certiorari in *Nestlé USA, Inc. v. Doe*⁸⁹ in part to decide whether domestic corporations could be subject to liability under the ATS.⁹⁰ Once again, the Court declined to issue a decision on the

Cir. 2011) (“The plaintiffs charge Firestone with utilizing hazardous child labor on the plantation in violation of customary international law.”); *Doe I v. Unocal Corp.*, 395 F.3d 932, 936, 939 (9th Cir. 2002) (“Plaintiffs allege that the Myanmar Military forced them, under threat of violence, to work on and serve as porters for the Project.”), *reh’g en banc dismissed per stipulation*, 403 F.3d 708 (9th Cir. 2005); *Adhikari v. Daoud & Partners*, 697 F. Supp. 2d 674, 687 (S.D. Tex. 2009) (“Plaintiffs allege that they were deceived and coerced into traveling to Iraq to work for KBR, thereby making them victims of human trafficking and forced labor.”); *Licea v. Curaçao Drydock Co.*, 584 F. Supp. 2d 1355, 1357 (S.D. Fla. 2008) (“Defendant enjoyed the economic advantage of between 50 and 100 trafficked, captive, forced laborers for a period of approximately 15 years.”); *Roe I v. Bridgestone Corp.*, 492 F. Supp. 2d 988, 990, 994 (S.D. Ind. 2007) (alleging “indigenous people were forced from their land and were then conscripted to provide forced labor” on a Liberian rubber plantation).

84. *See* 569 U.S. 108, 124-25 (2013).

85. MULLIGAN, *supra* note 74, at 14; *see also* *Chen Gang v. Zhao Zhizhen*, No. 04CV1146, 2013 WL 5313411, at *2-3 (D. Conn. Sept. 20, 2013) (dismissing “a paradigmatic ‘foreigncubed’ case” for lack of jurisdiction under the ATS).

86. *Kiobel*, 569 U.S. at 124-25.

87. 138 S. Ct. 1386, 1407 (2018).

88. *See id.*; *see also id.* at 1410 n.* (Alito, J., concurring in part and concurring in the judgment) (“[W]e have no need to reach the question whether an alien may sue a United States corporation under the ATS.”).

89. 141 S. Ct. 1931 (2021).

90. *See* Petition for a Writ of Certiorari at i, *Nestlé*, 141 S. Ct. 1931 (No. 19-416), 2019 WL 4747982 (petitioning the Court to decide “[w]hether the Judiciary has the authority under the Alien Tort Statute to impose liability on domestic corporations”); *Nestlé USA, Inc. v. Doe I*, 141 S. Ct. 188, 188 (2020) (mem.) (granting certiorari on all questions presented).

question,⁹¹ although five Justices suggested that domestic corporations could be subject to ATS liability under the right circumstances.⁹²

Although the Court did not reach a decision regarding domestic corporate liability, *Nestlé* limited the scope of the ATS in other ways. The plaintiffs were six individuals who alleged that they were trafficked from Mali into Côte d'Ivoire to work as child slaves on cocoa farms.⁹³ The defendants were Nestlé USA and Cargill—U.S.-based companies that both purchased cocoa from the farms on which the plaintiffs were allegedly enslaved and “provided those farms with technical and financial resources.”⁹⁴ The plaintiffs argued that Nestlé USA and Cargill had “aided and abetted child slavery” because they “knew or should have known’ that the farms were exploiting enslaved children yet continued to provide those farms with resources.”⁹⁵ The plaintiffs acknowledged that their injuries had “occurred outside the United States,” but argued that they could overcome the extraterritorial bar “because [Nestlé USA and Cargill] allegedly made all major operational decisions from within the United States.”⁹⁶

The Court disagreed, holding that “allegations of general corporate activity” in the United States are insufficient to support “domestic application of the ATS.”⁹⁷ The allegation that “every major operational decision”⁹⁸ was made in the United States was too generic to “draw a sufficient connection between the cause of action respondents [sought]—aiding and abetting forced labor overseas—and domestic conduct.”⁹⁹ The Court also cautioned that “[t]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.”¹⁰⁰

91. See *Nestlé*, 141 S. Ct. at 1936; see also *id.* at 1940 (Gorsuch, J., concurring) (noting that the Court did not resolve whether the ATS exempts all corporations from suit).

92. See *id.* at 1940 (Gorsuch, J., concurring) (“The notion that corporations are immune from suit under the ATS cannot be reconciled with the statutory text and original understanding.”); *id.* at 1947 n.4 (Sotomayor, J., concurring in part and concurring in the judgment) (“[T]here is no reason to insulate domestic corporations from liability . . .”).

93. *Id.* at 1935 (majority opinion).

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1937.

98. *Id.* (quoting Joint Appendix at 314, *Nestlé*, 141 S. Ct. 1931 (Nos. 19-416 & 19-453), 2020 WL 5289326).

99. *Id.*

100. *Id.* (quoting *Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010)).

The Court's recent cases have sharply limited use of the ATS to redress human rights abuses that occur abroad.¹⁰¹ Post-*Nestlé*, ATS causes of action appear limited "to claims against U.S. corporations based on conduct in the United States that goes beyond making decisions about how to conduct operations abroad."¹⁰² Cases that fit this description "are likely to be few and far between,"¹⁰³ and are unlikely to include claims brought by victims of forced labor abroad like the *Nestlé* plaintiffs.

2. Civil RICO

The Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968, is another federal statute that was used to combat forced labor abroad before it experienced a defanging similar to that of the ATS. RICO, first passed in 1970, was designed to strengthen the government's ability to combat organized crime.¹⁰⁴ RICO makes it illegal to commit "at least two acts of racketeering activity" within a ten-year period if such acts are related to an "enterprise."¹⁰⁵ The law includes a long list of crimes that constitute racketeering activity, including mail fraud, murder, and witness tampering.¹⁰⁶ In 2003, this list was amended to include human trafficking,¹⁰⁷ an umbrella term that includes both forced labor and sex trafficking.¹⁰⁸

RICO provides for both criminal and civil liability.¹⁰⁹ Specifically, it includes a private right of action that allows any person injured by a violation of the statute to sue for damages.¹¹⁰ Prior to 2016, foreign plaintiffs routinely

101. See, e.g., Beth Van Schaack, *Nestlé & Cargill v. Doe: What's Not in the Supreme Court's Opinions*, JUST SEC. (June 30, 2021), <https://perma.cc/UUX9-D7CF> ("[T]his is clearly a defeat for these particular plaintiffs and for other plaintiffs who suffer extraterritorial harm from conduct with no discernible U.S. nexus."); William S. Dodge, *The Surprisingly Broad Implications of Nestlé USA, Inc. v. Doe for Human Rights Litigation and Extraterritoriality*, JUST SEC. (June 18, 2021), <https://perma.cc/9BDF-XCWS> ("*Nestlé* . . . mark[s] the end of the *Filartiga* line of ATS cases against individual defendants whose relevant conduct occurs outside the United States.").

102. Dodge, *supra* note 101.

103. *Id.*

104. See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (codified at 18 U.S.C. § 1961 note (Congressional Statement of Findings and Purpose)).

105. 18 U.S.C. § 1961(4)-(5) (defining "enterprise" and "pattern of racketeering activity"); *id.* § 1962(a).

106. *Id.* § 1961(1).

107. See Trafficking Victims Protection Reauthorization Act of 2003, Pub. L. No. 108-193, § 5(b), 117 Stat. 2875, 2879 (codified at 18 U.S.C. § 1961).

108. See U.S. DEP'T OF STATE, *supra* note 71, at 31 ("The United States recognizes two primary forms of trafficking in persons: forced labor and sex trafficking.").

109. See 18 U.S.C. § 1963 (criminal); *id.* § 1964 (civil).

110. See 18 U.S.C. § 1964(c).

employed RICO's private right of action to seek redress for labor abuses that occurred abroad.¹¹¹ In 2016, however, the Court employed the presumption against extraterritoriality to limit the law's scope. In *RJR Nabisco, Inc. v. European Community*,¹¹² the Court held that RICO's private right of action "requires a . . . plaintiff to allege and prove a domestic injury to business or property and does not allow recovery for foreign injuries."¹¹³ Because forced laborers who are injured abroad cannot show a domestic injury, *RJR Nabisco* forecloses any chance of redress for those victims through civil RICO.

3. Trafficking Victims Protection Reauthorization Act

A third major tool for redressing forced labor and human trafficking is the Trafficking Victims Protection Reauthorization Act (TVPRA).¹¹⁴ Initially enacted in 2000, the TVPRA was "the first comprehensive federal law to address trafficking in persons"¹¹⁵ and has since been reauthorized multiple times.¹¹⁶ The TVPRA created "several new federal criminal offenses intended to more comprehensively and effectively combat human trafficking."¹¹⁷ In

111. *See, e.g.,* *Licea v. Curaçao Drydock Co.*, 584 F. Supp. 2d 1355, 1356-59 (S.D. Fla. 2008) (holding civil RICO supplied a basis for jurisdiction where plaintiffs were subjected to forced labor in Curaçao); *Adhikari v. Daoud & Partners*, No. 09-cv-01237, 2011 WL 13261998, at *1-2, *15 (S.D. Tex. Dec. 12, 2011) (holding civil RICO could be applied extraterritorially where plaintiffs were subjected to forced labor in Iraq). Although human trafficking was added to the list of racketeering activities in 2003, the first RICO human-trafficking suit was not brought until 2009. *See* Kendal Nicole Smith, Comment, *Human Trafficking and RICO: A New Prosecutorial Hammer in the War on Modern Day Slavery*, 18 GEO. MASON L. REV. 759, 761-62 (2011). It is not altogether clear why no suits were brought between 2003 and 2009, especially since the idea to use civil RICO to redress forced prostitution was proposed at least as early as 1987. *See* Lan Cao, Note, *Illegal Traffic in Women: A Civil RICO Proposal*, 96 YALE L.J. 1297, 1297-98 (1987).

112. 136 S. Ct. 2090 (2016).

113. *Id.* at 2111.

114. The law was first enacted as the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (codified as amended in scattered sections of the U.S. Code), but was commonly referred to as the Trafficking Victims Protection Act. As a result, the law is sometimes referred to as the TVPA. *See, e.g., Key Legislation*, U.S. DEP'T OF JUST., <https://perma.cc/6VG5-WRMP> (last updated Sept. 28, 2022) (to locate, select "The Trafficking Victims Protection Act of 2000"). This Note refers to the law as the TVPRA, based on the name of its subsequent reauthorizations, to avoid any confusion with the Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (1992) (codified at 28 U.S.C. § 1350 note).

115. *Federal Law*, NAT'L HUM. TRAFFICKING HOTLINE, <https://perma.cc/U8AA-ZRUK> (archived Mar. 1, 2023).

116. *See id.* Because the reauthorizations are typically titled Trafficking Victims Protection Reauthorization Act, the law is sometimes referred to as the TVPRA. *See Key Legislation, supra* note 114 (to locate, select "The Trafficking Victims Protection Reauthorization Act of 2003").

117. *Roe v. Howard*, 917 F.3d 229, 236 (4th Cir. 2019).

particular, 18 U.S.C. § 1595 provides a private cause of action for victims to sue their traffickers directly for damages and attorneys' fees.¹¹⁸

There is an ongoing dispute concerning the extraterritorial application of the TVPRA's private cause of action. 18 U.S.C. § 1596 expressly provides for extraterritorial jurisdiction for certain enumerated violations of the TVPRA where the alleged offender is "a national of the United States," "an alien lawfully admitted for permanent residence," or "present in the United States."¹¹⁹ However, this section does not expressly mention civil suits brought under 18 U.S.C. § 1595.¹²⁰ Thus, "the statutory language leaves open . . . whether the [TVPRA's] extraterritorial jurisdiction extends to civil actions."¹²¹

Lower courts have reached conflicting answers to this question. In a suit involving sexual abuse in Yemen, the Fourth Circuit concluded that 18 U.S.C. § 1595 applied extraterritorially.¹²² The District Court for the Central District of California ruled similarly in *Ratha v. Phatthana Seafood Co.*, a suit involving Cambodians who were allegedly trafficked into Thailand and subjected to forced labor in seafood-processing facilities.¹²³ On the other hand, the District Court for the District of Columbia reached the opposite conclusion in *Doe I v. Apple Inc.*, a suit in which the plaintiffs were children forced to work in cobalt mines in the Democratic Republic of the Congo.¹²⁴ The issue continues to

118. See 18 U.S.C. § 1595.

119. See *id.* § 1596(a).

120. See *id.* ("[T]he courts of the United States have extra-territorial jurisdiction over any offense . . . under section 1581, 1583, 1584, 1589, 1590, or 1591 . . .").

121. Sara Sun Beale, *The Trafficking Victim Protection Act: The Best Hope for International Human Rights Litigation in the U.S. Courts?*, 50 CASE W. RESV. J. INT'L L. 17, 39 (2018).

122. *Howard*, 917 F.3d at 233, 242.

123. No. CV 16-4271, 2017 WL 8292391, at *1, *3 (C.D. Cal. Dec. 21, 2017), *aff'd on other grounds*, 26 F.4th 1029 (9th Cir.), *amended by*, 35 F.4th 1159 (9th Cir. 2022). The district court's decision was affirmed on other grounds by a Ninth Circuit panel that did not reach the extraterritoriality question. See *Ratha v. Phatthana Seafood Co.*, 35 F.4th 1159, 1168 (9th Cir. 2022) ("[W]e assume without deciding that Plaintiffs are correct and that § 1595 permits a private cause of action for extraterritorial violations . . .").

124. No. 19-cv-03737, 2021 WL 5774224, at *1-2, *14-16 (D.D.C. Nov. 2, 2021) (finding that 18 U.S.C. § 1595 does not apply extraterritorially). Some commentators have argued that the district court's statement is dictum. See Maria Piontkovska & Doriane Nguenang, *US Court Dismissed Cobalt Mining Forced Labor Lawsuit Against Tech Companies*, BAKER MCKENZIE: GLOB. SUPPLY CHAIN COMPLIANCE BLOG (Nov. 18, 2021), <https://perma.cc/7AM9-LZJP>. The Fifth Circuit also held that 18 U.S.C. § 1595 did not apply extraterritorially in *Adhikari v. Kellogg Brown & Root, Inc.*, 845 F.3d 184, 201-02 (5th Cir. 2017). But it reached that decision because the trafficking at issue occurred before 18 U.S.C. § 1596 was amended in 2008 to provide for extraterritorial jurisdiction. See *id.* Accordingly, that decision has limited precedential value for suits based on trafficking that occurred after 2008.

percolate among the lower courts,¹²⁵ but recent trends give cause for concern that the extraterritorial reach of the TVPRA may soon be restricted as well.

* * *

But the purpose of this Note is not to provide a detailed account of the narrowing scope of various human rights statutes. For present purposes, it is sufficient to note that recent legal developments have limited the ability of victims of forced labor abroad to seek redress in federal court and, concomitantly, have limited the ability of these statutes to deter the use of forced labor.

Against this backdrop, this Note considers an alternate avenue for addressing the harms caused by forced labor—U.S. trade law and import regulations. As the following Subparts argue, current import restrictions—if enforced—could effectively reduce the importation of goods made using forced labor. Put another way, although the *Nestlé* plaintiffs were unable to bring their ATS claims in federal court, CBP is already authorized to block the importation of any chocolate made from cocoa harvested by child slaves.¹²⁶ If corporations were no longer able to import goods made using forced labor into the United States, they would be unable to profit from the use of forced labor. Therefore, they would have less incentive to “depend[] on—and orchestrate[]—a slave-based supply chain.”¹²⁷

B. Import Restrictions

The legal developments described in the preceding Subpart have made it more difficult for victims of forced labor to seek redress through federal courts, muting the potential deterrent effect that such suits provide.¹²⁸ Import restrictions—though they do not provide redress to victims¹²⁹—are another legal tool that can deter the use of forced labor. By blocking access to U.S. consumers, import restrictions may reduce demand for tainted products and

125. For example, *Doe I v. Apple Inc.* is currently on appeal before the D.C. Circuit. See Notice of Appeal at 1, *Doe I*, 2021 WL 5774224 (No. 19-cv-03737), ECF No. 52. Oral argument in the appeal took place in December 2022. See William S. Dodge, *Oral Argument in Doe v. Apple*, TRANSNAT’L LITIG. BLOG (Dec. 13, 2022), <https://perma.cc/8W6Z-XX57>. No decision has been released as of April 15, 2023.

126. See *infra* Part II.B.2 (explaining how CBP can seize goods made using forced labor pursuant to section 307 of the Tariff Act).

127. See *Doe v. Nestle, S.A.*, 906 F.3d 1120, 1123 (9th Cir. 2018), *amended by*, 929 F.3d 623 (9th Cir. 2019), *rev’d sub nom. Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021).

128. See *supra* notes 67-71 and accompanying text (discussing the potential deterrent effect of civil litigation).

129. See generally 19 U.S.C. § 1307 (lacking a mechanism to provide restitution to victims of forced labor).

limit the profitability of forced labor. Import restrictions are an especially helpful tool for addressing forced labor because the evidentiary requirement to initiate a section 307 enforcement action is lower than what is needed for a civil or criminal proceeding.¹³⁰

But import restrictions are no panacea. Preventing goods made using forced labor from entering the United States does not necessarily mean that producers will cease using forced labor, nor does it mean that the victims of forced labor will automatically be better off:

[S]uppose State *A* imposes a ban on the import of clothing from State *B* because that clothing is manufactured by children in exploitative conditions, and suppose that State *A*'s market constitutes 80 per cent of State *B*'s clothing exports. The ban might prompt State *B* to take measures against child labour so as to re-open its market access to State *A*. Alternatively, State *B* might find new markets. In that situation, at least State *A* has absolved itself of any allegation of complicity in the child labour. Unfortunately, the consequence of such measures in some situations might be to worsen the situation for the relevant children. Perhaps the clothing industry in State *B* will collapse, and the children forced into worse industries, such as mining or prostitution.¹³¹

That said, trade restrictions can still be a powerful tool in the fight against forced labor, especially when they are “imposed by trading giants such as the US and EU, especially in situations where the sanctioning State/s comprise a large percentage of pre-existing trade.”¹³² As noted above, the United States imports a disproportionately large amount of goods at risk of being produced by forced labor.¹³³

The United States first banned the importation of goods made using forced labor in 1930.¹³⁴ The following Subparts detail the history, enforcement procedures, and recent amendment of this important trade restriction.

130. See ANASUYA SYAM & MEG ROGGENSACK, HUM. TRAFFICKING LEGAL CTR., IMPORTING FREEDOM: USING THE U.S. TARIFF ACT TO COMBAT FORCED LABOR IN SUPPLY CHAINS 39 (Martina E. Vandenberg ed., 2020), <https://perma.cc/7SVH-TKSZ> (noting the evidentiary standard for enforcement under the Tariff Act is lower than probable cause).

131. SARAH JOSEPH, BLAME IT ON THE WTO? A HUMAN RIGHTS CRITIQUE 97 (2011); see also CATHLEEN D. CIMINO-ISAACS, CHRISTOPHER A. CASEY & KATARINA C. O'REGAN, CONG. RSCH. SERV., R46631, SECTION 307 AND U.S. IMPORTS OF PRODUCTS OF FORCED LABOR: OVERVIEW AND ISSUES FOR CONGRESS 2 (2021) (noting industry groups opposing import restrictions argue that such restrictions will “further harm vulnerable workers”).

132. JOSEPH, *supra* note 131, at 94.

133. See *supra* notes 6-7 and accompanying text.

134. See Sandra L. Bell, *The US Prohibition on Imports Made with Forced Labour: The New Law Is a Force' to Be Reckoned with*, 11 GLOB. TRADE & CUSTOMS L. 580, 580 (2016).

1. The Tariff Act of 1930

“[A]mong the most catastrophic acts in congressional history,” the Tariff Act of 1930, commonly known as the Smoot-Hawley Tariff Act, is considered the high-water mark of American protectionism.¹³⁵ American farmers and other industries had suffered greatly during the interwar period as European agriculture began to revitalize.¹³⁶ In response, Congress embraced a trade policy characterized by high tariffs and protectionism, passing several laws that successively raised import-tariff rates.¹³⁷ Though these laws proved insufficient to salvage the U.S. economy, Congress stayed its course. In the wake of the 1929 stock market crash, Congress enacted the Tariff Act of 1930 (Tariff Act), which “set some of the highest rates of tariff duties in the history of the United States.”¹³⁸

In addition to raising tariffs, the Tariff Act sought “to protect domestic producers, production, and workers from the unfair competition which would result from the importation of foreign products produced by forced labor.”¹³⁹ Section 307 of the Tariff Act was expanded to bar the importation 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.”¹⁴⁰

135. See *The Senate Passes the Smoot-Hawley Tariff*, U.S. SENATE, <https://perma.cc/4QFJ-GV2D> (archived Mar. 1, 2023); Irwin R. Hedges, *The Trade Expansion Act*, in *FARMER'S WORLD: THE YEARBOOK OF AGRICULTURE 1964*, at 379, 380-81 (1964); see also FERRIS BUELLER'S DAY OFF (John Hughes dir., 1986) (“Anyone? Anyone? The tariff bill? The Hawley-Smoot Tariff Act?”).

136. See *Protectionism in the Interwar Period*, OFF. OF THE HISTORIAN, <https://perma.cc/6ZR4-5FUV> (archived Mar. 1, 2023).

137. See *id.* (referring to the Emergency Tariff Act of 1921 and the Fordney-McCumber Tariff Act of 1922).

138. Deborah M. Mostaghel, *Dubai Ports World Under Exon-Florio: A Threat to National Security or a Tempest in a Seaport?*, 70 ALB. L. REV. 583, 586-87 (2007) (quoting RALPH H. FOLSOM, MICHAEL WALLACE GORDON & JOHN A. SPANOGLE, JR., *PRINCIPLES OF INTERNATIONAL BUSINESS TRANSACTIONS, TRADE, AND ECONOMIC RELATIONS* 229 (2005)).

139. *McKinney v. U.S. Dep't of Treasury*, 799 F.2d 1544, 1552 (Fed. Cir. 1986) (emphasis omitted).

140. 19 U.S.C. § 1307; see Bell, *supra* note 134, at 580. Initially, the law made no mention of forced child labor. See Bade, *supra* note 22, at 8-9. However, “[a] review of the legislative history reveals that Congress intended the term ‘forced labor’ in section 307 of the Tariff Act to include forced child labor,” because the terms Congress selected were borrowed from international law and typically interpreted to include child labor. See Janelle M. Diller & David A. Levy, Note, *Child Labor, Trade and Investment: Toward the Harmonization of International Law*, 91 AM. J. INT'L L. 663, 687-88, 687 n.215, 688 n.217 (1997) (emphasis omitted). Section 307 has since been amended to explicitly define “forced labor” as including “forced or indentured child labor.” See 19 U.S.C. § 1307.

The Tariff Act’s expansive definition of forced labor gave some politicians pause, however, over what they perceived as the law’s potential negative impact on American consumers. As Senator James A. Reed asked on the Senate floor in 1929:

Will it benefit Americans to exclude from importation into this country products which we do not make and can not make, such as tea and coffee and rubber? Will it help Americans for us in our zeal to abolish forced labor in foreign climes, to deny to all Americans the use of such articles . . . ?¹⁴¹

To ameliorate those concerns, Congress added an exception that ultimately “swallowed the statute.”¹⁴² The “consumptive demand loophole” permitted the importation of goods made by forced labor so long as they were “not mined, produced, or manufactured in such quantities in the United States as to meet the consumptive demands of the United States.”¹⁴³ If the United States did not produce an adequate supply of a product, or at least “a substitute that would be generally acceptable to the purchaser,” companies remained free to import slave-made products.¹⁴⁴ This loophole rendered the Tariff Act almost entirely useless in preventing the importation of forced-labor-made products. Functionally, it guaranteed that many goods—including virtually all tropical goods, like cocoa, palm oil, or bananas, which are not produced at scale within the United States—could never be barred.¹⁴⁵ As a result, section 307 was rarely enforced until the consumptive demand loophole was closed in 2016.¹⁴⁶

2. Section 307 enforcement procedures

CBP, which is housed within the Department of Homeland Security, is responsible for civil enforcement of section 307.¹⁴⁷ The procedures for civil

141. 71 CONG. REC. 4494 (1929) (statement of Sen. James A. Reed).

142. Marley S. Weiss, *Human Trafficking and Forced Labor: A Primer*, 31 A.B.A. J. LAB. & EMP. L. 1, 29 (2015).

143. See 19 U.S.C. § 1307 (2010) (amended 2016).

144. *China Diesel Imps., Inc. v. United States*, 18 Ct. Int’l Trade 1086, 1089 n.8 (1994).

145. See, e.g., *Int’l Lab. Rts. Fund v. United States*, 29 Ct. Int’l Trade 1050, 1055 (2005) (“[N]o domestic cocoa production industry exists in the United States sufficient to meet domestic consumptive demand.”).

146. See Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 910(a)(1), 130 Stat. 122, 239 (2016) (codified at 19 U.S.C. § 1307); *infra* notes 196-204 and accompanying text.

147. U.S. GOV’T ACCOUNTABILITY OFF., GAO-21-106, FORCED LABOR IMPORTS: DHS INCREASED RESOURCES AND ENFORCEMENT EFFORTS, BUT NEEDS TO IMPROVE WORKFORCE PLANNING AND MONITORING 6-7 (2020). CBP was established in 2003. See *CBP Through the Years*, U.S. CUSTOMS & BORDER PROT., <https://perma.cc/Y3XZ-W7WK> (last updated Sept. 19, 2022). Prior to the establishment of CBP, section 307 was enforced by one of CBP’s predecessors, the U.S. Customs Service. See CIMINO-ISAACS ET AL., *supra* note 131, at 4. U.S. Immigration & Customs Enforcement (ICE) is responsible
footnote continued on next page

enforcement are laid out in agency regulations.¹⁴⁸ The process begins when “any port director or other principal Customs officer *has reason to believe*” that merchandise being imported into the United States was produced using forced labor.¹⁴⁹ While there is no obligation for CBP to seek out information that would give rise to such a belief, “[a]ny person outside” the agency may communicate their belief to CBP officers.¹⁵⁰ When a CBP officer has the requisite “reason to believe” that forced labor has been used, they “shall communicate [t]his belief to the Commissioner of CBP.”¹⁵¹ The definition of forced labor under section 307 is nearly identical to that of the ILO’s Convention Concerning Forced or Compulsory Labour,¹⁵² and CBP frequently relies on the ILO’s standards for and indicators of forced labor.¹⁵³

Upon receipt of a communication conveying a belief about forced labor, the CBP Commissioner “will cause such investigation to be made *as appears to be warranted by the circumstances* of the case.”¹⁵⁴ Investigations usually last six months or longer.¹⁵⁵ If the “information available reasonably but not conclusively indicates that merchandise” in violation of section 307 “is being, or is likely to be, imported,” the Commissioner “shall” enact a withhold release order (WRO).¹⁵⁶ The “reasonably but not conclusively” standard is a lower evidentiary threshold than probable cause.¹⁵⁷

Goods included in a WRO are detained at ports of entry.¹⁵⁸ An importer may either attempt to demonstrate that the goods were not made using forced

for investigating criminal violations of section 307. U.S. GOV’T ACCOUNTABILITY OFF., *supra*, at 1. The scope of this Note is limited to civil enforcement of section 307.

148. See 19 C.F.R. §§ 12.42-12.43 (2022).

149. *Id.* § 12.42(a) (emphasis added).

150. See *id.* § 12.42(b). CBP encourages members of the trade community and the public to file petitions notifying the agency of potential instances of forced labor. See *Forced Labor*, U.S. CUSTOMS & BORDER PROT., <https://perma.cc/Q54R-QAFX> (last updated Feb. 8, 2023) (to locate, select “How You Can Help”).

151. 19 C.F.R. § 12.42(a) (emphasis added).

152. Compare Convention Concerning Forced or Compulsory Labour art. 2, *adopted* June 28, 1930, 39 U.N.T.S. 55 (entered into force May 1, 1932) (defining forced labor as “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”), with 19 U.S.C. § 1307 (defining forced labor 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”).

153. See, e.g., *Forced Labor*, *supra* note 150 (citing ILO INDICATORS, *supra* note 11).

154. 19 C.F.R. § 12.42(d) (emphasis added).

155. See SYAM & ROGGENSACK, *supra* note 130, at 23.

156. 19 C.F.R. § 12.42(e). For a list of active WROs as of March 2023, see Appendix A below.

157. SYAM & ROGGENSACK, *supra* note 130, at 10.

158. See 19 C.F.R. § 12.42(e).

labor¹⁵⁹ or re-export them.¹⁶⁰ If the CBP investigation reveals conclusive evidence or probable cause that the merchandise violates section 307, the CBP Commissioner, “with the approval of the Secretary of the Treasury,” will publish a “Finding” in the Customs Bulletin and the Federal Register, which enables the permanent seizure of goods.¹⁶¹ Importers that challenge CBP determinations must provide “*satisfactory evidence* that the merchandise was not mined, produced, or manufactured in any part with the use of a class of labor specified in the finding.”¹⁶²

Section 307 grants significant authority to CBP. It authorizes the agency to investigate any merchandise worldwide that is likely to be imported into the United States,¹⁶³ enabling the agency to investigate every portion of the global supply chain. The “wholly or in part” language of section 307 indicates that “even ‘minor’ involvement of forced or prison labor in the manufacture of a product may taint the entire product.”¹⁶⁴

At the same time, the statute grants the agency significant discretion as to how it exercises its authority. Key phrases like “has reason to believe,”¹⁶⁵ “as appears to be warranted,”¹⁶⁶ and “satisfactory evidence”¹⁶⁷ are highly malleable and are not defined in regulations. Moreover, there appears to be no way for importers or the public at large to better understand how CBP exercises its discretion. Requests made by the Author pursuant to the Freedom of Information Act¹⁶⁸ for all “internal guidance documents, policy manuals, employee handbooks, guides, standards, or instructions that aid CBP officials in exercising their discretion pursuant to 19 C.F.R. § 12.42 to prevent goods made with forced labor from being imported into the United States,” as well as “any training manuals and other training documents used to teach CBP officials how to effectuate this regulation” yielded only six sparsely worded, heavily redacted PowerPoint slides used during CBP officer training.¹⁶⁹ The

159. *See id.* § 12.43.

160. *Id.* § 12.44(a).

161. *See id.* §§ 12.42(f), 12.44(b).

162. *Id.* § 12.42(g) (emphasis added).

163. *See id.* § 12.42(a), (d).

164. T. Markus Funk, Paul Hirose & Elizabeth Breakstone, *Importing Goods Made with Forced Labor Now Under Stricter Scrutiny*, BLOOMBERG BNA: WHITE COLLAR CRIME REP., Mar. 18, 2016, at 1, 2.

165. 19 C.F.R. § 12.42(a).

166. *Id.* § 12.42(d).

167. *Id.* § 12.42(g).

168. 5 U.S.C. § 552.

169. U.S. Customs & Border Prot., U.S. Dep’t of Homeland Sec., *Business Partners: Forced Labor* (n.d.) (on file with author). This document was obtained by the Author pursuant to a request under the Freedom of Information Act.

unredacted portions of these slides suggest they mostly reprint the language found in the regulations rather than provide additional guidance.

3. The Trade Facilitation and Trade Enforcement Act of 2015

In 2016, U.S. trade policy related to the importation of goods made using forced labor was significantly revised. The Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA)¹⁷⁰ made sweeping changes to trade law “with the overall objective to ensure a fair and competitive trade environment.”¹⁷¹ Among other changes, TFTEA provided CBP with new tools to combat the importation of counterfeit goods, to enforce antidumping laws, and to collaborate with other government agencies and the private sector.¹⁷² Most relevant for present purposes, section 910 of TFTEA amended section 307 of the Tariff Act to eliminate the consumptive demand loophole.¹⁷³

TFTEA was signed into law in February 2016.¹⁷⁴ As such, we are now able to assess its early enforcement and begin to understand its impact, a task undertaken in the next Part.

III. Understanding the Early Impact of TFTEA

This Part considers the multiple effects of the closing of section 307’s consumptive demand loophole by TFTEA. CBP was restructured in the wake of the passage of TFTEA.¹⁷⁵ In addition, the agency has increased its enforcement of section 307, which has prevented some tainted goods from entering the United States and driven positive changes in global supply chains.¹⁷⁶ But CBP’s enforcement thus far remains insufficient: The goods

170. Pub. L. No. 114-125, 130 Stat. 122 (2016) (codified as amended in scattered sections of the U.S. Code). Despite the Act’s name, it was not officially signed into law until February 24, 2016. *Id.*

171. U.S. Customs & Border Prot., U.S. Dep’t of Homeland Sec., CBP Publ’n No. 0544-0716, Trade Facilitation and Trade Enforcement Act of 2015—Overview (2016), <https://perma.cc/9SAX-54XZ>.

172. *See id.*

173. TFTEA § 910(a)(1), 130 Stat. at 239 (codified at 19 U.S.C. § 1307); *see also* Merchandise Produced by Convict, Forced, or Indentured Labor, 82 Fed. Reg. 26,582 (June 8, 2017) (codified at 19 C.F.R. pt. 12) (implementing section 910 of TFTEA). There were multiple unsuccessful attempts to eliminate the consumptive demand loophole in the years prior to the enactment of TFTEA. *See Int’l Lab. Rts. Fund v. United States*, 29 Ct. Int’l Trade 1050, 1057 n.7 (2005).

174. Press Release, White House Off. of the Press Sec’y, Signing Statement for H.R. 644 (Feb. 24, 2016), <https://perma.cc/K2HH-9BGL>.

175. *See infra* Part III.A.

176. *See infra* Part III.B.

covered by WROs represent a very small share of high-risk goods, and significant quantities of goods made using forced labor continue to enter the country.¹⁷⁷ Closing the consumptive demand loophole has not closed U.S. ports to goods made using forced labor.

A. Structural Changes Within CBP

The enactment of TFTEA triggered a reorganization of CBP. In April 2016, shortly after TFTEA was signed,¹⁷⁸ CBP established a Trade Enforcement Task Force to develop procedures to implement TFTEA and enforce the strengthened ban on forced-labor imports.¹⁷⁹ At the recommendation of the Director of the Trade Enforcement Task Force, the CBP created the Forced Labor Division—a permanent division to enforce section 307—which “began operations in January 2018.”¹⁸⁰ Before the enactment of TFTEA, CBP “did not allocate resources specifically to enforcing the prohibition on forced labor imports.”¹⁸¹ Instead, enforcement of section 307 was one of the responsibilities of the Civil Enforcement Division in CBP’s Office of Trade.¹⁸²

The Forced Labor Division’s expenditures were about \$1 million in fiscal year 2018 and \$1.4 million in fiscal year 2019.¹⁸³ The Division is expanding its operations, however, and requested a \$70.3 million budget for fiscal year 2023.¹⁸⁴

B. Uptick in Enforcement Actions

The enactment of TFTEA led to an immediate uptick in CBP enforcement. After declining to issue a single WRO for fifteen years, the agency has issued thirty-nine since 2016.¹⁸⁵ Four of those WROs led to subsequent Findings.¹⁸⁶

177. *See infra* Part III.C.

178. *See* Press Release, *supra* note 174.

179. U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 147, at 9.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 15. By contrast, ICE—the agency responsible for criminal enforcement of forced labor-related conduct—reported expenditures of roughly \$40 million in fiscal year 2019. *Id.* at 33.

184. U.S. CUSTOMS & BORDER PROT., U.S. DEP’T OF HOMELAND SEC., U.S. CUSTOMS AND BORDER PROTECTION BUDGET OVERVIEW: FISCAL YEAR 2023 CONGRESSIONAL JUSTIFICATION, at CBP-OS-9 (2022), <https://perma.cc/J7MT-6ZAM>.

185. *See infra* Figure 1. A complete list of WROs issued since 2016 can be found in Appendix B below.

186. July 2022 Version of Withhold Release Orders and Findings List, U.S. CUSTOMS & BORDER PROT., <https://perma.cc/7YMP-F6D5> (archived Mar. 5, 2023) (to locate, select “View the live page”).

Section 307 enforcement was nearly nonexistent until the early 1990s, with only two WROs issued beforehand, in 1953 and 1958 respectively.¹⁸⁷ The uptick in enforcement in the early 1990s was almost entirely attributable to China: All but one WRO issued between 1991 and 1995 were against Chinese goods.¹⁸⁸ During that period, China was experiencing rapid economic growth and becoming one of the most important trade partners of the United States.¹⁸⁹ At the same time, there were concerning allegations that “Chinese political prisoners were being used to produce goods for export to” the United States.¹⁹⁰ These allegations triggered investigations by CBP and the State Department, leading to the issuance of twenty-six WROs¹⁹¹ and other executive actions.¹⁹² After this brief period, section 307 largely returned to hibernation until 2016.¹⁹³ Though virtually any enforcement would have constituted an increase from previous levels, the period since 2016 has been the most aggressive enforcement era in the history of section 307.

187. *Id.*

188. *See id.*

189. *See* U.S. GEN. ACCT. OFF., GAO/GGD-95-106, U.S.-CHINA TRADE: IMPLEMENTATION OF THE 1992 PRISON LABOR MEMORANDUM OF UNDERSTANDING 1 (1995).

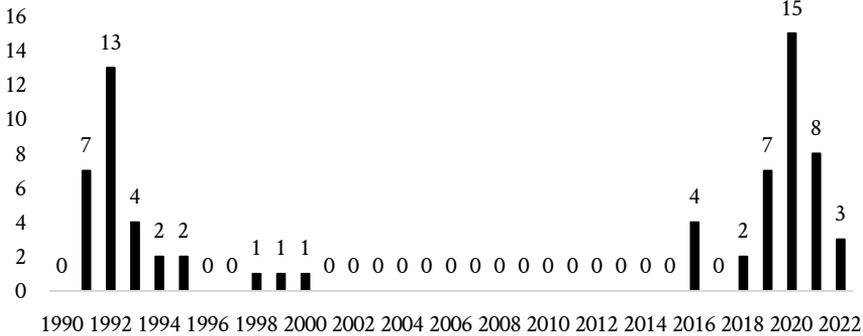
190. *Chinese Prison Labor Exports*, U.S. DEP’T STATE (June 17, 1997), <https://perma.cc/5HYP-XB59>.

191. *Id.*

192. *See* U.S. GEN. ACCT. OFF., *supra* note 189, at 3-4 (describing the 1992 Prison Labor Memorandum of Understanding that authorized the United States to investigate Chinese facilities suspected of producing goods using forced labor).

193. *See infra* Figure 1.

Figure 1
Withhold Release Orders Issued by Year (1990-2022)¹⁹⁴



The issuance of a WRO can have a clear and immediate effect that extends beyond the withholding of goods at the U.S. border. Some WROs spur investment in better business practices. For example, Malaysia’s Top Glove Corporation—responsible for producing over one-quarter of the world’s disposable gloves¹⁹⁵—responded favorably after a WRO was issued against it in July 2020 and a Finding was published in March 2021.¹⁹⁶ Top Glove “issu[ed] more than \$30 million in remediation payments to workers and improv[ed] labor and living conditions at the company’s facilities.”¹⁹⁷ These investments adequately addressed CBP’s concerns, and the WRO and Finding were deactivated in September 2021, allowing the company to resume shipping disposable gloves to the United States.¹⁹⁸

The closure of the consumptive demand loophole and a renewed attention to combatting forced labor directly led to an increase in WROs issued pursuant to section 307. But not every WRO is taken seriously or results in meaningful action to address CBP’s concerns.¹⁹⁹ And notwithstanding the positive effects

194. Data compiled by Author from July 2022 Version of Withhold Release Orders and Findings List, *supra* note 186. As of April 15, 2023, no WROs have been issued in 2023.

195. Elizabeth Skokan, U.S. Int’l Trade Comm’n, *Glove Story: Global Glove Production Amidst the COVID-19 Pandemic* (2021), <https://perma.cc/Q9CN-MQ5H>.

196. Press Release, U.S. Customs & Border Prot., *CBP Modifies Forced Labor Finding on Top Glove Corporation Bhd.* (Sept. 9, 2021), <https://perma.cc/2U3L-PZGT>.

197. *Id.*

198. *See id.*

199. *See, e.g.,* Mark Godfrey, *China Brushes Off US Sanctions Against Dalian Ocean Fishing*, SEAFODSOURCE (June 4, 2021), <https://perma.cc/3MWM-YL6Z> (quoting Chinese footnote continued on next page

some WROs have, enforcement remains a challenge. For example, although a WRO was issued against all cotton produced in Turkmenistan in May 2018,²⁰⁰ products advertised as “Made in Turkmenistan” with “100% Turkmenistan cotton” could be purchased from Amazon, Walmart, and eBay’s websites more than six months later.²⁰¹ Still, at least in some cases, increased enforcement has led to improved working conditions abroad. As the next Subpart explains, however, these cases are few and far between due to an overall dearth of enforcement actions.

C. The Insufficiency of Existing Enforcement Efforts

While it is true that CBP has increased its enforcement of section 307 since the passage of TFTEA,²⁰² current enforcement levels remain inadequate. Goods covered by WROs make up only a miniscule fraction of the high-risk products imported into the United States each year. And the United States remains heavily reliant on countries that utilize forced labor for many products. What is more, it is difficult to discern any widespread reduction in the import of at-risk goods that could be attributed to the deterrent effects of increased enforcement.

1. Quantifying enforcement efforts

Despite recent efforts by CBP to increase enforcement of section 307, current enforcement levels represent a drop in the bucket. Goods covered by WROs make up only a small fraction of the over \$144 billion worth of high-risk imports that enter the United States every year.²⁰³ In the three years following the enactment of TFTEA (2017-2019), only \$6.3 million worth of goods were withheld at the border, roughly \$1 detained for every \$68,500 worth of at-risk goods that entered the country over the same period.²⁰⁴

Granted, CBP was constructing its enforcement infrastructure and ramping up enforcement efforts during that time.²⁰⁵ And according to CBP’s

officials describing allegations of forced labor as “American slander” and “part of a coordinated effort to ‘tarnish’ China”).

200. See *infra* Appendix B.

201. Victoria Gallagher, *Turkmenistan Cotton Products Found on Walmart, eBay and Amazon Websites*, APPAREL INSIDER (Feb. 19, 2019), <https://perma.cc/DLB9-8FW6>; Charlotte Tate & Eric Gottwald, *Are Amazon, Walmart, and eBay’s Online ‘Marketplaces’ Providing a Refuge for Goods Made with Forced Labor?*, THOMSON REUTERS FOUND. NEWS (Jan. 31, 2019, 2:02 PM GMT), <https://perma.cc/2JP5-PZN3>.

202. See *supra* Part III.B.

203. See WALK FREE FOUND., *supra* note 6, at 137.

204. See Fields, *supra* note 9.

205. See *supra* Part III.A.

own statistics, the agency drastically scaled up enforcement over the next three years: CBP estimates the value of goods detained and seized pursuant to WROs and Findings to be about \$50 million in fiscal year 2020, \$485 million in fiscal year 2021,²⁰⁶ and \$817 million in fiscal year 2022.²⁰⁷ Even so, \$817 million worth of seized goods amounts to only one-half of one percent of the value of at-risk goods that enter the United States annually. Notwithstanding CBP's increased enforcement efforts, the overwhelming majority of high-risk imports continue to freely enter the U.S. market. Moreover, it is unclear whether the expanded efforts seen in recent years will persist: As discussed below in Part IV.C, recent efforts by CBP to combat forced labor, including increased funding and staffing, have been predominantly focused on Xinjiang, China, raising questions about the sufficiency of CBP resources dedicated to combatting forced labor elsewhere. And the incidence of new enforcement actions has dropped precipitously—only three WROs were issued during 2022 and zero were issued during the first quarter of 2023.²⁰⁸

2. Continued imports of high-risk goods

Trade statistics can further illuminate the extent to which high-risk goods flow into the United States. Though a lack of supply-chain transparency makes it difficult to quantify with specificity the importation of goods made using forced labor,²⁰⁹ existing datasets can be combined to paint a general picture. The Food and Agriculture Organization (FAO) of the United Nations manages a dataset detailing the annual trade of agricultural goods.²¹⁰ This data can be combined with the U.S. Department of Labor's *2020 List of Goods Produced by Child Labor or Forced Labor*.²¹¹ This list is produced pursuant to the Department of Labor's duties under the TVPRA,²¹² and includes goods from countries the agency "has reason to believe are produced by forced labor or child labor in violation of international standards."²¹³ The 2020 version of the list identifies

206. U.S. CUSTOMS & BORDER PROT., U.S. DEP'T OF HOMELAND SEC., CBP TRADE AND TRAVEL REPORT: FISCAL YEAR 2021, at 17 (2022), <https://perma.cc/SWU3-KRNA>.

207. Press Release, U.S. Customs and Border Prot., CBP Highlights Top 2022 Accomplishments (Jan. 30, 2023), <https://perma.cc/ZE2Y-E9HG>. Over half the total value of the goods seized in 2022, nearly \$500 million, were seized under the Uyghur Forced Labor Prevention Act. *Id.*

208. *See infra* Appendix B.

209. *See supra* Part I.

210. *See Detailed Trade Matrix*, FOOD & AGRIC. ORG. UNITED NATIONS, <https://perma.cc/TQ49-JDGQ> (archived Mar. 5, 2023) (to locate, select "View the live page").

211. BUREAU OF INT'L LAB. AFFS., U.S. DEP'T OF LAB., 2020 LIST OF GOODS PRODUCED BY CHILD LABOR OR FORCED LABOR (2020), <https://perma.cc/Y7P3-9ZKT>.

212. *See* 22 U.S.C. § 7112(b)(2)(C).

213. BUREAU OF INT'L LAB. AFFS., *supra* note 211, at 1 (quoting 22 U.S.C. § 7112(b)(2)(C)).

155 goods from 77 countries.²¹⁴ Inclusion on the list indicates a “significant incidence of child labor or forced labor in the production of a particular good.”²¹⁵ “Information that relates only to a single company or facility, or which indicates an isolated incident of child labor or forced labor, will not ordinarily weigh in favor of a finding that a good is produced in violation of international standards.”²¹⁶ That said, inclusion on the list does not mean that 100% of a product is produced using forced labor.²¹⁷

Combining these datasets reveals that, for many agricultural imports, the United States is heavily reliant on countries that utilize forced labor. For example, more than 96% of the palm oil imported into the United States in 2021 came from high-risk countries where forced labor is prevalent.²¹⁸ Other commodities, like soybeans, were predominantly imported from countries that are not considered to be high-risk.²¹⁹ What is more, most of the imports displayed in Figure 2 are *not included* in the \$144 billion figure that has been discussed in this Note, which includes only the top five at-risk goods: laptops, computers, and mobile phones; garments; fish; cocoa; and sugarcane.²²⁰

214. *Id.* at 19.

215. *Id.* at 80.

216. *Id.*

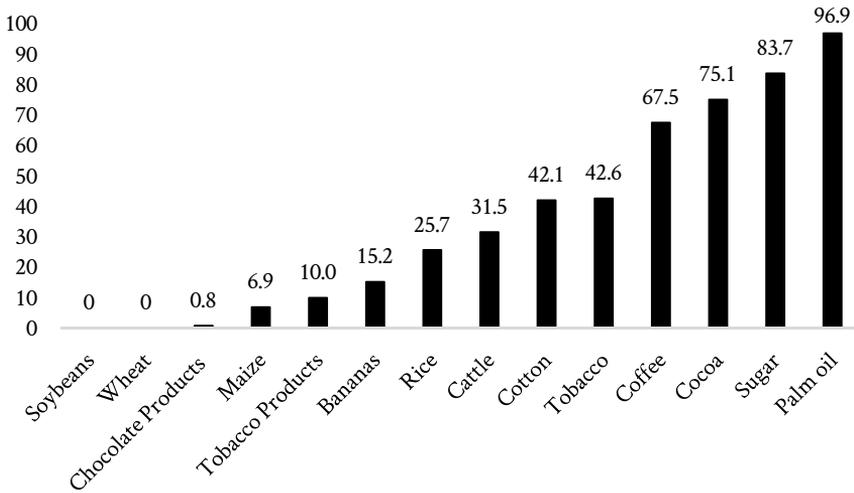
217. *See id.*

218. *See infra* Figure 2. These imports come from Indonesia and Malaysia, both of which appear in the 2020 *List of Goods Produced by Child Labor or Forced Labor*. *See* BUREAU OF INT’L LAB. AFFS., *supra* note 211, at 22; *see also* Margie Mason & Robin McDowell, *Palm Oil Labor Abuses Linked to World’s Top Brands, Banks*, AP NEWS (Sept. 24, 2020), <https://perma.cc/H35V-DZKX> (detailing instances of forced labor in the Indonesian and Malaysian palm-oil sector); FAIR LAB. ASS’N & CONSUMER GOODS F., *ASSESSING FORCED LABOR RISKS IN THE PALM OIL SECTOR IN INDONESIA AND MALAYSIA* 11 fig.2 (2018), <https://perma.cc/9LAC-S6EQ> (describing the same).

219. *See infra* Figure 2. Major trade partners in soy include Canada and Argentina. *See Detailed Trade Matrix, supra* note 210.

220. *See* WALK FREE FOUND., *supra* note 6, at iv, 137.

Figure 2
Percent of U.S. Imports from Countries Considered
High-Risk for the Use of Forced Labor (2021)²²¹



Conclusions based on Figure 2 should not be overdrawn. Not all goods imported from high-risk countries are tainted by forced labor. At the same time, it is likely that Figure 2 fails to capture all instances of forced labor because some imports from “safe” countries are nonetheless tainted.²²²

Complex trade patterns complicate the situation and shield additional instances of forced labor from view. For example, three-quarters of the \$1.3

221. See *Detailed Trade Matrix*, *supra* note 210; BUREAU OF INT’L LAB. AFFS., *supra* note 211, at 20-24. This chart was created by combining data from the FAO’s “Detailed Trade Matrix,” which quantifies trade flows between countries, and then filtering for the countries that are listed in the *2020 List of Goods Produced by Child Labor or Forced Labor*. By comparing total imports from high-risk countries with total imports from all countries, this chart shows the percentage of U.S. imports from high-risk countries. The use of forced labor, of course, extends beyond agricultural commodities; Figure 2 is limited to agricultural products solely due to data availability. Datasets for other sectors are not as rigorously kept or as reliable as FAO data.

222. See, e.g., RAINFORST FOUND. NOR. & FUTURE IN OUR HANDS, SALMON ON SOY BEANS—DEFORESTATION AND LAND CONFLICT IN BRAZIL 30-32 (2018), <https://perma.cc/3Q22-NP58> (identifying instances of slave labor in the Brazilian soybean industry); Anastasia Moloney, *Mexico’s Indigenous Migrant Workers Risk Enslavement on Farms: Rights Commission*, REUTERS (Dec. 4, 2017, 11:43 AM), <https://perma.cc/KQ6U-TY5C> (identifying the Mexican maize industry as a “hotspot[] of forced labor”).

billion of cocoa beans imported into the United States in 2021 came from high-risk countries.²²³ But the United States imported far more chocolate products—nearly \$3 billion.²²⁴ Those imports came from wealthier countries—like Canada, Germany, and Belgium—that are less prominently associated with forced labor and that do not themselves produce cocoa.²²⁵ Virtually none of the United States’ major trade partners in chocolate products grow cocoa at any appreciable scale (the lone exception being Mexico).²²⁶ Each of those countries, like the United States, is thus reliant on cocoa beans from high-risk countries,²²⁷ meaning that some (perhaps many or most) chocolate-product imports—purportedly “clean” imports based on Figure 2—are also tainted by cocoa harvested using forced labor.

The extent to which tainted goods enter the United States is even more pronounced with respect to other commodities like cobalt, a vital component of lithium-ion batteries.²²⁸ The Democratic Republic of the Congo (DRC) supplies approximately 70% of the world’s cobalt and houses more than half of global reserves.²²⁹ The DRC’s cobalt industry is known for its brutal conditions and labor abuses, including the employment of an estimated 40,000 children—some as young as three years old.²³⁰ The United States does not report importing any

223. See *supra* Figure 2; *Detailed Trade Matrix*, *supra* note 210; BUREAU OF INT’L LAB. AFFS., *supra* note 211, at 20-24.

224. *Detailed Trade Matrix*, *supra* note 210.

225. See *id.*; BUREAU OF INT’L LAB. AFFS., *supra* note 211 (omitting named countries from the list).

226. Compare *Detailed Trade Matrix*, *supra* note 210 (using the “Import Quantity” element), with *Crops and Livestock Products*, FOOD & AGRIC. ORG. UNITED NATIONS, <https://perma.cc/TVH7-9CH5> (archived Mar. 7, 2023) (using the “Crops and Livestock Products” dataset) (to locate, select “View the live page”).

227. See *Detailed Trade Matrix*, *supra* note 210 (showing that Belgium, Canada, and Germany import significant amounts of cocoa from Brazil, Cameroon, Côte d’Ivoire, Ghana, and Nigeria).

228. Though other metals can be used, cobalt enhances energy density and battery stabilization, features that make cobalt batteries hugely popular in two growing industries: consumer electronics and electric vehicles. See Prachi Patel, *Lithium-Ion Batteries Go Cobalt Free*, CHEM. & ENG’G NEWS (July 22, 2020), <https://perma.cc/2EF2-ZBRN>; Robert Ferris, *Automakers and Tech Firms Scramble for the Once Little-Known Element Cobalt, Essential for iPhones, Laptops and Electric Cars*, CNBC, (July 9, 2018, 2:12 PM EDT), <https://perma.cc/C623-9Q4E>.

229. U.S. GEOLOGICAL SURV., U.S. DEP’T OF THE INTERIOR, MINERAL COMMODITY SUMMARIES 2021, at 50-51 (2021), <https://perma.cc/4RZ9-63CH>.

230. Tria, *supra* note 19 (“It is estimated that 20% of the mines in the DRC are small-scale and use mostly child workers. These children, aged between 3 and 17, have to work in appalling and dangerous conditions, usually barefoot.”); see also *Is My Phone Powered by Child Labour?*, AMNESTY INT’L, <https://perma.cc/Q2AA-QXX8> (archived Mar. 1, 2023) (“The children told us that they endured long hours—up to 12 hours a day—working at the mines hauling back-breaking loads of between 20 and 40kg for US\$1-2 per day.

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appreciable amount of cobalt from the DRC.²³¹ But 43% of its cobalt imports—worth about \$226 million per year—come from Norway, Japan, and Finland.²³² Combined, these three countries only mine enough cobalt to satisfy 10% of the United States’s demand.²³³ Refineries in these countries are thus reliant on cobalt imports from other countries like the DRC.²³⁴

Trade in manufactured lithium-ion batteries is no better. Batteries produced in China “accounted for 80% of U.S. lithium-ion battery imports in the [final three months of 2021].”²³⁵ But Chinese companies own roughly half of the cobalt produced in the DRC.²³⁶ Even if the United States does not directly trade with the DRC, significant quantities of cobalt from the DRC—either in its refined form or embedded in products like lithium-ion batteries—nonetheless enter the United States via “clean” intermediary countries.²³⁷

3. Minimal deterrence

The expanded powers given to CBP by TFTEA could be reducing the import of goods made with forced labor beyond the goods CBP actually seizes

Many had nothing to eat all day.”); NICOLAS TSURUKAWA, SIDDHARTH PRAKASH & ANDREAS MANHART, ÖKO-INSTITUT E.V., SOCIAL IMPACTS OF ARTISANAL COBALT MINING IN KATANGA, DEMOCRATIC REPUBLIC OF CONGO 27-39 (2011), <https://perma.cc/UBK6-BJM5> (describing forced labor in the cobalt industry in the DRC); AFREWATCH & AMNESTY INT’L, “THIS IS WHAT WE DIE FOR”: HUMAN RIGHTS ABUSES IN THE DEMOCRATIC REPUBLIC OF THE CONGO POWER THE GLOBAL TRADE IN COBALT 19-33 (2016), <https://perma.cc/HHK5-3TY6> (documenting human rights abuses experienced by cobalt miners in the DRC).

231. U.S. GEOLOGICAL SURV., *supra* note 229, at 50. This source only discusses cobalt in unrefined forms (such as, metals, oxides, and salts). As this Subpart explains, cobalt that originates in the DRC is still imported into the United States through intermediary countries and manufactured products.
232. See *Cobalt Statistics and Information*, U.S. GEOLOGICAL SURV., <https://perma.cc/XTC4-6MQ9> (archived Mar. 1, 2023) (to locate, select “View the live page,” then download “2019 tables-only release,” and select tab “T4”).
233. See *id.* (to locate, select “View the live page,” then download “2019 tables-only release,” and select tab “T7”) (showing that Finland produced 1,454 metric tons of cobalt in 2019 and not listing Norway or Japan as cobalt producers).
234. See, e.g., *Japan, Congo Agree to Co-operate on Stable Supply of Rare Metals*, REUTERS (Dec. 9, 2022, 12:00 AM), <https://perma.cc/PMN8-5NQL>.
235. Garrett Hering, *US Lithium-Ion Battery Imports Surge as Auto, Energy Sectors Race to Meet Demand*, S&P GLOB. MKT. INTEL. (Feb. 25, 2022), <https://perma.cc/5G5H-XU4E>.
236. Luiza Ch. Savage, *How America Got Outmaneuvered in a Critical Mining Race*, POLITICO (Dec. 2, 2020, 4:30 AM EST), <https://perma.cc/6DZK-4QPL>.
237. In fact, it is a virtual certainty that the devices on which this Note was written, and on which it is being read, rely on cobalt-based batteries. See *Doe I v. Apple Inc.*, No. 19-cv-03737, 2021 WL 5774224, at *1 (D.D.C. Nov. 2, 2021) (“From iPhones to electric cars, Chromebooks to tablets, many everyday pieces of technology need cobalt from the DRC to run.”).

at the border. Section 307 could also be affecting trade decisions through deterrent effects.²³⁸ It does not appear, however, that such effects have yet occurred at scale.

Companies that fear an agency enforcement action, or simply want to avoid being associated with forced labor, might remove tainted goods from their supply chains and purchase substitute goods instead. This phenomenon was seen in 2021, after WROs were issued in 2020 against Sime Darby and FGV, two major Malaysian palm-oil producers.²³⁹ Multiple companies, “fearing the risk to their own reputation[s] if they [bought] from Sime Darby and FGV,” suspended business ties with the two palm-oil producers.²⁴⁰ General Mills, for example, issued “no buy orders” against both companies, which applied to all purchases, regardless of whether the General Mills product was destined for the United States or another country without a similar import restriction.²⁴¹ The WROs issued against Sime Darby and FGV thus influenced the trade of palm oil even when it was not destined for the U.S. market, an important example of the global leadership role U.S. trade policy can play.

Other companies are reducing their reliance on high-risk products even in the absence of an enforcement action.²⁴² Tesla, for example, advertises that it “uses far less cobalt per vehicle than the rest of the electric vehicle industry” and has announced “a goal of eliminating” cobalt from its batteries entirely.²⁴³ To date, no WROs have been issued against any cobalt producers.²⁴⁴

It is difficult to determine the extent to which such preemptive product shifting is occurring: Companies do not always explain the motives for their decisionmaking as Tesla did. If such substitutions were widely occurring, however, we would expect imports—especially of tropical commodities not subject to section 307 enforcement until the closure of the consumptive demand loophole²⁴⁵—to shift from at-risk countries toward countries less known for forced labor. We would expect a similar shift in the data if corporations were responding to a heightened enforcement risk at the U.S.

238. Fields, *supra* note 9 (noting that a CBP spokesperson said the ban on forced-labor-made goods would have a deterrent effect regardless of the total value of goods seized at the border).

239. See Mei Mei Chu, *Exclusive: Buyers Shun Major Malaysian Palm Oil Producers After Forced Labour Allegations*, REUTERS (Feb. 7, 2021, 9:33 PM), <https://perma.cc/BD8X-U9GY>.

240. *Id.*

241. *See id.*

242. *See* Bade, *supra* note 22, at 5 (“Recent protests demanding corporate accountability for the use of forced child labor and the associated adverse publicity is more feared than any potential monetary penalty assessed by a government agency.”).

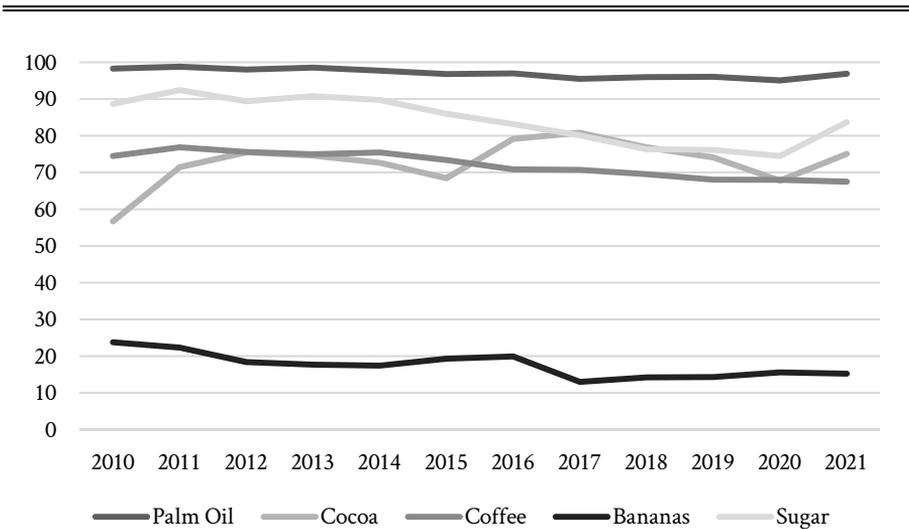
243. TESLA, IMPACT REPORT 33 (2018), <https://perma.cc/84JU-8DK3>.

244. *See infra* Appendix A, Appendix B. This statement is accurate as of April 15, 2023.

245. *See supra* notes 142-46 and accompanying text.

border by simply diverting their high-risk products to other markets.²⁴⁶ But this has not occurred at scale.²⁴⁷

Figure 3
Percent of Imports Coming from High-Risk Countries²⁴⁸



Note: TFTEA was enacted in 2016.

Figure 3 shows, for five major tropical agricultural commodities, the percentage of imports from high-risk countries by monetary value. Although there has been some annual fluctuation in the value of imports from high-risk countries, the enactment of TFTEA in 2016 did not drive substitution away from high-risk countries in favor of lower-risk ones.

For the same reasons as Figure 2, conclusions based on Figure 3 should not be overdrawn.²⁴⁹ In particular, Figure 3 does not identify shifting supply

246. See *supra* note 131 and accompanying text (explaining how heightened trade restrictions can cause trade of tainted products to simply shift destination markets).

247. See *infra* Figure 3.

248. *Detailed Trade Matrix*, *supra* note 210; BUREAU OF INT'L LAB. AFFS., *supra* note 211, at 20-24. This chart was created by using data from the FAO's "Detailed Trade Matrix," which quantifies trade flows between countries, and filtering for the countries that are listed in the *2020 List of Goods Produced by Child Labor or Forced Labor*. By comparing the value of imports from high-risk countries with the value of imports from all countries, this chart shows the percentage of U.S. imports from high-risk countries for each year.

249. See *supra* note 222 and accompanying text.

chains within a given country, which can occur as companies remove high-risk suppliers from their supply chains.²⁵⁰

In sum, the expanded enforcement power granted by TFTEA does not appear to have deterred the import of high-risk goods. This finding, combined with the minimal level of enforcement that has taken place, indicates that section 307 is not having as large of an effect as it could. The next Part of this Note seeks to delineate why.

IV. Diagnosing TFTEA's Limited Impact on Section 307 Enforcement

This Part argues that the underenforcement discussed in Part III is driven by a confluence of factors. Some of these factors are specific to section 307 and the international trade context, like CBP's specific enforcement strategies and the lack of transparency in global supply chains.²⁵¹ Others, like a lack of funding and the general nonreviewability of agency inaction, apply to agency enforcement more broadly.²⁵² This Part identifies four major factors contributing to CBP's underenforcement of section 307 before Part V proposes two potential solutions to the enforcement challenge.

A. Narrowly Targeted WROs

Most CBP enforcement actions have targeted a small number of companies, goods, and global regions. CBP typically targets individual producers: 34 of the 39 WROs issued since 2016 target specific business entities,²⁵³ many of which account for an extremely small share of imports. For example, five WROs target individual commercial fishing vessels, while a sixth targets a company that operates only thirty-three ships and trades mostly with Japan.²⁵⁴ But there are more than 60,000 commercial fishing vessels globally,²⁵⁵ and a study of roughly 16,000 vessels found that up to 26% were

250. See *supra* notes 239-41 and accompanying text.

251. See *infra* Parts IV.A, IV.B.

252. See *infra* Parts IV.C, IV.D.

253. See *infra* Appendix B (identifying 39 WROs, 34 of which target specific entities). Many of these WROs apply to multiple named entities, or a single entity and its subsidiaries. See *infra* Appendix B.

254. See *infra* Appendix B; *Corporate Info*, DALIAN OCEAN FISHING CO. LTD., <https://perma.cc/2Z2Q-QBZW> (archived Mar. 1, 2023); Godfrey, *supra* note 199 (noting a dispute over whether the company shipped products to the United States at all but contending that, if it had, sales amounted to less than \$300,000 per year).

255. FOOD & AGRIC. ORG. OF THE UNITED NATIONS, THE STATE OF WORLD FISHERIES AND AQUACULTURE 2020: SUSTAINABILITY IN ACTION 45 (2020), <https://perma.cc/92MH-NNMP>.

considered high-risk for employing forced labor.²⁵⁶ To be sure, some WROs, such as those against palm oil produced by Sime Darby and FGV in Malaysia, target large companies; however, the vast majority of WROs are issued against smaller businesses without significant market share.²⁵⁷

Additionally, CBP enforcement has narrowly focused on a small set of goods and regions. Nearly two-thirds of all active WROs²⁵⁸—and 17 of the 39 WROs issued since 2016²⁵⁹—target Chinese entities. Of the 39 WROs issued since 2016, 12 target companies operating in a single province, the Xinjiang Uyghur Autonomous Region of China (Xinjiang).²⁶⁰ The ongoing importance of these

256. Gavin G. McDonald et al., *Satellites Can Reveal Global Extent of Forced Labor in the World's Fishing Fleet*, 118 PNAS e2016238117, at 3 (2020), <https://perma.cc/7E2N-W4M2> (to locate, select “View the live page”). The study’s model estimated that between 2,300 and 4,200 vessels (14% to 26% of the study fleet) were high-risk. *Id.* Like other statistics presented in this Note, see *supra* text accompanying notes 56-58, this figure is considered to be a conservative estimate, McDonald et al., *supra*, at 3.

257. FGV manages nearly 417,000 hectares of land in Malaysia and produces about 3 million metric tons of crude palm oil annually. *Plantation Upstream*, FGV HOLDINGS BERHAD, <https://perma.cc/K6DG-8YZC> (archived Mar. 1, 2023). This annual supply of crude palm oil is worth \$2.1 to \$3.6 billion based on estimated prices of \$700 and \$1200 per metric ton. See *Palm Oil Monthly Price—US Dollars Per Metric Ton*, INDEX MUNDI, <https://perma.cc/GJX6-KFSH> (archived Mar. 1, 2023) (displaying historical palm-oil pricing data). At the other end of the spectrum, the Mexican tomato producer Agropecuarios Tom, S.A. de C.V. reported total sales of \$13 million in 2018. See *Agropecuarios Tom, S.A. de C.V.*, DUN & BRADSTREET, <https://perma.cc/H6RB-C4W7> (archived Mar. 1, 2023). For comparison, the total value of fresh tomatoes in 2018 exceeded \$93 billion globally. See *Value of Agricultural Production*, FOOD & AGRIC. ORG. UNITED NATIONS, <https://perma.cc/W3FS-9BFV> (archived Apr. 2, 2023) (to locate, select “View the live page”).

258. See *infra* Appendix A.

259. See *infra* Appendix B.

260. See Press Release, U.S. Customs & Border Prot., CBP Issues Detention Orders Against Companies Suspected of Using Forced Labor (Oct. 1, 2019), <https://perma.cc/BXP4-85LB> (Hetian Taida Apparel Co., Ltd.); Press Release, U.S. Customs & Border Prot., CBP Issues Detention Order on Hair Products Manufactured with Forced Labor in China (May 1, 2020), <https://perma.cc/94ET-UAPG> (Hetian Haolin Hair Accessories Co., Ltd.); Press Release, U.S. Customs & Border Prot., CBP Issues Detention Order on Hair Products Manufactured with Forced Labor in China (June 17, 2020), <https://perma.cc/F8JG-VXQM> (Lop County Meixin Hair Products Co., Ltd.); Press Release, U.S. Customs & Border Prot., CBP Issues Detention Order on Garments Manufactured with Prison Labor in China (Aug. 11, 2020), <https://perma.cc/3MWR-CD5L> (Hero Vast Group); Letter from Josh Zinner, Chief Exec. Officer, Interfaith Ctr. on Corp. Resp., to Mark Morgan, Acting Comm’r, U.S. Customs & Border Prot. (Aug. 28, 2020), <https://perma.cc/H6WR-XS84> (linking Hero Vast Group to Xinjiang); Press Release, U.S. Customs & Border Prot., DHS Cracks Down on Goods Produced by China’s State-Sponsored Forced Labor (Sept. 14, 2020), <https://perma.cc/9DRH-4KME> (No. 4 Vocational Skills Education Training Center; Lop County Hair Product Industrial Park; Yili Zhuowan Garment Manufacturing Co., Ltd. & Baoding LYSZD Trade and Business Co., Ltd.; Xinjiang Junggar Cotton and Linen Co., Ltd.; Hefei Bitland Information Technology Co., Ltd.); Press Release, U.S. Customs & Border Prot., CBP

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WROs is limited in light of the recent passage of the Uyghur Forced Labor Prevention Act (UFLPA),²⁶¹ discussed in more depth below.²⁶² Six WROs target commercial fishing, and six target the disposable glove industry in Malaysia; combined, these two industries alone represent nearly one-third of all WROs enacted since 2016.²⁶³ Enforcement of section 307 in these regions and industries is long overdue and essential, but CBP efforts should not be so limited.

B. Limited Access to Information

As previously discussed, CBP is required to make several factual findings before issuing a WRO, including a determination that merchandise in violation of section 307 “is being, or is likely to be, imported.”²⁶⁴ When investigating a specific entity, CBP must show a reasonable likelihood of forced labor, which can require tracing goods from a specific production facility all the way to a U.S. port of entry.²⁶⁵

The nature of global supply chains makes this showing an extremely difficult task.²⁶⁶ As the U.S. Court of Appeals for the Federal Circuit has noted, “forced labor products are not readily identifiable.”²⁶⁷ Thus, it may be difficult

Issues Detention Order on Cotton Products Made by Xinjiang Production and Construction Corps Using Prison Labor (Dec. 2, 2020), <https://perma.cc/YA57-6DEV> (Xinjiang Production and Construction Corporation); Press Release, U.S. Customs & Border Prot., CBP Issues Region-Wide Withhold Release Order on Products Made by Slave Labor in Xinjiang (Jan. 13, 2021), <https://perma.cc/AA69-2YWK> (cotton and tomato products); Press Release, U.S. Customs & Border Prot., The Department of Homeland Security Issues Withhold Release Order on Silica-Based Products Made by Forced Labor in Xinjiang (June 24, 2021), <https://perma.cc/LYU8-G9CW> (Hoshine Silicon Industry Co. Ltd.).

261. See Pub. L. No. 117-78, 135 Stat. 1525 (2021) (codified at 22 U.S.C. § 6901 note (Prohibition on Importation of Goods Made Through Forced Labor in the Xinjiang Uyghur Autonomous Region)); U.S. CUSTOMS & BORDER PROT., U.S. DEP’T OF HOMELAND SEC., CBP PUBL’N No. 1793-0522, UYGHUR FORCED LABOR PREVENTION ACT: U.S. CUSTOMS & BORDER PROTECTION OPERATIONAL GUIDANCE FOR IMPORTERS 7 (2022), <https://perma.cc/T6QL-CKNV> (“The UFLPA will supersede current WROs related to Xinjiang for goods imported on or after June 21, 2022.”).

262. See *infra* Part V.A (discussing the UFLPA).

263. See *infra* Appendix B.

264. 19 C.F.R. § 12.42(e) (2022); see also *supra* notes 154-62 and accompanying text.

265. See SYAM & ROGGENSACK, *supra* note 130, at 37 (noting that a submission to CBP regarding the use of forced labor should include evidence of where the product was produced and that it is entering the United States, ideally providing information on the specific port of entry).

266. See *supra* Part I.

267. See *McKinney v. U.S. Dep’t of Treasury*, 799 F.2d 1544, 1553-54 (Fed. Cir. 1986) (discussing an appellant’s stipulation regarding their inability to identify Soviet forced-labor products).

for CBP to make the factual determinations necessary to support a WRO for a given product, even if the agency is confident that an industry or region is awash in forced labor.

C. Insufficient Funding

A third factor hindering section 307 enforcement is the simple fact that limited resources have been dedicated to this purpose. Prior to the enactment of TFTEA, CBP did not specifically allocate any funds and had no full-time staff dedicated to forced-labor enforcement.²⁶⁸ The Forced Labor Division's budget totaled only \$2.4 million from 2018 to 2020, its first two years of existence.²⁶⁹ Though CBP has requested an expanded budget of \$70.3 million for fiscal year 2023 to combat forced labor, the increased funding is dedicated to enforcement of the UFLPA, which expands enforcement of section 307 only in Xinjiang, China.²⁷⁰ It is not clear how much funding will be dedicated to enforcement beyond Xinjiang. Even still, this increased budgetary figure represents just 0.4% of CBP's total budget request for fiscal year 2023.²⁷¹

Lack of funding has limited CBP's enforcement capacity. For example, the Forced Labor Division "does not have enough personnel on board to investigate all allegations of forced labor."²⁷² Insufficient staffing has prevented the Division from pursuing some investigations and forced it to suspend others.²⁷³ In June 2022, CBP completed an initial workplace needs assessment for the Forced Labor Division,²⁷⁴ and asked for an increase of 300 positions in its budget request for fiscal year 2023.²⁷⁵ The stated purpose of this staffing increase was to enforce the UFLPA,²⁷⁶ and it is not clear how many of the new roles, if any, will focus on other regions.

268. See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 147, at 9.

269. *Supra* note 183 and accompanying text (noting that CBP's Forced Labor Division had expenditures of \$1 million in fiscal year 2018 and \$1.4 million in fiscal year 2019).

270. U.S. CUSTOMS & BORDER PROT., *supra* note 184, at CBP-10, CBP-OS-9.

271. U.S. DEP'T OF HOMELAND SEC., BUDGET-IN-BRIEF: FISCAL YEAR 2023, at 26, <https://perma.cc/RW93-PM4G> (requesting \$17.45 billion).

272. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 147, at 17.

273. See *id.*

274. See *Forced Labor Imports: DHS Increased Resources and Enforcement Efforts, but Needs to Improve Workforce Planning and Monitoring*, U.S. GOV'T ACCOUNTABILITY OFF., <https://perma.cc/X8L9-C8AS> (archived Apr. 2, 2023).

275. U.S. CUSTOMS & BORDER PROT., *supra* note 184, at CBP-10.

276. *Id.*

D. Nonreviewability of Agency Inaction

An additional contributor to CBP underenforcement is the general difficulty third parties face in compelling administrative bodies to initiate or maintain enforcement actions, because agency nonenforcement decisions are presumptively unreviewable by courts.²⁷⁷ It is difficult, if not impossible, to challenge CBP's discretionary decision *not* to issue a WRO. Though this difficulty is not unique to CBP, the nonreviewability of agency nonenforcement decisions has long applied in the context of section 307.

In *McKinney v. United States Department of the Treasury*,²⁷⁸ a broad coalition of parties petitioned CBP's predecessor to bar imports of goods made using forced labor in the Soviet Union.²⁷⁹ The petition came shortly after the release of a State Department report detailing extensive use of forced labor in the Soviet Union to manufacture goods for export to Western markets.²⁸⁰ After the Secretary of the Treasury determined that a Finding was not warranted and took no action to block the import of Soviet goods, the coalition of plaintiffs filed suit alleging that the nonenforcement decision violated the Administrative Procedure Act.²⁸¹ The plaintiffs included: eighty-four members of Congress, in both their official capacities and "their personal capacities as consumers"; organizations representing "producers of products which are similar to and compete with goods or products being imported unlawfully from the Soviet Union"; and a range of other stakeholders.²⁸² They asserted standing on the basis of both economic injury due to unfair competition²⁸³ and "non-economic ethical injury" caused by the "unwitting purchase" of tainted goods "in contravention of moral and legal principles."²⁸⁴

The Federal Circuit held that none of the plaintiffs had standing to challenge the nonenforcement decision.²⁸⁵ It rejected the plaintiffs' argument regarding economic injury, in part because they could not adequately identify

277. See *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (establishing the presumption that "[r]efusals to take enforcement steps" are "decision[s] generally committed to an agency's absolute discretion" and are therefore not reviewable).

278. 799 F.2d 1544 (Fed. Cir. 1986).

279. See *McKinney v. U.S. Dep't of Treasury*, 9 Ct. Int'l Trade 315, 317 (1985), *aff'd*, 799 F.2d 1544 (Fed. Cir. 1986).

280. *McKinney*, 799 F.2d at 1547-48.

281. See *id.* at 1548.

282. See *id.* at 1548, 1551 & n.14, 1553-56.

283. See *id.* at 1553-54.

284. *Id.* at 1551 n.17, 1555.

285. *Id.* at 1558.

which Soviet goods specifically caused their injury²⁸⁶ and in part because they did not describe their injury with adequate specificity.²⁸⁷ The court also rejected the plaintiffs' arguments regarding noneconomic injury, determining that section 307 does not "afford consumers a legal right or interest in preventing, for economic, moral, or ethical reasons, the importation of foreign goods produced by forced labor."²⁸⁸

It is difficult to imagine a third-party plaintiff better situated to establish standing to challenge a nonenforcement decision than a competing producer or an unwitting consumer of tainted goods. *McKinney* thus represents a significant hurdle for parties seeking to challenge nonenforcement decisions.

V. Expanding CBP Enforcement of Section 307

Part IV offered four explanations for the finding that, despite CBP's enforcement of section 307, hundreds of billions of dollars of products that may have been produced using forced labor continue to be imported into the United States. This Part considers how CBP could expand its enforcement efforts to limit the entry of tainted goods into the United States and thus shrink the role of the United States as a driver of demand for such goods.²⁸⁹ It begins by assessing recent legislation, the Uyghur Forced Labor Prevention Act (UFLPA),²⁹⁰ which was passed to address the use of forced labor in the Xinjiang Uyghur Autonomous Region of China.²⁹¹ It then identifies two strategies utilized by that law that should be used more broadly by CBP in its global enforcement of section 307. Specifically, CBP should alter the way it issues WROs: First, by shifting away from targeting individual entities in favor of more sweeping orders that withhold a larger quantity of goods,²⁹² and second, by shifting the evidentiary burden away from the agency and onto

286. *See id.* at 1553-54 (stating that the evidence presented was not "sufficiently specific for the most part to clearly delimit Soviet-made products that would contravene § 307"); *see also supra* Part I (describing how a lack of supply-chain transparency makes it extremely difficult to identify with specificity goods that are produced using forced labor).

287. *McKinney*, 799 F.2d at 1554.

288. *Id.* at 1552. This holding was based in part on the existence of the consumptive demand loophole, so there may be room to challenge its ongoing validity. *See id.* ("Had Congress intended such protection to flow from § 307, it would likely have imposed an absolute bar . . .").

289. *See* LEBARON ET AL., *supra* note 37, at 56.

290. Pub. L. No. 117-78, 135 Stat. 1525 (2021) (codified at 22 U.S.C. § 6901 note (Prohibition on Importation of Goods Made Through Forced Labor in the Xinjiang Uyghur Autonomous Region)).

291. *See infra* Part V.A.

292. *See infra* Part V.B.

importers.²⁹³ Each strategy is considered in more depth below, and potential complications and downsides are addressed. Importantly, both strategies could be employed without the enactment of any new legislation.

A. The Uyghur Forced Labor Prevention Act

The UFLPA was adopted in December 2021 with near-unanimous support in both houses of Congress,²⁹⁴ and it took effect on June 21, 2022.²⁹⁵ Motivating the law was a finding by Congress that the People’s Republic of China’s government had “arbitrarily detained as many as 1.8 million Uyghurs, Kazakhs, Kyrgyz, and members of other Muslim minority groups in a system of extrajudicial mass internment camps . . . and has subjected detainees to forced labor, torture, political indoctrination, and other severe human rights abuses.”²⁹⁶ Also motivating efforts against forced labor in Xinjiang was a concern that such forced labor “leave[s] American businesses and workers to compete on an uneven playing field by allowing firms to gain advantage over their competitors by exploiting workers and artificially suppressing wages.”²⁹⁷ Economic protectionism has long been a driver of anti–forced labor trade law in the United States, dating back to the Tariff Act of 1930.²⁹⁸

The UFLPA makes two key changes to the way CBP enforces section 307’s prohibition against forced labor. First, it targets the entire region of Xinjiang instead of an individual producer. Section 3(a) of the UFLPA establishes that all goods manufactured wholly or in part in Xinjiang violate section 307 and thus cannot enter the United States.²⁹⁹ Second, it flips the burden of proof, requiring importers to prove compliance with section 307 rather than requiring CBP to prove noncompliance. This rebuttable presumption can be overcome if an importer provides CBP with “clear and convincing evidence” that the goods at

293. *See infra* Part V.C.

294. The Senate adopted the law by unanimous consent, and the House passed the law 428-1. Marti Flacks & Madeleine Songy, *The Uyghur Forced Labor Prevention Act Goes into Effect*, CTR. FOR STRATEGIC & INT’L STUD. (June 27, 2022), <https://perma.cc/8R6Q-2WA2>.

295. *China: US Law Against Uyghur Forced Labor Takes Effect*, HUM. RTS. WATCH (June 20, 2022, 12:01 AM EDT), <https://perma.cc/FZU2-CZ9A>.

296. *See* Uyghur Forced Labor Prevention Act, H.R. 1155, 117th Cong. § 2(1) (2021) (enacted).

297. Press Release, White House, Fact Sheet: New U.S. Government Actions on Forced Labor in Xinjiang (June 24, 2021), <https://perma.cc/X94M-7R7Z>.

298. *See supra* notes 138-39 and accompanying text (discussing the economic concerns that motivated the Tariff Act of 1930).

299. UFLPA, Pub. L. No. 117-78, § 3(a), 135 Stat. 1525, 1529 (2021) (codified at 22 U.S.C. § 6901 note (Prohibition on Importation of Goods Made Through Forced Labor in the Xinjiang Uyghur Autonomous Region)).

issue were not produced by convict labor, forced labor, or indentured labor.³⁰⁰ The UFLPA is not the first time either tool has been used; both were also employed against goods from North Korea in the Countering America's Adversaries Through Sanctions Act, which Congress passed in 2017.³⁰¹

Critically, the UFLPA did not grant CBP any authority that it did not previously possess. Rather, Congress enacted the UFLPA in part because it viewed existing CBP enforcement efforts as insufficient.³⁰² In effect, Congress made its own finding that Xinjiang-made goods violated section 307 after growing impatient that CBP had not yet exercised its existing authority to do so.

CBP should recognize the UFLPA as a signal from Congress to do more to combat forced labor. More importantly, the agency has all the authority it needs to expand its enforcement of section 307; there is no need to wait for another congressional nudge. CBP should immediately take the UFLPA's enforcement tools and implement them worldwide. Doing so will bring the agency closer to fulfilling its mandate of preventing the importation of goods produced by forced labor.

The remainder of this Part discusses each of the enforcement strategies employed by the UFLPA in greater depth, including a consideration of their potential drawbacks and complications.

B. Shifting Away from Targeting Individual Entities

As discussed above, most WROs are issued against individual, identified organizations, which limits their overall effect.³⁰³ Narrowly tailored WROs are appropriate when a single actor is violating the law in an otherwise untainted industry or region, but they are insufficient when, as is often the

300. *Id.* §§ 3(b)(2), 7(2), 135 Stat. at 1529, 1532 (codified at 22 U.S.C. § 6901 note (Prohibition on Importation of Goods Made Through Forced Labor in the Xinjiang Uyghur Autonomous Region)). CBP advises that importers can satisfy the clear and convincing standard by providing various types of information: due-diligence-system information; supply-chain tracing; supply-chain-management measures; and other evidence that shows goods were not mined, produced, or manufactured using forced labor. U.S. CUSTOMS & BORDER PROT., *supra* note 261, at 13-15.

301. *See* Pub. L. No. 115-44, § 321(b)(1), 131 Stat. 886, 952 (2017) (codified at 22 U.S.C. § 9241a).

302. *See* Uyghur Forced Labor Prevention Act, H.R. 1155, 117th Cong. § 2(6) (2021) (enacted) (noting that CBP had already issued eleven WROs targeting goods made in Xinjiang); *see also id.* § 2(4) ("Audits and efforts to vet products and supply chains in the Xinjiang Uyghur Autonomous Region are unreliable"); Aaron R. Hutman, Stephan E. Becker, Benjamin J. Cote, Moushami P. Joshi & Toochoi L. Ngwangwa, *Companies Prepare for the Uyghur Forced Labor Prevention Act (UFLPA)*, PILLSBURY WINTHROP SHAW PITTMAN LLP (Jan. 18, 2022), <https://perma.cc/9CWH-BVBB> ("The UFLPA will replace the existing case-by-case implementation of WROs").

303. *See supra* Part IV.A.

case, forced labor is more widely used.³⁰⁴ Where evidence indicates that the use of forced labor is widespread, CBP should issue more sweeping WROs that cover a larger quantity of goods.

Increasingly, CBP is recognizing this alternative method as an effective strategy. Since mid-2018, the agency has issued five WROs targeting an entire industry or industries in a given region rather than specific, named businesses.³⁰⁵ It has ordered the withholding of all artisanal rough cut diamonds from the Marange Diamond Fields of Zimbabwe (one of the largest diamond-producing regions in the world³⁰⁶), all products containing cotton from Turkmenistan, all products containing tobacco from Malawi, all gold from artisanal small mines in the DRC, and all products containing cotton or tomatoes from Xinjiang.³⁰⁷ Industry-wide WROs—sometimes referred to as “blanket WROs”—not only cover more goods, but can also prevent corporations from evading enforcement actions by marketing products through separate entities not named in the WRO.

For example, the WRO against palm oil produced by Sime Darby in Malaysia includes “its subsidiaries, joint ventures, and affiliated entities.”³⁰⁸ But palm-oil supply chains are notoriously complex and employ “opaque ownership structures” that “contribute[] to the ‘leakage’ of unsustainable palm oil to world markets.”³⁰⁹ These opaque structures allow some corporate entities—even if they are closely linked to the entities engaging in unsustainable practices—to evade accountability because they are “not legally part of the same company group.”³¹⁰ The same structures can be used to evade WROs.

CBP’s recent use of industry-wide WROs demonstrates that additional legislation or rulemaking is not necessary for the agency to issue broader orders. Section 307 is silent as to the permissible scope of a WRO,³¹¹ as are agency regulations—all that is required is that the CBP Commissioner, in his

304. See, e.g., BUREAU OF INT’L LAB. AFFS., *supra* note 211, at 80 (noting that inclusion on the list ordinarily requires “significant incidence of child labor or forced labor in the production of a particular good”).

305. See *infra* Appendix B.

306. Anna Majavu, *Broken Houses and Promises: Residents Still in Poverty Near Massive Diamond Project*, MONGABAY (Oct. 24, 2022), <https://perma.cc/2TBX-AXLQ>.

307. *Id.*

308. Press Release, U.S. Customs & Border Prot., CBP Issues Withhold Release Order on Palm Oil Produced by Forced Labor in Malaysia (Dec. 30, 2020), <https://perma.cc/M6XP-NPX9>.

309. BARBARA KUEPPER & TIM STEINWEG, CHAIN REACTION RSCH., SHADOW COMPANIES PRESENT PALM OIL INVESTOR RISKS AND UNDERMINE NDPE EFFORTS 1 (2018), <https://perma.cc/TE2H-9FMA>.

310. See *id.* at 2.

311. See 19 U.S.C. § 1307.

exercise of discretion, determine that the “information available reasonably but not conclusively indicates that merchandise” in violation of section 307 “is being, or is likely to be, imported.”³¹² CBP needs no additional authority to begin issuing industry-wide WROs more broadly.

To be sure, there are drawbacks to industry-wide WROs. A primary concern with broader WROs is that they may cover goods that are not produced in violation of section 307 and thus are overinclusive. This, critics argue, could “deter legitimate business” and “worsen the economic security of vulnerable workers.”³¹³

While it is sometimes true that “‘active corporate investment’ in developing countries ‘contributes to the economic development that so often is an essential foundation for human rights,’”³¹⁴ this is not always the case. Investment that “fails to respect human rights norms will not improve living conditions, but will exacerbate poverty and inequalities, resulting in abuses like trafficking and forced child labor.”³¹⁵ Thus, it is not at all clear that wider enforcement of section 307 will in fact harm vulnerable workers.

Businesses can address overinclusion using pre-existing procedures. Importers can present evidence showing compliance with section 307, contest CBP’s determinations in administrative proceedings,³¹⁶ and seek judicial review of final agency actions.³¹⁷ WROs can also be modified or revoked to remedy any issues of overinclusion.³¹⁸ CBP has already narrowed the scope of multiple industry-wide WROs, removing certain companies from their coverage, thereby allowing the companies to resume imports. To date, three producers have been removed from the Malawi tobacco WRO after furnishing CBP with sufficient evidence to conclude that the tobacco they imported was not grown or harvested using forced labor.³¹⁹ Similar

312. 19 C.F.R. § 12.42(e) (2022).

313. See CHRISTOPHER A. CASEY & CATHLEEN D. CIMINO-ISAACS, CONG. RSCH. SERV., IF11360, SECTION 307 AND IMPORTS PRODUCED BY FORCED LABOR (2022).

314. Brief of Small and Mid-Size Cocoa and Chocolate Companies as Amici Curiae in Support of Respondents, *supra* note 21, at 31 (quoting *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1406 (2018) (opinion of Kennedy, J.)).

315. *Id.*

316. 19 C.F.R. § 12.43(a), (b).

317. See, e.g., *China Diesel Imps., Inc. v. United States*, 18 Ct. Int’l Trade 515, 515-17 (1994) (challenging a decision to exclude diesel engines from entry due to a violation of section 307).

318. See, e.g., *supra* note 196-198 and accompanying text (describing the revocation of the Top Glove WRO).

319. See Press Release, U.S. Customs & Border Prot., CBP Modifies Withhold Release Order on Certain Tobacco Imports from Premium Tobacco Malawi Limited (May 24, 2021), <https://perma.cc/A95G-Q78J>; see also *Withhold Release Orders and Findings List*, U.S.

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modifications were made to remove an importer from the WRO covering gold mines in the DRC.³²⁰

A second concern with blanket WROs is institutional capacity. Put simply, barring more goods with WROs increases the amount of work CBP must do. For example, CBP anticipates the UFLPA—a blanket WRO covering the entire region of Xinjiang—will require its field officers to investigate an additional 11.5 million shipments of goods each year.³²¹ As the head of one apparel trade organization contended, “we simply do not have the capability or capacity to implement, comply with, or enforce a blanket WRO.”³²²

Without a doubt, CBP is resource constrained,³²³ and additional funding will likely be necessary if CBP issues more blanket WROs.³²⁴ But CBP is seeking to dramatically expand its staff dedicated to forced labor over the next few years.³²⁵ In addition, the strain caused by additional industry-wide WROs can be reduced by placing more responsibility on the importers themselves, a strategy discussed in the next Subpart.

C. Shifting the Burden of Proof to Importers

Importers presently have no formal obligation to prove compliance with section 307 and may freely import goods (subject to other applicable law) in the absence of a WRO.³²⁶ Only after a WRO is issued does the burden shift to importers, who must establish compliance with the law to get the WRO revoked.³²⁷

The current approach has it backwards. Importers are better positioned than CBP or third-party watchdogs to acquire necessary information. Their business records already contain relevant information from their normal

CUSTOMS & BORDER PROT., <https://perma.cc/QP5A-7S7L> (last updated Feb. 8, 2023) (noting the removals from the Malawi tobacco WRO).

320. See Press Release, U.S. Customs & Border Prot., CBP Modifies Withhold Release Order on Gold Imports from the Democratic Republic of the Congo (May 28, 2020), <https://perma.cc/G6RF-9YLV>.

321. See U.S. CUSTOMS & BORDER PROT., *supra* note 184, at CBP-OS-35.

322. CIMINO-ISAACS ET AL., *supra* note 131, at 26 (quoting Am. Apparel & Footwear Ass’n, Enforcing the Ban on Imports Produced by Forced Labor in Xinjiang: Statement of Steve Lamar, President and CEO, American Apparel & Footwear Association 3 (2020), <https://perma.cc/Q6T7-74DL>).

323. See *supra* Part IV.C.

324. CIMINO-ISAACS ET AL., *supra* note 131, at 27.

325. See *supra* note 275 and accompanying text.

326. See generally 19 C.F.R. §§ 12.42-12.43 (2022) (lacking any requirements for importers to show compliance with section 307 until such time that a WRO is issued).

327. *Id.* § 12.43.

efforts to monitor supply chains,³²⁸ satisfy reporting requirements imposed by other statutes,³²⁹ or obtain third-party certifications.³³⁰ And importers are best situated to restructure their supply chains, alter procurement agreements, or pressure suppliers to adopt better business practices.³³¹ Put another way, the current approach tasks CBP with investigating commodity supply chains and identifying instances of forced labor even though the importing entities could do so more efficiently themselves. To borrow from law and economics, the importers are the cheapest cost-avoider, and they could perform those tasks at a lower cost.³³² The tasks should thus be assigned to them in the first instance. Such a change would also relieve the pressure on CBP's understaffed Forced Labor Division by shifting some of its workload onto the private sector.³³³

This alternative approach would require an *ex ante* showing of compliance with section 307 in order to import goods into the United States. Importers would be required to make an affirmative showing that their goods are untainted at the outset, rather than after the issuance of a WRO. Such a rule could be narrowly applied to a subset of high-risk goods—like those on the Department of Labor's *List of Goods Produced by Child Labor or Forced Labor*, or a

328. See, e.g., *Traceability to the Mill and Plantation by Market*, *supra* note 50 (documenting significant, though incomplete, supply-chain monitoring data that is already in Cargill's possession).

329. For example, the California Transparency in Supply Chains Act of 2010 mandates that retail sellers and manufacturers with “annual worldwide gross receipts” of over \$100 million disclose their efforts to combat slave labor in their supply chains. See CAL. CIV. CODE § 1714.43 (West 2023).

330. Many third-party-certification schemes purportedly require an absence of forced labor before they will certify a company. See, e.g., *Forced Labour*, FAIRTRADE INT'L, <https://perma.cc/E4T4-LKNF> (archived Mar. 1, 2023) (including a prohibition on forced labor as a requirement for certification); *Protecting Local Labour Rights in the Palm Oil Sector*, ROUNDTABLE ON SUSTAINABLE PALM OIL (Oct. 4, 2020), <https://perma.cc/AAF9-DETG> (same).

331. See, e.g., *supra* notes 239-41 and accompanying text (describing efforts by General Mills to alter its procurement practices after uncovering forced labor in its supply chain).

332. The concept of “cheapest cost-avoider” was initially developed by Guido Calabresi for determining the assignment of tort liability. Under this approach, liability should be allocated entirely to the party with the lowest cost of care; that is, the party that can fix or prevent the problem while incurring the lowest cost. See generally GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970). The concept has since been extended and applied to a wide range of legal doctrines and can be applied in this context as well. See, e.g., Tun-Jen Chiang, *The Reciprocity of Search*, 66 VAND. L. REV. 1, 4-5 (2013) (suggesting that the duty to search for infringing patents should be allocated to “the lower-cost searcher”); Kyle D. Logue & Joel Slemrod, *Of Coase, Calabresi, and Optimal Tax Liability*, 63 TAX L. REV. 797, 800-01 (2010) (applying the “cheapest cost avoider” principle in the tax context); Paul Rosenzweig, *Cybersecurity and the Least Cost Avoider*, LAWFARE (Nov. 5, 2013, 11:41 AM), <https://perma.cc/H2A6-S69J> (discussing the applicability of the “cheapest cost avoider” principle to cybersecurity).

333. See *supra* notes 272-73 and accompanying text.

subset thereof—and could dramatically limit the amount of tainted, poorly-traced products that enter the country. It would also induce companies to better understand their own supply chains and take a more proactive approach to forced labor. Under this regime, certain high-risk goods would be presumptively ineligible for entry until importers could satisfactorily convince CBP that their products were untainted.

Section 307 is again silent on the evidentiary standards required for CBP to withhold goods at the border.³³⁴ The current evidentiary standards were created by agency regulation rather than by statute. Thus, they could be amended through the ordinary rulemaking process at any time to flip the burden of production, without the need for new legislation.³³⁵ Of course, rulemaking is a challenging process, and it is not easy for agencies to promulgate rules that go against corporate interests.³³⁶ But the regulations governing the enforcement of section 307 were recently updated through the rulemaking process to account for changes made by TFTEA,³³⁷ and can be updated again.

Requiring importers to prove compliance with section 307 is not without its challenges. Some importers claim that it is not technologically possible for them to trace their products, and ensure an absence of forced labor, with sufficient reliability to overcome a WRO.³³⁸ The petitioners in *Nestlé*, in the context of ATS liability, argued that proving an absence of forced labor would be impossible because every chocolate company doing business in Côte d'Ivoire relied on it.³³⁹ But these assertions are just

334. See 19 U.S.C. § 1307.

335. See 5 U.S.C. § 553 (outlining the rulemaking provisions of the Administrative Procedure Act).

336. See Elizabeth Warren, Opinion, *Corporate Capture of the Rulemaking Process*, REGUL. REV. (June 14, 2016), <https://perma.cc/H84Y-HMKC> (“[O]ur rulemaking process is broken from start to finish. At every stage, the process is loaded with opportunities for powerful industry groups to tilt the scales in their favor.”).

337. See *Merchandise Produced by Convict, Forced, or Indentured Labor*, 82 Fed. Reg. 26,582, 26,582-83 (June 8, 2017) (codified at 19 C.F.R. pt. 12). CBP invoked the APA’s “good cause” exception pursuant to 5 U.S.C. § 553(b)(3)(B), which allowed it to promulgate this new rule without public comment. *Merchandise Produced by Convict, Forced, or Indentured Labor*, 82 Fed. Reg. at 26,583; see also Kyle Schneider, Note, *Judicial Review of Good Cause Determinations Under the Administrative Procedure Act*, 73 STAN. L. REV. 237, 247-48 (2021) (explaining that skipping notice and comment when promulgating agency regulations “allows agencies to reap the benefits of rulemaking without internalizing the full costs”).

338. CIMINO-ISAACS ET AL., *supra* note 131, at 26 (“[T]here is no technology yet developed that allows us to trace the origin of cotton with reasonable, let alone complete, accuracy.” (quoting Am. Apparel & Footwear Ass’n, *supra* note 322, at 3)).

339. See Brief for Petitioner Nestlé USA, Inc. at 33, *Nestlé USA, Inc. v. Doe*, 141 S. Ct. 1931 (2021) (Nos. 19-416 & 19-453), 2020 WL 5289315 (arguing that “[u]nder Plaintiffs’ theory, any company doing business from the United States with Ivorian cocoa

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admissions that corporations are importing high-risk goods that they cannot be sure were not made by forced labor.

What is more, in many cases, these assertions are simply not true. As several chocolate companies explained while writing as amici in *Nestlé*, the petitioners' argument "assume[s] that every company sourcing cocoa from countries with poor human rights enforcement sources cocoa tainted by forced child labor."³⁴⁰ But amici's own supply chains—and those of hundreds of other chocolate companies that source cocoa that is not produced with forced labor³⁴¹—disprove that claim: By investing in supply-chain transparency, they are able to trace their cocoa beans all the way back to the farm, "allowing consumers and regulators to link specific farms to particular buyers," and ensure those farms are not using forced labor.³⁴² Companies that operate in high-risk regions but refuse to invest in supply-chain transparency are "choos[ing] not to know"³⁴³ about potential labor abuses.

A second argument against requiring importers to prove compliance with section 307 is that producing evidence of compliance would be cost-prohibitive. This argument is belied by the hundreds of companies that already trace their supply chains and can show that they do not rely on forced labor.³⁴⁴ Moreover, cost concerns may be overstated for at least three reasons. First, many companies have already committed to investing in the resources necessary to show compliance with section 307.³⁴⁵ Second, many of the investments needed to

farmers is subject to an ATS suit," presumably because of a belief that every company sourcing from Côte d'Ivoire relied on forced labor).

340. Brief of Small and Mid-Size Cocoa and Chocolate Companies as Amici Curiae in Support of Respondents, *supra* note 21, at 15.

341. *Id.*

342. *See id.* at 16; *see also* Alden Wicker, *Beyond Organic: Brands That Use Traceable Cotton and Support Regenerative Cotton Farmers*, ECO CULT (May 9, 2022), <https://perma.cc/WW2Z-92YH> (listing apparel companies that use fully traceable cotton).

343. *See* CIMINO-ISAACS ET AL., *supra* note 131, at 26 (quoting Scott Nova, Written Testimony Before the U.S. House of Representatives, Committee on Ways and Means, Subcommittee on Trade: Hearing Concerning Forced Labor in the Xinjiang Uyghur Autonomous Region and the US Apparel Industry 7 (2020), <https://perma.cc/KG5A-WWLC>).

344. *See, e.g.*, Brief of Small and Mid-Size Cocoa and Chocolate Companies as Amici Curiae in Support of Respondents, *supra* note 21, at 15-16.

345. For example, the members of the Human Rights Coalition of the Consumer Goods Forum have committed to establishing systems to "identify, prevent, mitigate and account for" adverse effects on human rights caused by their operations. *Human Rights Due Diligence (HRDD): Identifying, Addressing and Preventing Human Rights Risks*, CONSUMER GOODS F., <https://perma.cc/7S2Z-SBBX> (archived Mar. 1, 2023) (quoting Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. A/HRC/17/31, annex at 15 (Mar. 21, 2011), <https://perma.cc/FVP8-PGCK>). And Nestlé has committed to achieving full traceability of its cocoa

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prove compliance with section 307 are already required, or may soon be required, by other laws.³⁴⁶ Third, some of the costs of compliance may be recouped: “[C]onsumers may be willing to pay 2% to 10% more for products from companies that provide greater supply chain transparency.”³⁴⁷

Conclusion

Forced labor is a scourge that affects millions of people worldwide and poisons global supply chains. At the same time, recent jurisprudential developments have increasingly closed the door on victims seeking redress in U.S. courts.

Although federal courts are less willing to provide a remedy to victims of forced labor, trade law still offers tools to deter its use. Section 307 of the Tariff Act of 1930 enables CBP to bar imports of goods made using forced labor, especially now that the consumptive demand loophole has been closed. But CBP has not effectively used the authority conferred by section 307. Although section 307 enforcement has expanded since the passage of TFTEA, only a small fraction of tainted goods is actually withheld.

Fortunately, it is possible for CBP to improve its performance and increase section 307 enforcement. Meaningful changes to the way CBP enforces the law can be initiated today: CBP can first embrace and expand its recent practice of issuing industry- and region-wide WROs that capture a broader swath of goods, and second, place a greater share of evidentiary and investigatory burdens on importers. Both changes were recently employed by the UFLPA,

products by 2030 as part of the Nestlé Cocoa Plan, which also includes a plan to eliminate child labor from its supply chain. *See New Program Aims to Tackle Child Labor Risks and Improve Farmer Incomes*, NESTLÉ COCOA PLAN, <https://perma.cc/A74V-QREE> (archived Mar. 1, 2023).

346. For example, section 54 of the United Kingdom’s Modern Slavery Act of 2015 requires certain companies to publish an annual statement regarding modern slavery in their supply chains. Muhammad Azizul Islam & Chris J. Van Staden, *Modern Slavery Disclosure Regulation and Global Supply Chains: Insights from Stakeholder Narratives on the UK Modern Slavery Act*, 180 J. BUS. ETHICS 455, 457 (2022). And the California Transparency in Supply Chains Act requires certain large businesses to “disclose information regarding their efforts to eradicate human trafficking and slavery within their supply chains.” *The California Transparency in Supply Chains Act*, STATE OF CAL. DEP’T OF JUST. OFF. OF THE ATT’Y GEN., <https://perma.cc/2J9A-ES7S> (archived Mar. 1, 2023); *see also* CAL. CIV. CODE § 1714.43 (West 2023). *But see* RE:STRUCTURE LAB, FORCED LABOUR EVIDENCE BRIEF: DUE DILIGENCE AND TRANSPARENCY LEGISLATION 12 (2021), <https://perma.cc/26XW-HNV9> (arguing that recent transparency legislation has been largely ineffective at reducing forced labor).

347. Alexis Bateman & Leonardo Bonanni, *What Supply Chain Transparency Really Means*, HARV. BUS. REV. (Aug. 20, 2019), <https://perma.cc/ZGK9-A3W3>.

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which received strong bipartisan support, and both could be employed more broadly without additional legislation.

The message for CBP is clear: There is a bipartisan desire to prevent goods produced using forced labor from entering the United States. And CBP already has the authority it needs to do so. All that is left is to use it.

Appendix A: Active WROs as of April 15, 2023, by Country³⁴⁸

China		
Date Issued	Merchandise Covered	Entity or Region Covered
06/23/2021	Silica-Based Products	Hoshine Silicon Industry Co. Ltd. and Subsidiaries
01/13/2021	Cotton, Tomatoes, and Downstream Products	Xinjiang Uyghur Autonomous Region
11/30/2020	Cotton and Cotton Products	Xinjiang Production and Construction Corporation and Its Subordinates
09/08/2020	Computer Parts	Hefei Bitland Information Technology Co., Ltd.
09/08/2020	Cotton and Processed Cotton	Xinjiang Junggar Cotton and Linen Co., Ltd.
09/03/2020	Apparel	Yili Zhuowan Garment Manufacturing Co., Ltd. and Baoding LYSZD Trade and Business Co., Ltd.
08/25/2020	All Products	No. 4 Vocational Skills Education Training Center
08/25/2020	Hair Products	Lop County Hair Product Industrial Park
08/11/2020	Garments	Hero Vast Group
06/17/2020	Hair Products	Lop County Meixin Hair Products Co., Ltd.
05/01/2020	Hair Products	Hetian Haolin Hair Accessories Co., Ltd.
09/30/2019	All Garments	Hetian Taida Apparel Co., Ltd.
03/05/2018	All Products	Huizhou Mink Industrial Co. Ltd.
09/16/2016	Peeled Garlic	Hongchang Fruits & Vegetable Products Co., Ltd.
05/20/2016	Stevia and Its Derivatives	Inner Mongolia Hengzheng Group Baoanzhao Agricultural and Trade LLC
03/29/2016	Soda Ash, Calcium Chloride, and Caustic Soda	Tangshan Sanyou Group and Its Subsidiaries

348. A list of WROs is available at *Withhold Release Orders and Findings List*, *supra* note 319. The CBP website deletes WROs when they are made inactive. Accordingly, the statistics in this Note may not match those on the website. Archived versions of the WRO list are on file with the Author. This Appendix is accurate as of April 15, 2023.

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China		
Date Issued	Merchandise Covered	Entity or Region Covered
10/06/1995	Malleable Iron Pipe Fittings	Tianjin Malleable Iron Factory, a/k/a Tianjin Tongbao Fittings Company, a/k/a Tianjin No. 2 Malleable Iron Plant, a/k/a Tianjian Secondary Mugging Factory, a/k/a Tianjin No. 2 Prison
04/27/1995	Tea	Nanhu Tree Farm, Zhejiang Sanmei Tea Co., Ltd.; Imaizumi Tea Manufacturing & Trading Co., Ltd. (of Nagoya, Japan)
12/21/1994	Artificial Flowers	Guangzhou No 1 Reeducation-Through-Labor Camp, a/k/a Guangdong Province No. 1 Reeducation-Through-Labor Camp; Kwong Ngai Industrial Company.
09/03/1993	Rubber Vulcanization Accelerators	Shenyang Xinsheng (New Life) Chemical Works, a/k/a Shenyang Dongbei Assistant Agent Main Factory, a/k/a Xinsheng Chemical Factory, a/k/a Shenyang No. 1 Laogai Detachment, a/k/a Shenyang Reform Through Labor Second Reform Division
09/01/1993	Rubber Gloves, Condoms, Rubber Raincoats, and Rubber Footwear	Shenyang New Life Rubber Factory, a/k/a Shenyang Xingsheng (or Xinsheng) (New Life) Rubber Plant, a/k/a Shenyang No. 2 Laogai Detachment, a/k/a Shenyang Dabei Prison, a/k/a Shenyang Model Prison
08/06/1993	Hoists	Wuyi Machinery Plant, a/k/a Zhejiang Light Duty Lifting Machinery Factory China, a/k/a Zhejiang Province No. 1 Prison
07/08/1993	Hoists	Wulin (or Wuling) Machinery Works, a/k/a Hangzhou Wulin Machinery Plant, a/k/a Hangzhou Wulin Machinery Works, a/k/a Zhejiang Province No. 4 Prison
08/14/1992	Asbestos	Hsin Kang Asbestos Mine, a/k/a Sichuan (Szechuan) Pin Chiang Enterprise Company

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China		
Date Issued	Merchandise Covered	Entity or Region Covered
08/03/1992	Electric Fans and Zinc-Coated Wire	Sichuan (Szechuan) Xinsheng (New Life) Labor Factory, a/k/a Xinsheng (New Life) Labor Factory
07/17/1992	Sulfuric (Sulphuric) Acid	Da Wei Chemical Factory
07/15/1992	Drilling Machines	Zi Gong Machinery Factory, a/k/a Zigong Machinery Factory, a/k/a Sichuan (Szechuan) Zigong Labor Reform Detachment
07/15/1992	Auto Parts and Machinery	Ya An Auto Parts Factory, a/k/a Sichuan (Szechuan) Bin-Jiang Enterprises Company
06/26/1992	Tea	Miao Chi Tea Farm
06/26/1992	Cast Iron Items	Wang Tsang Coal and Iron Factory
05/22/1992	Sheepskin and Leather	Qinghai Hide & Garment Factory, a/k/a Qinghair Leather and Wool Bedding and Garment Factory, a/k/a Qinghai Fur and Cloth Factory
02/25/1992	Galvanized Pipe	Shandong Laiyang Heavy Duty Machinery Factory
12/02/1991	Machine Presses	Xuzhou Forging and Pressing Machine Works
11/14/1991	Diesel Engines	Yunnan Machinery, a/k/a Golden Horse (JinMa) Diesel Factory, a/k/a Yunnan 1st Prison
11/06/1991	Planing Machines	Xiang-Yang Machinery Plant

Democratic Republic of the Congo		
Date Issued	Merchandise Covered	Entity or Region Covered
09/30/2019	Gold	Artisanal Small Mines

Dominican Republic		
Date Issued	Merchandise Covered	Entity or Region Covered
11/23/2022	Raw Sugar and Sugar-Based Products	Central Romana Corporation Limited

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India		
Date Issued	Merchandise Covered	Entity or Region Covered
11/23/1999	Beedie Cigarettes and Other Tobacco Products	Mangalore Ganesh Beedie Works

Japan		
Date Issued	Merchandise Covered	Entity or Region Covered
06/12/1994	Video Games and Connector Plugs Thereof	Fuchu Prison; Union Kogyo Co., Ltd.

Malawi		
Date Issued	Merchandise Covered	Entity or Region Covered
11/01/2019	Tobacco	Tobacco Produced in Malawi and Products Containing Tobacco Produced in Malawi

Malaysia		
Date Issued	Merchandise Covered	Entity or Region Covered
12/20/2021	Disposable Gloves	Brightway Holdings Sdn Bhd, Laglove (M) Sdn Bhd, and Biopro (M) Sdn Bhd (collectively, Brightway Group)
11/04/2021	Disposable Gloves	Smart Glove
10/21/2021	Disposable Gloves	Maxter Glove Manufacturing Sdn bhd, Maxwell Glove Manufacturing Berhad, and Supermax Glove Manufacturing
09/30/2020	Palm Oil and Palm Oil Products	FGV Holdings Berhad and Its Subsidiaries and Joint Ventures

Mexico		
Date Issued	Merchandise Covered	Entity or Region Covered
10/21/2021	Fresh Tomatoes	Agropecuarios Tom S.A. de C.V. and Horticola Tom S.A. de C.V. and Their Subsidiaries

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Nepal		
Date Issued	Merchandise Covered	Entity or Region Covered
07/21/1998	Carpets, Hand-Knotted Wool	Kumar Carpet Pvt., Singhe Carpet Pvt., Ltd., Valley Carpet

Turkmenistan		
Date Issued	Merchandise Covered	Entity or Region Covered
05/18/2018	Cotton	All Turkmenistan Cotton or Products Produced in Whole or in Part with Turkmenistan Cotton

Zimbabwe		
Date Issued	Merchandise Covered	Entity or Region Covered
09/30/2019	Artisanal Rough Cut Diamonds	Marange Diamond Fields

Fishing Vessels		
Date Issued	Merchandise Covered	Entity or Region Covered
08/04/2021	Seafood	Fishing Vessel: Hangton No. 112
05/26/2021	Seafood	Fishing Vessels Owned by Dalian Ocean Fishing Co. Ltd.
12/31/2020	Seafood	Fishing Vessel: Lien Yi Hsing No. 12
08/18/2020	Seafood	Fishing Vessel: Da Wang
05/11/2020	Seafood	Fishing Vessel: Yu Long No. 2

Appendix B: WROs Issued Since 2016³⁴⁹

Brazil			
Date Issued	Merchandise Covered	Entity or Region Covered	Status
09/30/2019	Bone Black	Bonechar Carvao Ativado Do Brasil Ltda	Inactive

China			
Date Issued	Merchandise Covered	Entity or Region Covered	Status
06/23/2021	Silica-Based Products	Hoshine Silicon Industry Co. Ltd. and Subsidiaries	Active
01/13/2021	Cotton, Tomatoes, and Downstream Products	Xinjiang Uyghur Autonomous Region	Active
11/30/2020	Cotton and Cotton Products	Xinjiang Production and Construction Corporation and Its Subordinates	Active
09/08/2020	Computer Parts	Hefei Bitland Information Technology Co., Ltd.	Active
09/08/2020	Cotton and Processed Cotton	Xinjiang Junggar Cotton and Linen Co., Ltd.	Active
09/03/2020	Apparel	Yili Zhuowan Garment Manufacturing Co., Ltd. and Baoding LYSZD Trade and Business Co., Ltd.	Active
08/25/2020	All Products	No. 4 Vocational Skills Education Training Center	Active
08/25/2020	Hair Products	Lop County Hair Product Industrial Park	Active
08/11/2020	Garments	Hero Vast Group	Active
06/17/2020	Hair Products	Lop County Meixin Hair Products Co., Ltd.	Active

349. The data in this appendix was compiled from multiple versions of CBP's Withhold Release Orders and Findings List. One version was archived in July 2022. See July 2022 Version of Withhold Release Orders and Findings List, *supra* note 186. Another version was archived in March 2023, and captures WROs issued between July 2022 and February 2023. See *Withhold Release Orders and Findings List*, *supra* note 319.

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China			
Date Issued	Merchandise Covered	Entity or Region Covered	Status
05/01/2020	Hair Products	Hetian Haolin Hair Accessories Co., Ltd.	Active
09/30/2019	All Garments	Hetian Taida Apparel Co., Ltd.	Active
03/05/2018	All Products	Huizhou Mink Industrial Co. Ltd.	Active
09/16/2016	Peeled Garlic	Hongchang Fruits & Vegetable Products Co., Ltd.	Active
05/20/2016	Stevia and Its Derivatives	Inner Mongolia Hengzheng Group Baoanzhao Agricultural and Trade LLC	Active
03/29/2016	Potassium, Potassium Hydroxide, Potassium Nitrate	Tangshan Sunfar Silicon Industries	Inactive
03/29/2016	Soda Ash, Calcium Chloride, and Caustic Soda	Tangshan Sanyou Group and Its Subsidiaries	Partially Active

Democratic Republic of the Congo			
Date Issued	Merchandise Covered	Entity or Region Covered	Status
09/30/2019	Gold	Artisanal Small Mines	Partially Active

Dominican Republic			
Date Issued	Merchandise Covered	Entity or Region Covered	Status
11/23/2022	Raw Sugar and Sugar-Based Products	Central Romana Corporation Limited	Active

India			
Date Issued	Merchandise Covered	Entity or Region Covered	Status
07/29/2022	Garments	Natchi Apparel (P) Ltd.	Inactive

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Malawi			
Date Issued	Merchandise Covered	Entity or Region Covered	Status
11/01/2019	Tobacco	Tobacco Produced in Malawi and Products Containing Tobacco Produced in Malawi	Partially Active

Malaysia			
Date Issued	Merchandise Covered	Entity or Region Covered	Status
01/28/2022	Disposable Gloves	YTY Industry Holdings Sdn Bhd (YTY Group), including YTY Industry Sdn Bhd, Green Prospect Sdn Bhd, and GP Lumut	Inactive
12/20/2021	Disposable Gloves	Brightway Holdings Sdn Bhd, Laglove (M) Sdn bhd, and Biopro (M) Sdn Bhd (collectively, Brightway Group)	Active
11/04/2021	Disposable Gloves	Smart Glove	Active
10/21/2021	Disposable Gloves	Maxter Glove Manufacturing Sdn Bhd, Maxwell Glove Manufacturing Berhad, and Supermax Glove Manufacturing	Active
12/30/2020	Palm Oil and Palm Oil Products	Sime Darby Plantation Berhad and Its Subsidiaries and Joint Ventures	Inactive
09/30/2020	Palm Oil and Palm Oil Products	FGV Holdings Berhad and Its Subsidiaries and Joint Ventures	Active
07/15/2020	Disposable Gloves	Top Glove Corporation Bhd.	Inactive
09/30/2019	Disposable Rubber Gloves	WRP Asia Pacific Sdn Bhd.	Inactive

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Mexico			
Date Issued	Merchandise Covered	Entity or Region Covered	Status
10/21/2021	Fresh Tomatoes	Agropecuarios Tom S.A. de C.V. and Horticola Tom S.A. de C.V. and Their Subsidiaries	Active

Turkmenistan			
Date Issued	Merchandise Covered	Entity or Region Covered	Status
05/18/2018	Cotton	All Turkmenistan Cotton or Products Produced in Whole or in Part with Turkmenistan Cotton	Active

Zimbabwe			
Date Issued	Merchandise Covered	Entity or Region Covered	Status
09/30/2019	Artisanal Rough Cut Diamonds	Marange Diamond Fields	Active

Fishing Vessels			
Date Issued	Merchandise Covered	Entity or Region Covered	Status
08/04/2021	Seafood	Fishing Vessel: Hangton No. 12	Active
05/26/2021	Seafood	Fishing Vessels Owned by Dalian Ocean Fishing Co. Ltd.	Active
12/31/2020	Seafood	Fishing Vessel: Lien Yi Hsing No. 12	Active
08/18/2020	Seafood	Fishing Vessel: Da Wang	Active
05/11/2020	Seafood	Fishing Vessel: Yu Long No. 2	Active
02/04/2019	Seafood	Fishing Vessel: Tunago No. 61	Inactive