

November 19, 2020

The Honorable Mark A. Morgan
Senior Official Performing the Duties of the Commissioner
and
Therese Randazzo
Executive Director
Forced Labor Division
U.S. Customs and Border Protection
1300 Pennsylvania Ave. NW
Washington, DC 20229

RE: Recommendations to Customs and Border Protection on Effective Enforcement of
Withhold Release Orders (WRO) issued under 19 CFR § 12.42 Pursuant to Section 307
of the U.S. Tariff Act

Dear Mr. Morgan and Ms. Randazzo:

Since the closing of the “consumptive demand” loophole in 2016, U.S. Customs and Border Protection (CBP) has issued a total of 25 Withhold Release Orders (WRO) concerning the importation of a range of goods made with forced labor or forced child labor around the world. Among these, a few WROs have implicated entire product lines – tobacco from Malawi, artisanal gold from the Democratic Republic of Congo (DRC) and cotton from Turkmenistan. A few other WROs, although targeted at specific producers, have potentially far-reaching impacts, including the most recent WRO against palm oil and palm oil products produced by FGV Holding Berhad and subsidiaries (Malaysia), a joint venture of Procter & Gamble. In September 2020, CBP also issued five WROs concerning the importation of goods from various entities in the Xinjiang Uyghur Autonomous Region (“Uyghur Region”).

The NGO community applauds CBP’s increasing enforcement of the prohibition on forced labor under Section 307 of the U.S. Tariff Act. However, we are concerned that without the adoption of an enforcement strategy for each such WRO, tainted goods will continue to enter the United States. While issuing a WRO can send a strong message, it is only a first step. A WRO must be followed by effective enforcement in order to dissuade the exaction of forced labor by governments and corporations and to eliminate the profit from that exploitation. First, CBP must ensure that goods that potentially fall under the scope of a WRO do not make their way into the U.S. market. Where possible, CBP should disclose, at a minimum, the number of shipments it is detaining. Next, the agency must leverage its position to demand full and meaningful remediation of all forced labor indicators from the targeted foreign producer. In addition to close monitoring of the foreign target, CBP must also deter U.S. importers from profiting off of overseas forced labor in violation of the

U.S. Tariff Act. This would mean more domestic civil penalties and for higher amounts, as well as collaboration with Immigration and Customs Enforcement (ICE) and other U.S. government agencies to pursue criminal prosecutions for forced labor.

A thorough enforcement strategy is critical given the complexity of supply chains. Primary goods tainted with forced labor are often not imported from the country subject to the WRO, but as processed goods from third countries. So far, CBP has not developed or shared any enforcement plans for existing WROs.

To achieve maximum impact from enforcement actions under Section 307, the Tariff Act Advisory Group (TAAG), comprising of four labor and human rights organizations – the Solidarity Center, Verité, the Human Trafficking Legal Center, and Global Labor Justice-International Labor Rights Forum (GLJ-ILRF) – make the following recommendations to ensure that WROs are enforced effectively and that corporations are deterred from sourcing goods made wholly or in part with forced labor.

The recommendations are divided into three topics:

- a) Lack of Transparency
- b) Elements of an Effective Enforcement Plan
- c) Need for More Civil Penalties and Criminal Prosecutions

A. Transparency

Lack of transparency by CBP is limiting the effectiveness of Section 307. Since the amendment of the Tariff Act, CBP has provided very limited information on its enforcement actions and detentions under Section 307. The Government Accountability Office (GAO) issued a report in April of 2020 recommending that CBP improve its communication with stakeholders about information needed for enforcement actions. While this report focused on seafood industry, the report documents the consistent lack of communication between petitioners and CBP.

Congress mandated annual reporting by CBP to the Senate Committee on Finance and the House Ways and Means Committee in the 2015 Trade Facilitation and Trade Enforcement Act (TFTEA), showing Congressional intent to require more transparency by CBP in enforcement of Section 307. It is unclear whether this report was submitted. If it was, the contents of such a report do not appear to be publicly available. The CSO community would like for parts of this report to be made public, in so far as the information is not law-enforcement sensitive or business confidential.

Under current practice, there is a profound lack of communication with petitioners or the public at key steps in the Section 307 process, including: 1) following the submission of a petition; 2) following the issuance of a WRO; and 3) when modifying or terminating a WRO.

1. Upon Submission of a Petition

CBP does not currently provide petitioners a response on the merits of petitions submitted or provide petitioners with regular updates on the status of the review. These communications are at best ad hoc and apparently at the sole discretion of CBP. Most recently, several organizations filed a petition seeking a regional WRO with regard to cotton-made goods linked to the forced labor of Uyghur workers on August 28, 2020. Despite the fact that the issue is one of headline news worldwide, and that CBP has previously and subsequently issued WROs related to the forced labor of Uyghur workers, CBP has only recently met with any of the petitioners regarding the submission. Worse, with regard to the recent WRO issued against palm oil and palm oil products from FGV Holding Berhad and subsidiaries (Malaysia), CBP only communicated with the petitioners about the case nearly a year after it was filed.

It is critical for the effective application of the law that CBP be engaged in a continual dialogue with petitioners as to the agency's assessment of the petition. This dialogue is an opportunity to share the steps the agency is taking to investigate the claims, to determine whether any further information is needed, and to determine whether a WRO should be issued or a finding be made. The lack of communication can disincentivize persons from expending the resources to file petitions if there is little trust that the cases will be reviewed and acted upon. CBP has relied heavily on the public to file allegations, therefore it should provide petitioners with information and updates.

2. Upon Issuing a WRO

Currently, CBP publishes the fact that it has issued a WRO or a finding on its website. However, the website provides very limited information, including as to the exact class of goods to be detained, the names of the exporter(s), and/or the producer of those goods and their address. The public listing on the CBP website usually mentions a corporate entity but does not provide an address or a list of covered facilities or subsidiaries, which may give rise to genuine confusion as to which facilities are covered by a WRO. For example, after the Hetian Taida WRO was first announced by CBP in October 2019, Costco claimed to a journalist that the Hetian Taida facility where Costco's goods were made was not covered by the WRO and thereby its production could be imported into the United States. It was only later that it became apparent that Costco's supplier was indeed operating out of the Hetian Taida facility in Xinjiang and was prohibited from exporting to the United States.

Further, CBP provides little to no information as to when goods are detained as a result of those WROs (or subsequently seized), the amount and value of those goods, and the identity of the importer. In a few instances, CBP's enforcement actions were made public, as was seen in the recent high-profile detention of human hair weaves and women's gloves from Xinjiang. However, CBP seldom discloses detentions or seizures of goods against other countries. The case of the country-wide WRO on cotton from Turkmenistan issued on May 18, 2018 is a prime example. CBP has still provided no public information as to how many shipments of goods, if any, have been detained at U.S. ports from Turkmenistan or from third countries that process the cotton into other goods, the dates of such action, and the entities involved in the export and import of those goods. Indeed, we are aware of only one enforcement action pursuant to that WRO in the last two years. We learned of that action only because the impacted importer contacted the petitioner. We assume no other enforcement action has occurred.

Without more information, it is difficult, at best, to determine whether the WRO is being effectively applied with regard to the detention of goods. More importantly, it makes it difficult to determine, particularly with regard to regional WROs, whether workers are no longer subject to forced or compulsory labor and whether they have been afforded an effective remedy.

Again, CBP must make available to petitioners and the public any and all actions taken pursuant to a WRO, as well as any information concerning the steps made to provide a remedy to workers whose forced labor led to the issuance of the WRO. In the case of a regional WRO, the CBP should provide information on the steps it is taking with other federal agencies to address the widespread use of forced labor, including any specific measures.

3. Upon Modifying or Terminating a WRO

Once a WRO is issued and applied, the lack of transparency continues. It is clear that CBP engages with companies that are seeking to lift WROs, including through the submission of due diligence plans. For example, on July 31, 2020, CBP removed from the regional WRO covering tobacco and tobacco products in Malawi all tobacco produced by Limbe Leaf Tobacco Company Limited (LLTC). On May 28, 2020, CBP removed from the WRO on DRC artisanal gold all gold imported by the Chambers Federations. To our knowledge, neither the petitioners nor the general public were provided an opportunity to evaluate the accuracy of the representations made in these due diligence plans as to the labor situation or to assess the adequacy of the measures proposed to prevent forced labor. Without access to even a summary of the commitments made in such plans, it is not possible for workers and their advocates to understand what mechanisms they may have available to them should the forced labor continue.

Petitioners – and workers – should be consulted to ensure that the information provided by companies is a comprehensive and an accurate representation of the situation on the ground. The

petitioners should also be consulted as to whether the plan proposed by the company is fit for purpose before any determination is made to lift the WRO as to that exporter.

B. Enforcement Plans

In addition to the measures above, meaningful enforcement of WROs (and in particular regional WROs) will require CBP to adopt a proactive enforcement strategy, in coordination with petitioners, industry, and relevant USG agencies and embassies. This is even more the case when a WRO has been issued with regard to a primary good that requires processing. It may be that the good itself is not commonly imported, but finished goods made with those inputs are in fact imported, either from the country that produced the primary commodity, or from third countries that export finished goods. For a particularly broad WRO, it may not be possible to intercept all prohibited goods, so identifying the most significant exporters and importers of these goods will be key to establish priorities.

The elements of an effective enforcement plan would, in our view, be the following:

1. The CBP should first identify the major U.S. importers of goods subject to a regional WRO. Importers will know their first-tier suppliers and may have made some effort to identify the sources of inputs to their suppliers.
2. CBP should work in collaboration with U.S. importers to ensure that companies potentially impacted by a WRO conduct due diligence, if they have not already done so, to ensure that their suppliers are not producing finished goods from primary or intermediate raw material made with forced labor. Such a situation may arise if the goods are processed or finished in third countries. Importers should share this information, on a confidential basis, with CBP.
3. CBP should have conducted inspections based on the due diligence data to ascertain whether prison or forced labor continues to take place, as well as on information obtained from other sources including other USG agencies and third-party sources - including petitioners.
4. CBP should also collaborate with counterpart agencies in Canada, Mexico, the UK, and the European Union, among others, to share information and ensure that goods which may not be entering the U.S. market are also not entering other markets.
5. As mentioned in the previous section, the outlines of such an enforcement strategy should be made public, except for strictly business-confidential information. CBP should issue at least every six months a report that includes all enforcement actions taken, including any

shipments which have been withheld or seized, and any fines levied and/or sanctions imposed (see next section).

6. Migrant workers, unions, workers' organizations, and worker representatives must be involved in the formulation of these remediation plans. CBP should ensure that affected workers, their unions, workers' rights organizations, migrant workers' rights groups, and other relevant CSO stakeholders have a role in enforcement. Workers' agency to monitor and report on their working conditions needs to be respected and to be included as an integral part of an enforcement plan.

C. Civil Fines and Criminal Prosecution

Apart from robust enforcement of Withhold Release Orders, CBP must hold U.S. importers accountable for importing forced labor tainted goods. On August 13, CBP announced the collection of an unprecedented monetary penalty from a U.S. company for importing stevia produced using prison labor in violation of Section 307 of the U.S. Tariff Act. The CSO community applauds the imposition of this civil penalty against a U.S. importer. We were disappointed to learn that the final amount collected from the importer was actually much less than the amount initially demanded. While this is a great first step, a higher fine would have had more impact.

We encourage the issuance of more civil penalties for forced labor. We encourage fines for greater amounts. Imposing hefty fines is critical in deterring U.S. companies from sourcing forced labor tainted goods with impunity. Forced labor is often perpetuated and sustained by continued patronage from big domestic corporations. These corporations shift the burden to foreign suppliers, vendors, and producers that use or employ forced labor, often failing to reform their own supply chains.

As highlighted by your agency, WROs only target foreign producers and facilities. Domestic importers and retailers often go unpunished for their part in propping up a system that facilitates forced labor. Corporations should know their supply chains down to the smallest farm and facility level, from raw material to finished product. They should not be allowed to hide behind their complex supply chains and simply cut and run. The possibility of accruing hefty fines puts U.S. companies and importers on notice. This also forces corporations to take a close look at what is happening in their direct and indirect networks. Once these fines are collected, CBP and relevant partner agencies should consider routing the money to a fund for reparations for forced labor victims to support remediation efforts on the ground.

In tandem with civil fines, we encourage the agency to collaborate with ICE in pursuing criminal prosecutions for forced labor. We have yet to see a single prosecution for forced labor based on allegations submitted under Section 307 of the Tariff Act.

Conclusion:

Section 307 of the Tariff Act provides a powerful tool to combat forced labor around the globe. But it is not the number of WROs issued that matters. Rather, it is the impact of those WROs and subsequent enforcement actions that is key. The Tariff Act should be wielded strategically to achieve systemic change in global supply chains.

We, the Human Trafficking Legal Center, Global Labor Justice-International Labor Rights Forum (GLJ-ILRF), Solidarity Center, and Verité, believe that the suggestions in this letter fall squarely within CBP's remit under Section 307 of the U.S. Tariff Act. We look forward to engaging with CBP to understand any gaps or constraints in implementing our recommendations. The CSO community stands ready to support this important enforcement work and CBP's broad authority to implement Section 307.

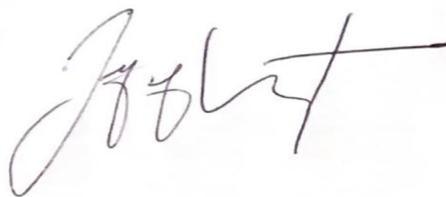
Sincerely,



Martina Vandenberg, The Human Trafficking Legal Center



Shawn Macdonald, Verité



Jeff Vogt, Solidarity Center



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