

The Outlaw Ocean Project Responds to Questions from Rep. Ryan Zinke, Montana

Question: "You cite the UFLPA which creates a CBP rebuttable presumption of "forced labor" for products from the Xinjiang region. If you think that the onus should be on industry and that currently available third-party auditors don't provide "sufficient evidence" of a lack of forced labor, how can US seafood companies meet your standard for proving the lack of forced labor?"

Answer: Respectfully, I'd start by refining certain phrasing of your question because it has errors in its assumptions.

Firstly, it is important to point out that the issue is not that I "think the onus should be on industry." The onus is in fact on industry under the UFLPA. This is not an aspirational or interpretive matter. It is a fact of law. Feel free to check with Prof. Stumberg or other legal experts about UFLPA. But the 'rebuttable presumption' within that law indeed shifts the burden of proof to an importer to show that its supply chain from those provinces is free of forced labor. Under CBP rules, that would require the importer to prove a negative, either that: (a) its suppliers do not include processing facilities from those provinces, or, (B) if they do, those suppliers do not use processing facilities where there is evidence of forced labor. So, the issue is not meeting my standard of proving forced labor.

Secondly, it is important to look at the meaning of "forced labor" in the UFLPA and elsewhere. Here is a helpful pull of relevant spots in the laws.

CBP's introduction

The Uyghur Forced Labor Prevention Act (UFLPA) 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 certain entities, 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. The presumption applies unless the Commissioner of U.S. Customs and Border Protection (CBP) determines, through clear and convincing evidence, that the goods, wares, articles, or merchandise were not produced using forced labor or that UFLPA does not apply to the goods, wares, or merchandise seeking to be entered into the United States.

Statutory definition in the Tariff Act

19 U.S.C.A. § 1307 Convict-made goods; importation prohibited (section 307 of the Tariff Act)
All 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 of the Treasury is authorized and directed to prescribe such regulations as may be necessary for the enforcement of this provision. “Forced labor”, as herein used, shall mean 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. For purposes of this section, the term “forced labor or/and indentured labor” includes forced or indentured child labor.

CBP rule for withholding imports

19 CFR 42 Findings of Commissioner of CBP

(e) If the Commissioner of CBP finds at any time that information available reasonably but not conclusively indicates that merchandise within the purview of section 307 is being, or is likely to be, imported, he 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.

CPB 2023 update: Enforcement of the UFLPA Rebuttable Presumption

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The UFLPA establishes a rebuttable presumption, which became effective on June 21, 2022, that the importation of any goods mined, produced, or manufactured wholly or in part in Xinjiang, or produced by an entity on the UFLPA Entity List, is prohibited under 19 U.S.C. § 1307.14 The Commissioner of CBP may grant an exception to the presumption if an importer meets specific criteria outlined in Section 3(b) of the UFLPA.15

UFPLA section 3(b)

SEC. 3. REBUTTABLE PRESUMPTION THAT IMPORT PROHIBITION APPLIES TO GOODS MINED, PRODUCED, OR MANUFACTURED IN THE XINJIANG UYGHUR AUTONOMOUS REGION OR BY CERTAIN ENTITIES.

under subsection (a) unless the Commissioner determines—

(1) that the importer of record has—

(A) fully complied with the guidance described in section 2(d)(6) and any regulations issued to implement that guidance; and

(B) completely and substantively responded to all inquiries for information submitted by the Commissioner to ascertain whether the goods were mined, produced, or manufactured wholly or in part with forced labor; and (2) by clear and convincing evidence, that the good, ware, article, or merchandise was not mined, produced, or manufactured wholly or in part by forced labor.

CBP guidance

See the guidance generally; Part II Requesting an Exception to the Rebuttable Presumption (page 9)

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E. Evidence Goods Originating in China Were Not Mined, Produced, or Manufactured Wholly or In Part by Forced Labor

Documentation may include, but is not limited to:

- Supply chain map identifying all entities involved in production of the goods;
- Information on workers at each entity involved in the production of the goods in China such as wage payment and production output per worker;
- Information on worker recruitment and internal controls to ensure that all workers in China were recruited and are working voluntarily; and
- Credible audits to identify forced labor indicators and remediation of these if applicable.

Note: The resources listed in Section III of this CBP operational guidance document provide additional information on due diligence, supply chain tracing, and supply chain management measures.

The bottom line is that it is not relevant under UFLPA whether (as the Chinese government and US companies seeking to do business in China are apt to point out) that select Xinjiang workers in their plants may be given a wage, attest in interviews with auditors or state media that they are "happy" to have the job, provided dorms, meals, vocational training. The relevant point here is that under UFLPA, these workers are categorically seen as part of state-sponsored forced labor because they are not given the true option to decline the work nor to leave the work without serious penalty. (This interpretation is consistent with CBP's description of labor transfer programs in the UFLPA implementation strategy, pages 19-22. That description relates back to the legal definition: work that is involuntary and performed under the menace of a penalty.) The comparison to keep in mind here is prison labor or child labor or North Korean labor or debt bonded labor. Even if auditors or companies are told that those workers are "happy" and earning, the legal lens through which they are viewed is distinct because of issues of agency and choice. Here again, it is confusing for lawmakers to ask questions about these matters since in fact this is embodied in the laws themselves and it is by no means an interpretive matter of a journalist. Nor does it make much sense for industry to ask journalists to counsel them on how to comply with these laws. If the industries seek to do business in settings where such labor concerns exist, it is likely best for the industries to figure out how and whether they can do so without running afoul of existing laws. The relevant questions for the industry and lawmakers to ask would be at the social auditors: Are they actually inspecting plants for the presence of Xinjiang labor (not what is the definition of forced labor)? Can social auditors actually do legitimate inspections that entail unannounced visits, actual anonymized worker interviews, true investigation of labor conditions in China and if not, are such audits illegitimate tools?

Question: "Moving further, where does the onus on industry for compliance end and where does the US Government's responsibility begin to identify bad actors in the Chinese seafood industry?"

Answer: This is a question best answered by scholars or lawmakers but not likely me.

Question: "Prior to your reporting, would you expect any US seafood company to be able to uncover what you uncovered in a general audit of a Chinese exporter?"

Answer: What made our reporting difficult was that we were needing to penetrate these supply chains from the outside, typically with no help from companies, in fact, most often with active resistance from companies. The companies themselves are the ones who have internal access and control over their own supply chains, so, yes, to put it bluntly, the companies can investigate their own supply chains and indeed are required to do so under US law. The companies have direct access to their own full and unfettered transport and trade data (which is vaguely and only partially handed over to government or private databases minded by reporters and NGOs). The companies have the decision-making power and leverage to instruct their suppliers in China to allow spot checks and legitimate audits or else those companies will withdraw from China (reporters and NGOs have no such leverage). The companies indeed are the ones who have financially benefited by doing business in contexts like China where labor is cheaper and this financial benefit puts added responsibility on them to control their supply chains to ensure they are devoid of labor or environmental crimes on their supplier ships or supplier processing plants.

Mandatory human rights due diligence surely would help the industry. While Section 2(d)(6) of the UFLPA requires the FLETF to provide guidance to importers on conducting due diligence and effective supply chain tracing, there is no requirement for firms sourcing from China to actually undertake due diligence. Mandatory human rights due diligence in global supply chains is emerging across key market states, most notably with the European Union's Directive on Corporate Sustainability Due Diligence.

So, here again, I fear the framing of the question misses the bigger picture: whether it is easy or difficult to weed out forced labor in a product's supply chain is immaterial. The law in the US forbids companies from importing items made with forced labor and therefore companies likely have to only enter countries or markets where they are pretty confident that they can operate in compliance with the law. If there is a reasonable expectation that China might not allow auditors or companies to fully check on compliance with such laws, the real question becomes whether those companies can find ways to fix that problem so that they can operate in those cost-saving settings lawfully.