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Forced Labor: Framework, Supply Chain Issues and Remedies

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Due to recent U.S. statutory changes strengthening import prohibitions on products made with forced labor and related increased enforcement efforts, forced labor is receiving increased attention from U.S. importers. This paper discusses U.S. government enforcement efforts, the relevant statutory framework, issues faced by the trade community, and available administrative and judicial remedies, including before the U.S. Court of International Trade.

I. Overview of International Forced Labor

Forced labor, as set forth in the International Labor Organization (ILO) Forced Labor Convention, 1930 (No. 29) is "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." According to the ILO, over 21 million people are in forced labor in sectors other than commercial sexual exploitation on any given day. *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage*, ILO, Walk Free, and International Organization for Migration, at 17 (Geneva 2022) (*Global Estimates of Modern Slavery*), *available at* Global Estimates of

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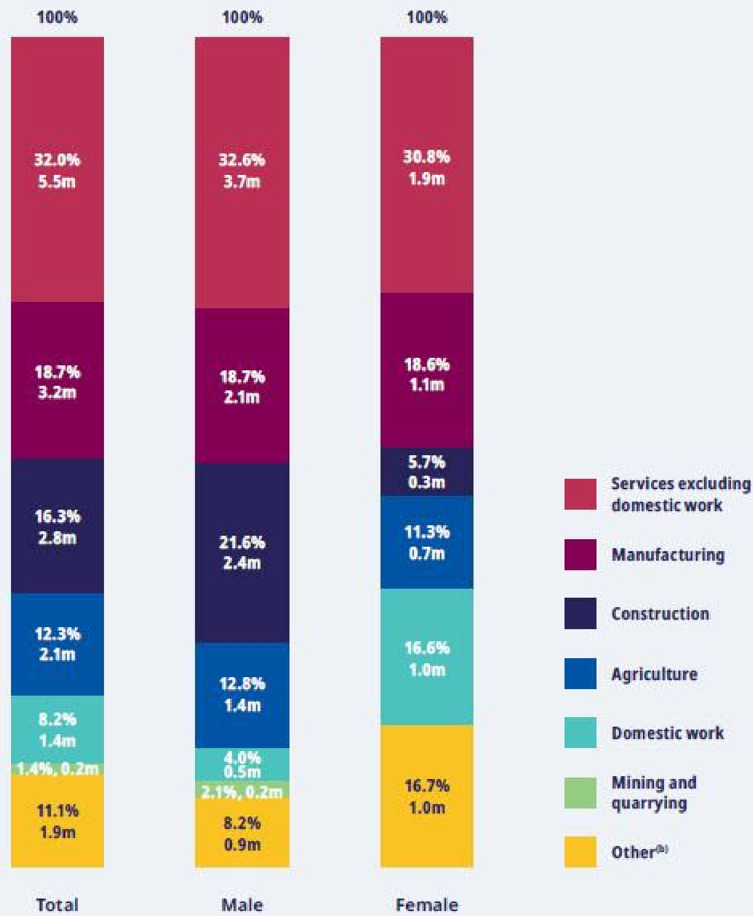
Modern Slavery: Forced Labour and Forced Marriage | International Labour Organization (ilo.org). Of these, over 17 million are in forced labor in the private economy, including 1.3 million children. Both the prevalence and the number of people in forced labor in the private sector are rising. Many of these people work in internationally traded sectors, including manufacturing, agriculture, and mining and quarrying.

Figure 8.

The services sector accounts for the largest share of forced labour exploitation



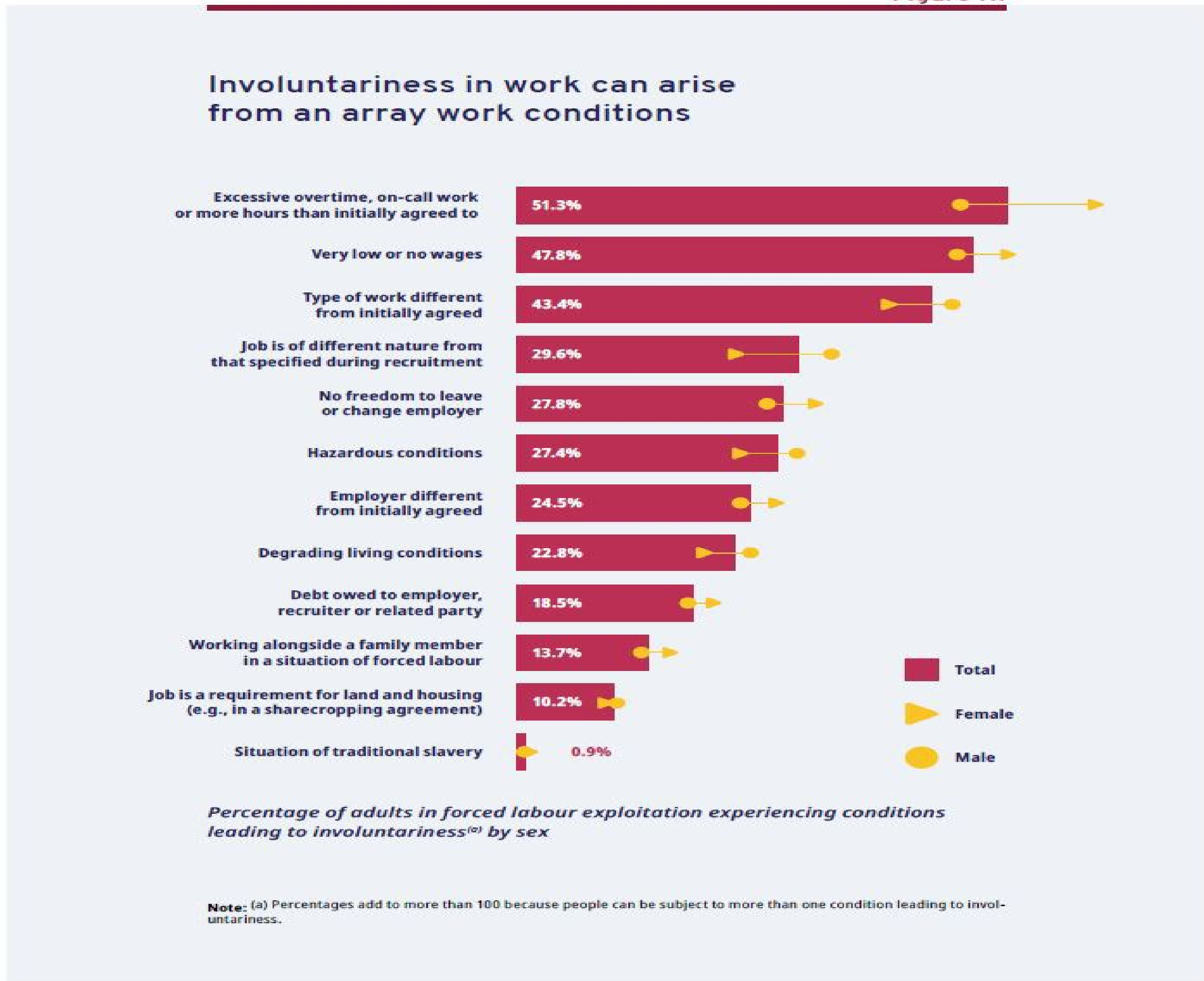
Number and percentage distribution of adults in forced labour exploitation, by branch of economic activity and sex[a]

Notes: (a) 2.8 per cent of respondents did not indicate a type of forced labour. (b) "Other" includes begging and involvement in illicit activities.

Id., at 31.

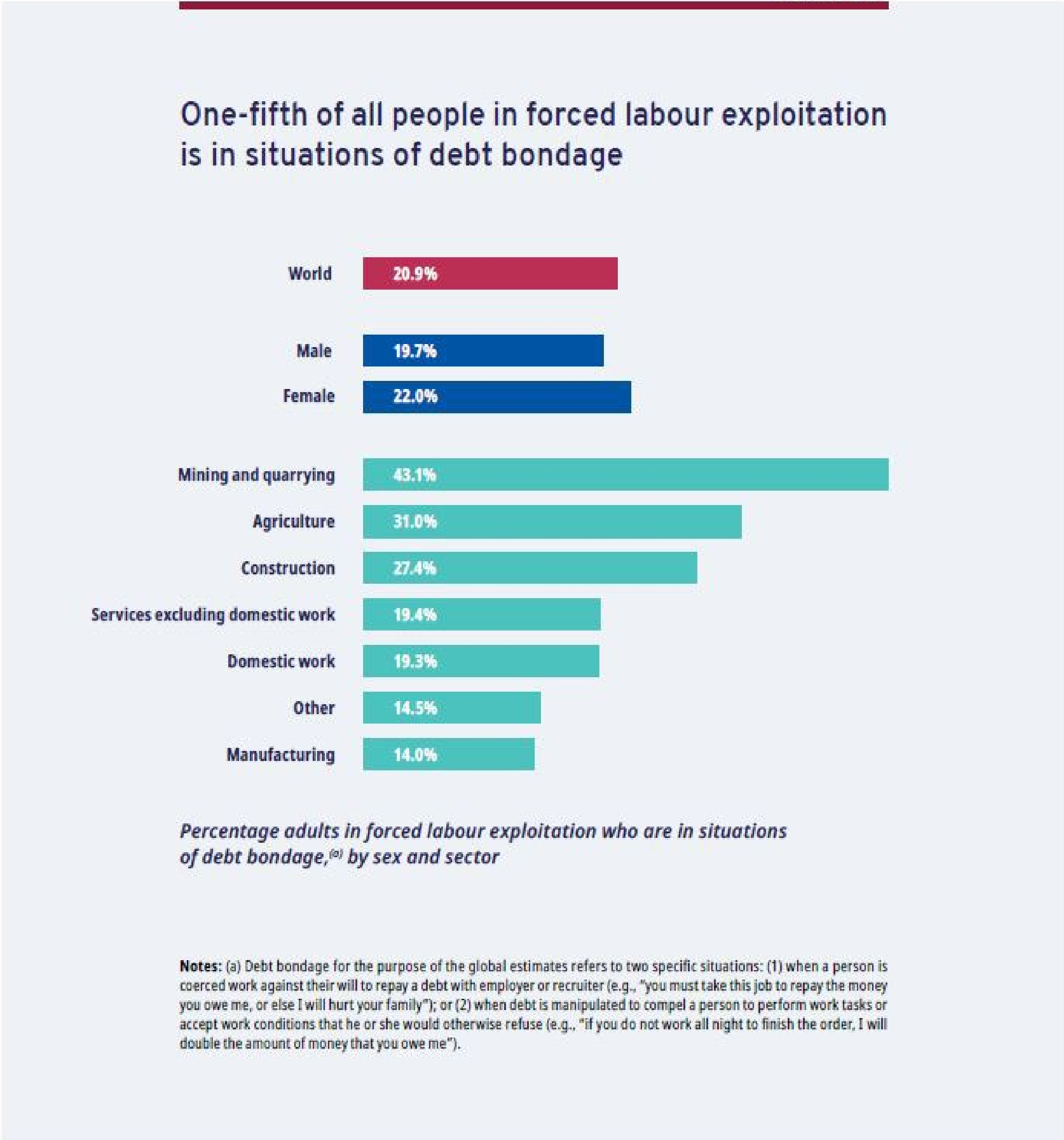
The definition of forced labor requires two different aspects: 1) lack of free and informed consent to the work, and 2) a form of coercion. The most common work conditions that constitute involuntariness are longer hours or more overtime than agreed, very low or no wages, and the type of work being different from that agreed upon.

Figure 11.



Id., at 40. The most common forms of coercion are deliberate withholding of wages to compel workers to stay to avoid losing earnings, abuse of vulnerability (for example, knowing that a person has a lack of alternative options, threatening to dismiss them if they do not perform work

they would otherwise refuse), and direct threats. In certain sectors, notably mining and quarrying and agriculture, a large percentage of people in forced labor are in debt bondage. *Id.*, at 44.



Percentage adults in forced labour exploitation who are in situations of debt bondage,[(a)] by sex and sector

Notes: (a) Debt bondage for the purpose of the global estimates refers to two specific situations: (1) when a person is coerced work against their will to repay a debt with employer or recruiter (e.g., "you must take this job to repay the money you owe me, or else I will hurt your family"); or (2) when debt is manipulated to compel a person to perform work tasks or accept work conditions that he or she would otherwise refuse (e.g., "if you do not work all night to finish the order, I will double the amount of money that you owe me").

Finally, the ILO estimates that almost 4 million people are in state-sponsored forced labor on any given day. "State-imposed forced labour has a number of overarching characteristics: 1) there is a mobilisation of labour using state apparatuses including the army, the police, the judiciary, and the prison system; 2) these state apparatuses act either in accordance with national law that is in non-conformity with ILO Conventions or remain unchallenged in imposing forced labour in contravention of national and international law; 3) there is no path to remediation because the forced labour is imposed by the state itself." *Id.*, at 50. ILO Convention 105 specifically "prohibits the use of any form of forced or compulsory labor as a means of political coercion or education, or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social, or economic system." *Id.*, at 58.

Congress passed the Uyghur Forced Labor Prevention Act (UFLPA) (discussed further below) to strengthen the prohibition against importation of goods made with forced labor specifically with respect to the People's Republic of China (PRC) government policy or pattern of widespread forced labor, which includes the continued mass arbitrary detention and labor transfers of Uyghurs, ethnic Kazakhs, ethnic Kyrgyz, and members of other ethnic and religious minority groups from the Xinjiang Uyghur Autonomous Region (Xinjiang). PRC authorities have utilized discriminatory surveillance technologies and arbitrary administrative and criminal provisions to detain more than one million Uyghurs, ethnic Hui, ethnic Kazakhs, ethnic Kyrgyz, ethnic Tajiks, and ethnic Uzbeks since 2017 in as many as 1,200 "Vocational Skills Education and Training Centers" – internment camps designed to erase ethnic and religious identities under the pretext of "deradicalization." During detention within – and following "graduation" from – these facilities, government authorities and/or authorized commercial entities subject many of these individuals to forced labor in adjacent or off-site factories producing a variety of goods for

domestic and international distribution. The government continues to transfer some non-interned members of minority communities designated arbitrarily as "rural surplus labor" to other areas within Xinjiang as part of a "poverty alleviation" program to exploit them for forced labor. In total, the PRC has reportedly placed 2.6 million members of minority communities in agricultural and manufacturing jobs within Xinjiang and across the country through state-sponsored "surplus labor" and "labor transfer" initiatives featuring overt forced labor indicators.

In accordance with section 105(b)(1) of the Trafficking Victims Protection Reauthorization Act (TVPRA), DOL consults with other departments and agencies within the U.S. Government to reduce forced labor and child labor in violation of international standards and eliminate such labor from goods imported into the United States. As part of this work, DOL's Burean of International Labor Affairs (ILAB) represents the Department of Labor on the Forced Labor Enforcement Task Force (FLETF), which is discussed further below. Of particular note to importers and the international trade community, the TVPRA directs DOL to "work with persons who are involved in the production of goods to create a standard set of practices that will reduce the likelihood that such persons will produce goods using forced or child labor." ILAB's publicly available resources are designed to help the international business community identify and mitigate forced labor and child labor risks in supply chains.

Pursuant to the TVPRA, ILAB produces a biannual *List of Goods Produced by Child Labor or Forced Labor* which constitutes a key tool for raising awareness among governments and industry groups about these issues. *List of Goods Produced by Child Labor or Forced Labor*, U.S. Dep't of Labor, https://www.dol.gov/agencies/ilab/reports/child-labor/list-of-goods. A 2018 expansion of the TVPRA further required ILAB to include goods produced with inputs produced with child labor or forced labor on the List of Goods Produced by Child Labor or

Forced Labor. The TVPRA List is a valuable resource for companies wishing to carry out risk assessments and engage in due diligence on labor rights in their supply chains.

ILAB produces Comply Chain, a resource to help companies mitigate risks of child and forced labor in their supply chains by building or improving worker-driven social compliance systems. *Comply Chain*, U.S. Dep't of Labor, https://www.dol.gov/agencies/ilab/comply-chain. These systems include stakeholder engagement, assessment of risks, codes of conduct, communication and training across the supply chain, compliance monitoring, remediation, independent review, and performance reporting. These same steps are reflected in the FLETF'S UFLPA Strategy's importer guidance, with which importers of goods made wholly or in part in Xinjiang or produced by an entity on the UFLPA Entity List must demonstrate compliance in order to obtain an exception from the presumption that the good is prohibited from import (among other requirements, including demonstrating that the good was not made with forced labor).

II. Statutory Framework and U.S. Customs and Border Protection Enforcement and Administration

U.S. Customs and Border Protection (CBP), as part of its trade facilitation and trade enforcement mission, is responsible for enforcing the customs laws of the United States, including enforcing hundreds of laws at the border on behalf of other federal government agencies. One of the most important aspects of CBP's trade mission is CBP's forced labor enforcement, which supports ethical and humane trade while leveling the playing field for U.S. companies that respect fair labor standards. CBP is the only U.S. government agency with the legal authority to take enforcement action at the border against goods produced with forced labor to prevent entry into domestic commerce.

CBP protects against the importation and entry of forced labor goods into the United States through the enforcement of three separate legal authorities: Section 1307 of Title 19 of the United States Code, the Uyghur Forced Labor Prevention Act (UFLPA), and Section 321 of the Countering America's Adversaries Through Sanctions Act (CAATSA). Each will be discussed in turn.

A. Section 307 of the Tariff Act of 1930 (19 U.S.C. § 1307)

CBP's primary authority to prevent the importation and entry of goods made with forced labor is found in section 1307 of title 19, United States Code. Section 1307 prohibits the importation of all goods made "wholly or in part" by forced, convict, or indentured labor, and it states:

> [a]ll goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labor or/and forced labor or/and indentured labor under penal sanctions shall not be entitled to entry at any of the ports of the United States, and the importation thereof is hereby prohibited,

and the Secretary . . . is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision.

"Forced labor," which includes forced child labor, is defined in section 1307 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." 19 U.S.C. § 1307. This definition is modeled on International Labor Organization Convention, 1930.

CBP, as well as its legacy agency, the United States Customs Service, has had authority to prevent the entry, into the United States, of goods made with forced labor since as early as the 1890s. In the Tariff Act of 1930, this authority was expanded to include a broad definition of forced labor. Because the law was originally enacted to protect domestic industry, the statutory authority originally provided for a "consumptive demand exemption," which allowed the importation and entry of forced labor goods if such goods were not made in the U.S. in sufficient quantities to meet U.S. demand. In 2016, however, the President signed into law the Trade Facilitation and Trade Enforcement Act of 2015, which removed the "consumptive demand exception" from section 1307. This amendment strengthened CBP's ability to enforce section 1307, and the agency renewed its efforts toward prevention of these violative goods from entering U.S. commerce.

CBP enforces section 1307 through implementing regulations, found in section 12.42-12.45 of Title 19, Code of Federal Regulations. Pursuant to the Regulations, if the CBP Commissioner, "finds at any time that information available, obtained either by CBP or through an outside party, reasonably, but not conclusively indicates (*i.e.* reasonable suspicion) that merchandise within the purview of 19 U.S.C. § 1307, or is likely to be, imported," the Commissioner, will "promptly advise all port directors accordingly and the port directors shall

thereupon withhold release of any such merchandise pending instructions from the Commissioner as to whether the merchandise may be released otherwise than for exportation" (WRO). 12 C.F.R. § 12.42(e). WROs are internal instructions to all port directors to withhold release of specific merchandise into the U.S. commerce pending instructions from the Commissioner as to whether the merchandise may be released otherwise than for exportation. Moreover, if the Commissioner is provided with information sufficient to determine that the goods in question are subject to the provisions of 19 U.S.C. § 1307, i.e., probable cause, the Commissioner will publish a formal finding to that effect in the Customs Bulletin and in the Federal Register. 19 C.F.R. § 12.42(f). Any merchandise of a class specified in a finding, "which is imported directly or indirectly from the locality specified in the findings and has not been released from CBP custody" before publication of the finding in the Federal Register "shall be considered and treated as an importation prohibited by 19 U.S.C. § 1307, unless the importer establishes by satisfactory evidence that the merchandise was not mined, produced, or manufactured in any part" with the type of labor specified in the finding. 19 C.F.R. §12.42(g).

In enforcing section 1307, CBP uses the International Labour Organization's eleven forced labor indicators as a basis to analyze whether forced labor is being used for the mining, manufacture or production of goods likely to be imported into the United States in violation of section 1307. They are intended to help front-line criminal law enforcement officials, inspectors, trade union officers, NGO workers, and others to identify persons who are possibly subjected to forced labor conditions. These indicators, listed here, represent the most common signs that point to the possible existence of forced labor:

1. Abuse of Vulnerability
2. Deception

3. Restriction of Movement

4. Isolation

5. Physical and Sexual Violence

6. Intimidation and Threats

7. Retention of Identity Documents

8. Withholding of Wages

9. Debt Bondage

10. Abusive Working and Living Conditions

11. Excessive Overtime

CBP will also consider DOL's reports on *Findings on the Worst Forms of Child Labor* and the *List of Goods Produced by Child Labor or Forced Labor*, among other resources and information, when investigating allegations of forced labor. CBP's forced labor threshold only requires one instance of a forced labor indicator to meet its criteria for taking an enforcement action pursuant to its authorities.

If CBP issues a WRO against a specific good or goods produced by a particular entity, the entity can request a modification or revocation of the decision. A modification is a determination by CBP that the foreign entity subject to the WRO (importer/manufacturer) has remediated all indicators of forced labor present, after providing sufficient information to CBP to demonstrate full remediation. A revocation is a removal of an entity from the scope of a WRO once the importer/manufacturer has demonstrated that it has not engaged in forced labor.

Articles destined for the United States may be detained pursuant to a WRO. The importer of detained goods may export the merchandise to a location outside the United States within the 3-month detention period. The importer of any detained article under 19 C.F.R.

§ 12.42(e) or (g) may also contend that the detained article was not "mined, produced, or manufactured in any part with the use of a class of labor specified in 19 U.S.C. § 1307." In order to seek release of the detained goods, the importer shall submit to the port director or CBP Commissioner within 3 months of the importation:

- A certificate of origin, or its electronic equivalent, in the form set forth in this section, signed by the foreign seller or owner of the article. If the detained article was "mined, produced, or manufactured wholly or in part in a country other than that from which it was exported to the United States, an additional certificate…, [signed by the last owner or seller in such other country] or its electronic equivalent," shall be submitted.
- A detailed statement demonstrating the goods were not manufactured with forced labor.

19 C.F.R. § 12.43.

Such merchandise will be excluded from entry if: 1) The importer fails to either re-export the detained shipment or timely furnish the required Certificate and Statement; 2) CBP determines the proof submitted by the importer does not establish admissibility of the merchandise. The importer may protest exclusions under 19 U.S.C. § 1514. Merchandise withheld subject to a finding may be subject to seizure. 19 C.F.R § 12.44.

B. The Uyghur Forced Labor Prevention Act (UFLPA)

The Uyghur Forced Labor Prevention Act, Public Law No. 117-78, codified at 22 U.S.C. § 6901, was enacted to strengthen the prohibition of goods made with forced labor from entering the United States. The UFLPA, signed into law in December 2021, establishes a rebuttable

presumption that the importation of any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of the People's Republic of China, or produced by entities on the UFLPA entity list, is prohibited by Section 307 of the Tariff Act of 1930 and that such goods, wares, articles, and merchandise are not entitled to entry to the United States. 22 U.S.C. § 6901. The presumption applies unless the Commissioner determines, through clear and convincing evidence, that an importer has complied with requirements under the Act, such as compliance with the Importer Guidance, and that such goods, wares, articles, or merchandise were not produced using forced labor.

The UFLPA required the Forced Labor Enforcement Task Force (FLETF), led by the Department of Homeland Security (DHS) and originally created in implementing legislation for the United States Mexico Canada Agreement (USMCA), to publish a strategy within six months of enactment. Such a strategy was required to include importer guidance for compliance with the UFLPA, as well as certain categories of entity lists. Thereafter, the FLETF published the strategy and developed a process for naming entities to the UFLPA entity list. The UFLPA Entity List identifies facilities and entities that source material from XUAR or from persons working with the government of Xinjiang or the Xinjiang Production and Construction Corps for purposes of the "poverty alleviation" program or the "pairing-assistance" program or any other government labor scheme that uses forced labor. The four lists required by clauses (i), (ii), (iv), and (v) of Section 2(d)(2)(B) of the UFLPA that the FLETF identify and publish include:

> (1) a list of entities in the Xinjiang Uyghur Autonomous Region that mine, produce, or manufacture wholly or in part any goods, wares, articles, and merchandise with forced labor;

(2) a list of entities working with the government of the Xinjiang Uyghur Autonomous Region to recruit, transport, transfer, harbor or receive forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of the Xinjiang Uyghur Autonomous Region;

(3) a list of entities that exported products made by entities in lists 1 and 2 from the People's Republic of China into the United States; and

(4) a list of facilities and entities, including the Xinjiang Production and Construction Corps, that source material from the Xinjiang Uyghur Autonomous Region or from persons working with the government of the Xinjiang Uyghur Autonomous Region or the Xinjiang Production and Construction Corps for purposes of the ''poverty alleviation'' program or the ''pairing-assistance'' program or any other government-labor scheme that uses forced labor.

The UFLPA established a rebuttable presumption that the importation of any goods mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region or produced by an entity on the UFLPA entity list is prohibited from importation into the United States. To rebut this presumption, importers must be able to demonstrate that every stage of their supply chain is free from forced labor. An importer must ensure that the supply chains of its imports do not include the use of forced labor; otherwise, they run the risk of their goods being detained upon importation.

C. Countering America's Adversaries Through Sanctions Act (CAATSA)

CBP also enforces the Countering America's Adversaries Through Sanctions Act (CAATSA). CAATSA Section 321(b) (22 U.S.C. § 9241a), signed into law in August 2017, and amended the North Korea Sanctions and Policy Enhancement Act of 2016 (22 U.S.C. § 9241 et

seq.), created a rebuttable presumption that significant goods, wares, merchandise, and articles mined, produced, or manufactured wholly or in part by North Korean nationals or North Korean citizens anywhere in the world are forced labor goods prohibited from importation under the Tariff Act of 1930. Accordingly, any goods subject to this presumption shall not be entitled to entry at any port of the United States and may be subject to detention, seizure, and forfeiture. An importer may overcome the presumption by demonstrating to the CBP Commissioner, by clear and convincing evidence, that the goods were not produced with convict labor, forced labor, or indentured labor. Evidence must be provided within 30 days of notice of detention. If the importer fails to provide clear and convincing evidence within this timeframe, the merchandise may be subject to exclusion or seizure and forfeiture.

In addition to enforcing the above laws to prevent the importation into the United States of goods made with forced labor, CBP also has authority to issue civil penalties or seize and forfeit goods, where the facts warrant such action. *See, e.g.,* 19 U.S.C. §§ 1592, 1595a.

III. Issues Faced In the Trading Community

Importation of goods into the United States suspected of violating the forced labor statutes will result in CBP taking an enforcement action against the shipment, which can include detention, exclusion, and/or seizure.

If a shipment is detained, the importer will receive a detention notice that will identify the legal basis for the detention – WRO, CAATSA, or UFLPA. Where the detention has been initiated pursuant to a WRO, an importer is given three months from the time of importation to seek release of the goods. 19 C.F.R. § 12.43(a). Alternatively, the shipment may be exported to a location outside of the United States within three months. Under the applicable regulation, an

importer seeking release of goods detained under a WRO is required to provide CBP with a certificate of origin. If the detained article was mined, produced, or manufactured wholly or in part in a country other than that from which it was exported to the United States, additional certificates are required. 19 C.F.R. § 12.43(a). In addition,

> The importer shall also submit to the port director or Commissioner of CBP within such 3-month period a statement, or its electronic equivalent, of the ultimate consignee of the merchandise, showing in detail that he had made every reasonable effort to determine the source of the merchandise and of every component thereof and to ascertain the character of labor used in the production of the merchandise and each of its components, the full results of his investigation, and his belief with respect to the use of the class of labor specified in the finding in any stage of the production of the merchandise or of any of its components.

19 C.F.R. § 12.43(b)

When CBP detains goods or merchandise under the UFLPA, the detention notice is issued in accordance with 19 U.S.C. § 1499 and 19 C.F.R. § 151.16. The detention notice will provide the reason for the detention, the detention's anticipated length, and instructions for submitting information to CBP. *See U.S. Customs and Border Protection Operational Guidance for Importers,* p. 7 (CBP Publication No. 1793-0522, June 13, 2022) (Guidance). Detentions under the UFLPA are subject to an initial 30-day response period, which may be extended upon approval by the Port at which the goods are detained. An importer that wishes to challenge the detention may do so in one of two ways.

The importer may demonstrate that the subject goods were sourced completely outside Xinjiang and have no connection to entities on the UFLPA Entity List. This type of submission, typically referred to as an "applicability review," requires the collection and summary of comprehensive documentation, including purchase orders, payment records, invoices, proofs of payment, inventory records, factory reports and additional documentation for all suppliers. The documentation must be translated into English and cover each stage of the supply chain from raw materials to the imported good.

Alternatively, if the goods are subject to the UFLPA presumption (*i.e.*, are sourced in whole or in part within the Xinjiang region), an importer may request an exception. Importers may rebut the presumption by: (A) fully complying with the guidance described in section 2(d)(6) of the UFLPA and any regulations issued to implement that guidance; and, (B) completely and substantively responding to all inquiries for information submitted by the Commissioner to ascertain whether the goods were mined, produced, or manufactured wholly or in part by forced labor. In addition, the importer must provide "clear and convincing evidence" that the good, ware, article, or merchandise was not mined, produced, or manufactured wholly or in part by forced labor. *See Guidance*, at p. 9.

Satisfying the clear and convincing evidence standard is a high burden. Required documentation includes supply chain tracing information, information on supply chain management measures, and other evidence, that the goods were not mined, produced, or manufactured wholly or in part by forced labor. Required evidence might also include detailed maps identifying the location of all entities involved in the production, wage and recruitment information for the employees at each facility in the supply chain, or reliable social compliance audits demonstrating the absence of any forced labor indicators. Given the breadth of

documentation needed to provide a wholistic and accurate survey of the supply chain, preparing a submission can take months to complete.

Upon submission of all the necessary documentation, the importer's request for an exception will be reviewed by CBP. If the CBP Commissioner determines that an exception to the rebuttable presumption is warranted, CBP must notify the appropriate Congressional committees and, not later than 30 days after the CBP Commissioner determines an exception is warranted, make available to the public a report identifying the goods and the evidence considered in granting the exception. *Guidance*, at p. 10.

Given the broad scope of the UFLPA, it is in an importer's best interests to fully understand its entire supply chain, not just its first-tier suppliers. However, tools that can help importers, such as targeting/tracing software and/or isotopic testing, can be cost prohibitive. To help alleviate the financial burden on small and medium sized importers, the DOL has made its "Better Trade Tool" and "Comply Chain" resources available at no cost. Both are due diligence tools that provide practical guidance to the private sector and help importers strengthen their compliance efforts. These tools have also been incorporated into the government's due diligence outreach efforts. The Better Trade Tool integrates existing ILAB data on international child labor and forced labor with trade data to show which global imports present a higher risk of being made with child and forced labor. Comply Chain is a set of best practices to address child labor and forced labor in supply chains. This year, ILAB launched a new interactive web format for Comply Chain to better equip businesses of all sizes tackle child labor and forced labor in their supply chains via a worker-driven social compliance system.

IV. Judicial Remedies

The importation of goods at U.S. ports of entry suspected of being produced with the use of forced labor, whether as a result of a determination under section 1307, or subject to the UFLPA or CAATSA, may result in possible detention, exclusion, or seizure, and possible forfeiture, of those goods. Civil penalties may also be issued against those who facilitated the importation of goods with forced labor. 19 U.S.C. §§ 1592, 1595. In light of the more recent statutory changes discussed above, several actions have been commenced in the Court of International Trade in recent years. A summary of those cases are set forth below.

a) Virtus Nutrition LLC. v. United States, CIT Court No. 21-00165

In 2021, Virtus Nutrition LLC (Virtus) filed an action under 28 U.S.C. § 1581(a) to challenge the denial of a protest filed with CBP that contested the exclusion from entry of palm fatty acid distillates and palm stearin. Pl. Compl.at ¶ 2, 1:21-cv-00165-TMR (Ct. Int'l Trade. Apr. 15, 2021), ECF No. 2. CBP notified Virtus that its imported palm oil products were being detained at the port of San Francisco pursuant to a Withhold Release Order issued on December 30, 2020, which concerned palm oil and products containing palm oil produced by a Malaysian firm, Sime Darby Plantation Bhd. (Sime Darby). *Id*. Virtus timely protested the exclusion of the merchandise under 19 U.S.C. §1514(a)(4). *Id.* at 4. CBP subsequently denied the plaintiff's protest, and plaintiff filed a complaint with the CIT.

Virtus asserted that the WRO did not apply to the product because the palm oil and related parts have no relation to the Sime Darby or any other Malaysian palm oil producer that is subject to the WRO. *Id*. Further, plaintiff claimed that CBP had no basis in fact or law to exclude the merchandise for violation of 19. U.S.C. §1307, claiming that the exclusion was unlawful. *Id*. at 5. In response, the government emphasized that CBP is authorized to issue a WRO under 19 C.F.R. § 12.42(e) if it has information that "reasonably but not conclusively indicates" that merchandise falls within scope of section 19 U.S.C. §1307 and will likely be

imported into the United States. Def.'s Opp'n to Pl.'s Resp. to the Ct.'s Order to Show Cause and Mot. to Dismiss the Case with a Stipulation Allowing Exportation Under the Temporary Storage Agreement at 3, 1:21-cv-00165-TMR (Ct. Int'l Trade. Nov. 3, 2022), ECF No. 77.

In August of 2021, Virtus notified the government that it would no longer continue to contest the exclusion, and the parties moved to amend scheduling order because Virtus indicated its intent to export the merchandise. *Id*. at 5. This matter was ultimately dismissed under USCIT Rule 41(a)(2).

b) International Rights Advocates v. Mayorkas et al., CIT Court No. 23-00165

International Rights Advocates (IRAdvocates) brought an action pursuant to 28 U.S.C. § 1581(i) against the Department of Homeland Security and CBP, seeking to compel agency action under the Administrative Procedure Act (APA), 5 U.S.C. § 706, for failure to take action and issue a WRO pursuant to 19 U.S.C. § 1307. Slip Op. at 13, 1:23-cv-00165-CRK (Ct. Int'l Trade Aug 8, 2024), ECF No. 34. Pl.'s Compl. at ¶ 2, 1:23-cv-00165-CRK (Ct. Int'l Trade Aug. 15, 2023), ECF No. 2. IRAdvocates had submitted an allegation requesting that CBP issue a country-wide WRO and exclude cocoa imports that were being produced with forced child labor in Cote d'Ivoire. Def.'s Mot. to Dismiss for Lack of Jurisdiction and Failure to State a Claim upon which Relief Can Be Granted and Supporting Memorandum at 10, 1:23-cv-00165-CRK (Ct. Int'l Trade Dec. 15, 2023) ECF No. 16. In accordance with the applicable regulations, CBP initiated an investigation based on information provided by IRAdvocates. Slip Op. at 5, 1:23-cv-00165-CRK (Ct. Int'l Trade Aug 8, 2024), ECF No. 34.

The government moved to dismiss on the grounds that there is no subject-matter jurisdiction and no valid claim for relief, and IRAdvocates opposed. *Id*. On August 8, 2024, the court granted defendant's motion to dismiss. The court held that plaintiff IRAdvocates, as an

organization, could not demonstrate the three elements of constitutional standing, that is injury-in-fact, causation, and redressability. The court examined the recent Supreme Court case *FDA v. Alliance of Hippocratic Medicine*, 602 U.S. 367 (2024) and its discussion of *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), a case in which the organization demonstrated a concrete harm to core business activities beyond advocacy efforts to establish an injury-in-fact. However, IRAdvocates was similar to the situation in *Alliance* where the plaintiff-organizations were solely advocacy organizations without any core business activities that were interfered with due to the agency's action. CBP's alleged failure to issue a WRO for cocoa imported from the CDI in this case did not obstruct a core business activity or impose any similar impediment to the organization's efforts of engaging in public advocacy, conducting studies, and drafting civil actions. IRAdvocates expended resources post-allegation in an effort to persuade CBP to act in accordance with its wishes did not constitute an injury-in-fact as an organization "cannot spend its way into standing." The Court held that as for the last two elements of constitutional standing, even if IRAdvocates had suffered an injury-in-fact, it was not caused by CBP because the expenditures were related to routine organizational operations and not traceable to CBP's inaction. Moreover, a decision by the court would likely not redress the injury as CBP could conclude that a WRO should not be issued. *Id.* at 19. Therefore, the defendant's motion to dismiss was granted. *Id*. at 20.

c) <u>Ninestar Corporation et al. v. United States et al., CIT Court No. 23-00182</u>

In 2023, Ninestar Corporation, a Chinese entity, and its corporate affiliates filed suit against various federal agencies under 28 U.S.C. § 1581(i) to challenge a decision by the Forced Labor Enforcement Task Force (FLETF), an interagency task force made up of seven member agencies and six observer agencies, to add plaintiffs to the list of entities described in section

2(d)(2)(B) of the Uyghur Forced Labor Prevention Act (UFLPA), *see* P.L. 117-78 (Dec. 23, 2021), . *Ninestar Corp. v. United States*, 666 F.Supp.3d 1351, 1353 (Ct. Int'l. Trade 2023). Plaintiffs brought suit under 28 U.S.C. § 1581(i), which confers jurisdiction upon the Court of International Trade over any action that arises out of any law providing for "embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety." 28 U.S.C. § 1581(i)(C).

On June 9, 2023, the FLETF announced that it was adding plaintiffs to the UFLPA Entity List. On June 12, 2023, the decision was published in the Federal Register. 88 Fed. Reg. 38,080-83. Specifically, the Federal Register notice indicated that Ninestar Corporation and its affiliated entities were being added to the UFLPA Entity List because they were deemed to have been "working with the government of Xinjiang to recruit, transport, transfer, harbor or receive forced labor or Uyghurs, Kazakhs, Kyrgyz, or members of other persecuted groups out of Xinjiang," which is the standard under section o2(d)(2)(B)(ii) of the UFLPA. *Id.* at 38,082. Ninestar did not immediately submit a request to be removed from the UFLPA Entity List, but instead filed suit, *Ninestar Corp. v. United States,* No. 1:23-cv-00182-GSK (Ct. Int'l. Trade Aug. 22, 2023), ECF No. 8, Compl. ¶ 45

In this initial complaint, Ninestar claimed that it was not given a "reasoned explanation" as to why it was placed on the UFLPA Entity List. *Id.*, ¶ 6. It sought a declaration that the FLETF violated the APA, vacatur of the listing decision, an injunction against enforcement of the UFLPA's rebuttable presumption, and attorney fees under the Equal Access to Justice Act. Compl., Prayer for Relief. Ninestar also requested preliminary injunctive relief requesting that the Court both stay the Listing Decision and prevent the Government from blocking plaintiff's imports predicated on the decision. *See* 666 F.Supp.3d at 1357-8.

Again, Ninestar invoked the Court's jurisdiction under 28 U.S.C. § 1581(i)(C), which governs agency action relating to "embargoes." Actions falling within the CIT's "residual" jurisdiction under this provision are subject to the APA, 5 U.S.C. § 706. *Ninestar Corp. v. United States*, 687 F.Supp.3d. 1308, 1322 (Ct. Int'l. Trade 2024). The scope of judicial review for actions commenced under 28 U.S.C. § 1581(i) is found in 28 U.S.C. § 2640(e), which directs the Court to 5 U.S.C. § 706; it is "highly deferential" to the agency, here the FLETF. *See Islamic Am. Relief Agency (IARA-USA) v. Gonzales*, 477 F.3d 728, 733 (2007). It requires the Court to set aside agency action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*

The Court first determined that Ninestar was likely to be able to establish subject matter jurisdiction in this case under 28 U.S.C. § 1581(i).

In December 2023, following the filing of the Administrative Record, Ninestar amended its complaint to assert three new claims. ECF No. 69. In addition to its original claim that it did not receive a reasoned explanation (Count I), Ninestar alleges that the FLETF's determination lacked substantial evidence (Count II), applied the wrong evidentiary standard (Count III), and was impermissibly retroactive (Count IV). By its amended complaint, Ninestar seeks the same relief as in its initial complaint, with an added prayer for declaratory relief with respect to each of its new counts. Amended Complaint, Prayer for Relief.

On February 27, 2024, this Court denied Ninestar's motion for a preliminary injunction, concluding, among other things that Ninestar was not likely to succeed on the merits of Counts I, III, or IV of its amended complaint. *Ninestar Corp. v. United States*, Court No. 23-00182, Slip Op. 24-24, 2024 WL 864369. Specifically, the Court concluded that the Administrative Record provided an adequate explanation for Ninestar's listing; the FLETF's reasonable cause standard

is the correct burden of proof for its listing decisions; and the FLETF's decision was not impermissibly retroactive. Ninestar reserved its arguments as to Count II (its substantial-evidence challenge) for its motion for judgment on the agency record and, therefore, the Court did not consider that cause of action as part of the preliminary injunction decision. In addition, the Court held that Ninestar did not establish that it was irreparably harmed, nor did the balance of the equities weigh in its favor, which are the remaining factors considered when a preliminary injunction is sought.

As of the preparation of this paper, the Ninestar matter is stayed following a petition, filed by Ninestar on July 18, 2024, to be removed from the UFLPA Entity List.

d) Hoshine Silicon (Jia Xing) Industry Co., Ltd. v. United States et al., CIT Court No. 24-00048

In February 2024, plaintiff Hoshine Silicon (Jia Xing) Industry Co., Ltd. filed an action in the Court of International Trade challenging the issuance of a Withhold Release Order (WRO) under 28 U.S.C. § 1581(i). *Hoshine Silicon (Jia Xing) Industry Co., v. United States,* No. 1:24-cv-00048-N/A (Ct. Int'l. Trade Feb. 20, 2024), ECF No. 4, Pl.'s Compl. at ¶ 1-2. Hoshine commenced this action against the Department of Homeland Security (DHS) and U.S. Customs and Border Protection (CBP) challenging the issuance of a WRO involving goods manufactured by plaintiffs. *Id.* Issuance of a WRO is a regulatory mechanism for enforcing 19 U.S.C. § 1307. Once a WRO is issued, merchandise covered by the WRO may not enter the United States unless an importer is able to "establish by satisfactory evidence" that the merchandise is not made with forced labor. 19 C.F.R. § 12.42(g).

CBP issued the WRO at issue in June 2021 for certain silica-based products manufactured by plaintiffs, as well as derivative goods that used such products. *The Department of Homeland Security Issues Withhold Release Order on Silica-Based Products Made by Forced Labor in Xinjiang* (Jun. 24, 2021). In a press release, CBP stated that Hoshine operates from the Xinjiang region of the People's Republic of China, although the company alleges in its complaint that it is located thousands of miles away from the region. *See* Pl.'s Compl. at ¶ 33. After the WRO was issued, Hoshine submitted a Modification Petition in September 2023 to seek removal from the listing. Pl.'s Compl. at ¶ 8. The petition not only requested removal but also asked to exclude from the listing a supply chain for Hoshine's products alleged to be outside of the Xinjiang region. *Id.* Two months later, CBP denied Hoshine's petition, stating that it was necessary for the company to "demonstrate full remediation of all forced labor indicators present at *all* of [its] locations subject to the WRO" (emphasis added). *See* Pl.'s Compl.at ¶ 9.

CBP's guidance provides that in seeking to modify the scope of an existing WRO, an entity must show they have remediated all indicators of forced labor. *See* Pl.'s Compl. at ¶ 10. CBP identified two of the International Labour Organization's indicators in Hoshine's production process: intimidation and threats, and restriction of movement. *Id.* Despite these findings, Hoshine alleged that CBP acted unlawfully by not pointing to specific facts that formed the basis for this decision. *See* Pl.'s Compl. at ¶ 11-12. In its complaint, Hoshine stated that CBP acted arbitrarily and capaciously by not divulging the facts used in making its determination and by subsequently rejecting the Modification Petition. *Id.* According to plaintiff, CBP violated the Administrative Procedure Act (APA). 5 U.S.C. § 706(2)(A). Plaintiff alleged reputational harm and harm to its business operations and financial standing as a result of CBP's decisions. *See* Pl.'s Compl. at ¶ 42-44. The company requested that the Court require CBP to

produce the administrative record and vacate CBP's decisions regarding both the WRO listing and the petition denial. Pl.'s Compl. at ¶ 12. As of the preparation of this paper, this case was pending.