Using the U.S. Tariff Act Of 1930 to Combat Human Trafficking
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I. Introduction

A recent amendment to Section 307 of the Tariff Act of 1930 (“Section 307”) has made it another weapon in the arsenals of Liberty Asia and other human rights organizations working across the world to eradicate human trafficking.

The Tariff Act of 1930 (19 U.S.C. Ch. 4, §§ 1202 et seq.) (the “Tariff Act”) does not contain express prohibitions on human trafficking. Section 307, however, prohibits the importation into the U.S. of goods produced by means of forced labor and mechanisms for private parties—including non-governmental organizations and charitable organizations—to report potential trafficking violations to U.S. Customs and Border Protection (“CBP”). In turn, CBP has the power to seize and require forfeiture of such property. Depending on the nature of their misconduct, violators may also be subject to criminal and civil penalties.

Historically, CBP enforcement of Section 307 has been minimal. However, recent amendments to the Tariff Act have increased the scope of Section 307 to enable broader enforcement by CBP with respect to goods produced by means of forced labor. Recent amendments also require CBP to file annual reports with Congress describing the agency’s Section 307 enforcement efforts, increasing transparency and providing a valuable resource to human rights organizations for tracking enforcement trends.

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II. The Tariff Act

A. OVERVIEW

Congress passed the Tariff Act in 1930 as a protectionist measure designed to reduce foreign competition with domestic production by raising U.S. tariffs on more than 20,000 imported goods. The Tariff Act also contained other restrictions on the importation of foreign goods—for example, Section 307 prohibits the importation of goods made with forced, indentured, child, or prison labor.1 “Forced labor” is defined 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.”2

B. OVERSIGHT

CBP is the law enforcement agency principally tasked with the enforcement of Section 307. When it finds evidence that “reasonably but not conclusively” indicates signs of prohibited labor in imported goods, it can issue a Withhold Release Order (“WRO”) on these goods.3 CBP may then detain the imported goods for up to three months under the WRO, and the importers may attempt to either re-export the merchandise or prove import admissibility of the goods during this time.4 After determining that the goods are indeed in violation of Section 307, CBP will publish a formal finding to that effect in the weekly issue of the Customs Bulletin and in the Federal Register.5 CBP’s formal findings typically contain very few, if any, details regarding the facts of each case—the primary message is the detainment of the goods. The importer may then protest CBP’s determination by either filing a petition with CBP or by commencing a civil action in the United States Court of International Trade.6 In addition to WROs, both civil and criminal penalties are also available for false statements made in connection with the importation of goods, and the extent of the penalties depends on the violator’s level of culpability.7

Critically, CBP regulations state that any person who has reason to believe that merchandise produced by forced labor “is being, or is likely to be,” imported into the U.S. in violation of Section 307 may communicate his or her belief to any Port Director or the Commissioner of CBP through a prescribed form provided by CBP or by other means, as long as the submission is in compliance with relevant regulations. The regulation calls for the following information: (1) a full statement of the reasons for the belief that the importation of the goods at issue would violate Section 307; (2) a detailed description or sample of the relevant merchandise; and (3) all pertinent facts available as to the production of the merchandise abroad.8 A petitioner may submit both a written description of the alleged violation and corroborating evidence (as described in Section III.B, below). So long as the submission complies with these requirements, the Port Director will transmit the report within 10 days to the CBP Commissioner, who may open an investigation into the matter.

C. ENFORCEMENT HISTORY

By deputizing private citizens, Section 307 has significant potential as a tool to detect and punish import violations and human traffickers. Section 307 enforcement, however, has been minimal throughout the statute’s history, in large part because the prohibition only applied to goods that were already available in the U.S. in sufficient quantity to satisfy U.S. domestic demand. This limitation is commonly known as the “consumptive demand loophole,” which has been called the “Achilles heel” of the Tariff Act.9 As discussed below, however, this loophole has recently been eliminated.
D. THE TRADE FACILITATION AND TRADE ENFORCEMENT ACT OF 2015 (THE “TFTEA”)

1. Modifications to the Tariff Act
Recent amendments have the potential to reverse the Tariff Act’s sparse record of enforcement. In March 2016, Congress enacted the TFTEA, which eliminated the consumptive demand loophole by extending Section 307’s prohibitions to all goods made with forced, indentured, child, or prison labor, regardless of U.S. supply and demand concerns.

Commentators celebrated the amendment as a significant step toward realizing the full potential of Section 307 as a weapon against forced labor. Senator Sherrod Brown (D-Ohio), who offered the amendment, commented that “closing this loophole gives the U.S. an important tool to fight global slavery.”

CBP has stated that closing this loophole “provides CBP with a more robust ability to consider information and petitions alleging violations of 19 U.S.C. § 1307.”

Human rights organizations and labor rights organizations have also hailed the development as a major victory in fighting human trafficking and modern-day slavery. The International Labor Rights Forum (“ILRF”) pointed out that “goods known to be at a high risk of being produced with forced labor, including cocoa from farms in West Africa, palm oil from Malaysia, and seafood from Thailand, are now open to challenge for exclusion from the U.S. market under Section 307.”

Also of note, the TFTEA implemented a reporting requirement for CBP to submit an annual report to Congress describing: (1) the number of instances in which merchandise was denied entry to the United States under the Tariff Act in the prior year; (2) the merchandise withheld; and (3) any other relevant information. Commentators have observed that the change may lead to an increase in Section 307 enforcement, though lawmakers have not said this explicitly.

2. Recent Enforcement Efforts
The amendment has already precipitated greater Tariff Act enforcement in the past six months than in the previous 15 years. Before the amendment, CBP reported only 41 instances in which it denied entry to goods suspected to have been produced with forced, indentured, child, or prison labor since 1930. This number is especially striking when compared to statistics maintained by the Department of Labor regarding the prevalence of goods produced by child and forced labor worldwide, including a list of 353 such goods that were identified in 2014 alone.

Since Congress enacted the TFTEA a few months ago, CBP has issued four WROs under Section 307 on Chinese products tainted by convict labor:

- On March 29, 2016, CBP issued two related detention orders against, first, Tangshan Sanyou Group and its subsidiaries and, second, Tangshan Sunfar Silicon Industries, both against imported soda ash, calcium chloride, caustic soda, and viscose/rayon fiber manufactured or mined in China.
On June 1, 2016, CBP issued a detention order against PureCircle Ltd in China against imported Stevia.19

On September 16, 2016, CBP issued a detention order against Hongchang Fruits & Vegetable Products Co., Ltd. in China against imported peeled garlic.20

The matters are still active and, as a result, CBP has not yet released the complete facts behind the WROs, including whether either involved instances of human trafficking. However, the uptick in enforcement suggests that, even though the TFTEA is still young, the amendment may prompt a renewed focus by CBP on Section 307 enforcement.

### III. The Tariff Act and Human Trafficking

By eliminating the consumptive demand loophole, the TFTEA expands the Tariff Act’s potential as a tool for organizations to enlist and direct government resources to deter and punish human trafficking.

#### A. Applicability to Trafficking Violations

Section 307 refers to “forced” rather than to “trafficked” labor. The extent to which this distinction matters is an open question—no court has addressed whether evidence that goods were produced by means of illegally trafficked labor satisfies the “forced labor” element of Section 307. However, the similarity between the definition of “forced labor” in Section 307 and the definition of “severe forms of trafficking in persons” under the Trafficking Victims Protection Act (“TVPA”) suggests that similar facts would satisfy the respective elements of both statutes.

As described above, Section 307 defines “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.”21

By comparison, the TVPA defines “severe forms of trafficking in persons” to include “the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjecting to involuntary servitude, peonage, debt bondage, or slavery.”22 (emphasis added) Under both Section 307 and the TVPA, the use of force can take multiple forms, including not only physical force but the threat of violence, emotional distress, severe consequences, and other forms of coercion.23

Furthermore, as the TVPA’s definition of “severe forms of trafficking in persons” make clear, many trafficking victims are transported for the very purpose of providing forced, indentured, child, or prison labor. Therefore, as a practical matter, Section 307 enforcement also undermines the economic incentives that motivate certain forms of human trafficking by punishing the (attempted) importation of goods produced by means of forced labor.

#### B. Reporting Potential Trafficking Violations

As discussed, CBP regulations permit organizations like Liberty Asia to report potential trafficking violations to any Port Director or the Commissioner of CBP. CBP may issue a WRO where such petitions demonstrate “reasonably but not conclusively” that the subject goods are the products of forced labor. Unfortunately, there is very little guidance available regarding the meaning of the “reasonably but not conclusively” standard.

In the 86 years since the Tariff Act was enacted, only a single case has been decided addressing the quantum of evidence necessary to establish the inadmissibility of goods under Section 307. In *China Diesel Imports, Inc. v. U.S.*,24 an importer challenged CBP’s withholding of certain diesel engines manufactured in China that CBP alleged were the products of convict labor. CBP’s evidence included Chinese documents demon-
strating the goods’ origin, an official U.S. government publication regarding the prevalence of forced labor in the Chinese penal system, publications issued by the Chinese government about the particular facility in which the engines were produced, reports from visits to the facility and on-site interviews conducted by State Department representatives, and maps of the region.25 By contrast, the WRO’s challenger failed to satisfy its obligation to provide sufficient documentation to demonstrate that convict labor input at the relevant facility was de minimis. The court ultimately found that the facility was affiliated with a prison and that the diesel engines were the products of convict labor. While the court did not address the “reasonably but not conclusively” standard expressly, the case demonstrates the significant difficulty of overturning a WRO that is supported by substantial evidence.26

Reports of organizations that have filed petitions with CBP also suggest that CBP may be reluctant to pursue petitions that are not supported by strong evidence. For example, in 2013, the ILRF filed a petition with CBP pursuant to Section 307 to prevent the importation of goods made with cotton from Uzbekistan.27 ILRF called its case “particularly strong,” claiming that all cotton from Uzbekistan is produced under a closed, state-run system that employs “forced labor.”28 The petition included public statements from the importer, a multinational company based in South Korea, acknowledging the widespread use of forced labor in the Uzbek textile industry, documentation tracing the source of the textile imports, and a statement from an Uzbek human rights organization. Nevertheless, according to ILRF, CBP never issued a WRO and refused to share further information on the case.29

As a practical matter, all that is required to trigger CBP review is the completion of a form, available on CBP’s website.30 Submissions should be as detailed as possible and contain facts sufficient to suggest a reasonable likelihood that the importation of the suspect goods would cause a violation of Section 307. These include: (i) a description of the goods at issue; (ii) identifying information for the alleged violators and related parties; (iii) a thorough accounting of the factual basis underlying the belief that the goods were produced by forced, indentured, convict, or child labor; and (iv) any available corroborating evidence.

Corroborating evidence may be critical. The party who submits the initial petition may not have a subsequent opportunity to present additional evidence. Thus, it would be wise to provide CBP with as complete a submission as possible in the first instance. The report may consist of whatever compilation of memorandums and corroborating evidence most strongly presents the case. Examples of helpful corroborating evidence include, but are not limited to, the following:

- Sworn witness statements;
- Documents demonstrating the origin of goods;
- Public source information, including the Department of Labor’s “List of Goods Produced by Child Labor or Forced Labor,”31 the annual “Trafficking in Persons Report” published by the U.S. Department of State32, or information made available via the Department of Homeland Security’s “Blue Campaign.”33

Section 307 submissions should include:

(i) a description of the goods at issue;
(ii) identifying information for the alleged violators and related parties;
(iii) a thorough accounting of the factual basis underlying the belief that the goods were produced by forced, indentured, convict, or child labor; and
(iv) any available corroborating evidence.
Industry or human rights reports on the working conditions common to the industry and geography from which the goods were sourced;
Maps and other details regarding the site at which the goods were manufactured;
Personnel lists; and
Reports from site visits.

C. TRANSPARENCY AND ACCOUNTABILITY
Not to be overlooked are the TFTEA’s requirements that CBP file annual reports with Congress describing the agency’s Section 307 enforcement activities. CBP is not due to file the first such report with Congress until September 2016, and to date, CBP has not released any statements specifically on this newly added reporting requirement. Still, this requirement may serve two functions.

First, it guarantees public access to CBP reports regarding Section 307 enforcement, providing a valuable resource to human rights organizations. These reports contain insight into the U.S. government’s priorities with respect to anti-trafficking enforcement, and into the industries in which trafficking is most prevalent.

Second, CBP reports may increase the effectiveness of Section 307 petitions by bringing transparency—and, by extension, accountability—to CBP officials’ anti-trafficking enforcement efforts.

Another potential tool in human rights organizations’ toolbox is the Freedom of Information Act (“FOIA”), which provides the public the right to request access to records from federal agencies. Generally, any person—regardless of citizenship and including individuals, corporations, foreign governments, etc.—can make a FOIA request. Each federal agency handles its own records and any related FOIA requests, which must “reasonably describe” the records sought and must be made in accordance with the agency’s published FOIA regulations.

CBP has a dedicated website for FOIA requests and an electronic submission form, which directs users to create a FOIA account before proceeding to the actual FOIA request form. Once CBP receives a properly filed FOIA request, it has 20 business days to make a determination on whether to comply with the request; if denied, the FOIA requester has a right to file an appeal to the CBP commissioner. Using a FOIA request, Liberty Asia and similar organizations may be able to access information in CBP’s records that would shed light on particular CBP enforcement actions under Section 307.

IV. Conclusion
The recently amended Tariff Act provides a powerful weapon for encouraging the U.S. government, and CBP in particular, to prioritize anti-trafficking efforts. Armed with Section 307, Liberty Asia, similar human rights organizations, labor organizations, and religious rights groups can effectively act as the eyes and ears of CBP and take an active role in challenging the importation of tainted goods. If widely enforced, penalties for violations of Section 307 could reduce the available market for tainted goods and the corresponding economic incentive to traffic human labor. The recent amendments also increase transparency around Section 307 enforcement efforts, providing a valuable resource to human rights organizations and increasing accountability.
Endnotes

1 19 U.S.C. § 1307 et seq.
3 19 C.F.R. § 12.42(e).
4 19 C.F.R. § 12.43.
5 19 C.F.R. § 12.42(f).
6 19 U.S.C. § 1514(a). CBP’s website also provides instructions on how to file such a petition. See https://help.cbp.gov/app/answers/detail/a_id/296/-/importers--protesting-or-petitioning-a-decision-made-by-cbp.
7 Civil penalties for the violation of Section 307 may be substantial. These include forfeiture and fines up to the domestic value of the goods withheld depending on the violator’s level of culpability. 19 C.F.R. § 12.44(b). In addition to civil penalties, violators may also be subject to criminal sanctions that include up to 2 years’ imprisonment or a fine for each violation. 18 U.S.C. § 542
8 19 C.F.R. § 12.42.
9 Id.
14 See http://www.laborrights.org/blog/201602/tariff-act-strengthened-will-enforcement-follow. The International Labor Rights Forum, or the ILRF, is a human rights organization that advocates for workers globally.
16 See, e.g., http://www.goodweave.org/index.php?id=9478
17 See “List of Goods Produced by Child Labor or Forced Labor,” issued by the Bureau of International Labor Affairs, United States Department of Labor, December 1, 2014.
20 See https://www.cbp.gov/trade/trade-community/programs-outreach/convict-importations. To date, a media release does not appear to be available.
22 22 U.S.C. § 7101. Of course, CBP also encourages the public to report all human trafficking violations under the TVPA and other applicable anti-trafficking laws.
23 See supra notes 17 and 18.
25 See id.
26 The court also found that the consumptive demand loophole did not apply to convict-made goods. Id. While this finding has not come under a court’s further scrutiny, it is now largely irrelevant because the consumptive demand loophole has been eliminated by the most recent amendment to the Tariff Act.
28 See supra note 13.
29 Id.
30 19 C.F.R. § 12.42(b). Trade fraud violations may be reported directly to CBP or via the HSI Tip Form on the e-Allegations Online Trade Violation Reporting System at https://apps.cbp.gov/eAllegations. A sample of the HSI Tip Form, including the instructions, is included as Appendix A.
31 See supra note 10.
32 Available at http://www.state.gov/j/tip/rs/tiprpt/.
33 Information available at https://www.dhs.gov/blue-campaign.
34 See https://www.foia.gov/faq.html. Note that certain exemptions and exclusions to the types of records subject to FOIA apply and are listed on the FOIA website. Agencies have discretion over the exemptions and may release the requested records if they do not foresee any harm in doing so. CBP also provides a list of common FOIA requests and the relevant agency or departments to whom the request should be directed. See https://www.cbp.gov/site-policy-notices/foia/records.
36 Id.
37 https://www.cbp.gov/site-policy-notices/foia
38 https://foiaonline.regulations.gov/foia/action/public/request/publicPreCreate
39 Notably, FOIA requests are not required to be submitted in CBP’s form—which, i.e., Liberty Asia and other human rights organizations may tailor the format of their FOIA request submission according to their needs and the specific request.