

The US Prohibition on Imports Made with Forced Labour: The New Law Is a ‘Force’ to Be Reckoned With

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Since 1930, 19 U.S.C. 1307 prohibited importation of goods made wholly or partly by convict forced, or indentured labour under penal sanctions, and US Customs and Border Protection (CBP) was charged with enforcing this law. Up until February 2016, when the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) was enacted, there was a major limitation on CBP’s enforcement due section 1307’s exception of goods not produced in the US sufficiently to meet US consumptive demand. TFTEA eliminated the ‘consumptive demand exception’. This article explores the history of section 1307 and examines the impact on 1307 practice after TFTEA.

I INTRODUCTION

Suppose that you are trading your goods to markets (consumers or wholesalers) in the US after March 10, 2016 *Is it possible that your shipments will not be allowed admission because they were produced in whole or in part with the use of forced labour?* The answer is, ‘Yes, it is possible.’ So, to understand how this is possible, this article explores how we arrived at this point and suggests some steps businesses may consider to address implications from changes in the law.

2 THE PROHIBITION ON IMPORTS INVOLVING FORCED LABOUR

Section 307 of the Tariff Act of 1930, as amended, essentially prohibits the importation into the US of any goods mined or produced, or manufactured with the use of ‘forced labor’.¹ What is very clear in the statute today, regarding what is covered by the ‘forced labour’ term of art, actually was the subject of a long debate during the course of legislating the amendments to this provision under the 1930 Tariff Act amendments. The statute prior to the 1930 amendments prohibited the importation

of ‘goods, wares, articles, and merchandise manufactured wholly or in part in any foreign country by convict labor’.

3 THE AMENDMENTS UNDER THE ‘SMOOT-HAWLEY’ TARIFF ACT OF 1930 + THE EXCEPTION

One of the amendments made by the 1930 Tariff Act broadened the scope of products prohibited to include – ‘commodities mined or produced’, as well as manufactured wholly or in part by convict labor.² Another amendment by the Senate, which is reflected in the current statute today, broadened the definition of ‘forced labor’ even more to apply far beyond a prohibition of goods produced or manufactured with the use of convict labour. Senator Blaine from Wisconsin in the first session of the 71st Congress introduced the expanded scope and definition during the Senate’s review of the House Bill with the following language:

[A]fter the word ‘labor,’ it is proposed to insert ‘or/and forced labor or/and indentured labor under penal section,’ and at the end of the section, in line 20 of the

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¹ 19 U.S.C. 1307.

² See Senate Report No. 37, Committee on Finance Report on H.R. 2667, 60. (4 Sept. 1929).

same page, to insert ‘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 non-performance and for which the worker does not offer himself voluntarily[.]³

During a rather lengthy colloquy on the proposed amendment, Senator Blaine stated his primary goals included seeing that America ‘not give aid or comfort to those employers and planters in foreign countries [who use] forced and indentured labor’ and that ‘American agriculture and the American worker, from the standpoint of our economic security, should not be placed in competition with forced and indentured labor, wherever it may be found.’⁴

For Senator Blaine and supporters of his amendment, their major goal was to impede the flow of goods that supported in any way the continuation and expansion of slavery, called by any other name. Senators opposed to Senator Blaine’s proposed expanded definition of ‘forced labour’ empathized with his purpose, but were more concerned with the impact from excluding ‘*from importation into this country products which we do not make and cannot make, such as tea and coffee and rubber*’.⁵

In response to Senator Reed and other Senators who were concerned that including products made by indentured labour among those covered by the ban would include products not made or produced in the US at that time, Senator Blaine again noted that the ‘form of labor inhibited by this proposed amendment is slavery, nothing short of slavery’, while acknowledging that the country ‘might suffer some economic loss’.⁶

The Senate amendments to section 307 went forward and because those as well as other amendments were different from the version of H.R. 2667 that originally came from the House to the Senate, under standard Congressional rules, H.R. 2667 then went to Conference in the House. During this time, however, the United States indeed did not and could not make certain products, such as tea, coffee and rubber, as pointed out by Senator Reed and others during the debate on Senator Blaine’s amendments. Therefore, the actions taken during the House Conference on the Forced Labor amendments might not have been a surprise.

Senator Blaine’s amendments were accepted; but, the Conference created the *Consumptive Demand* exception. Congress specifically acknowledged that this exception will ‘prevent the application of these provisions to articles such as rubber and tea, which are not produced in the United States, and [for] ... which our domestic production does not satisfy our consumptive needs’.⁷

As a result, the amendments to section 307 under the Tariff Act of 1930, expanded the scope of the definition of ‘Forced Labor’, *but* at the same time, created an ‘exception’ that would swallow up the entire prohibition covered by the expanded definition. This ‘consumptive demand’ *exception* was codified in the finally enacted provision. As the Court of International Trade noted:

Congress intended to protect domestic workers and producers from unfair competition. But, this concern as well as any desire to improve foreign labor conditions were clearly subordinate in section 307, as enacted, to concern for the American consumer’s access to merchandise not produced domestically in quantities sufficient to satisfy consumer demand.⁸

The ‘consumptive demand’ exception remained a component of the law prohibiting the importation of goods produced with the use of forced labor from June of 1930, *until* February of 2016.

4 THE 2016 REMOVAL OF THE EXCEPTION

On 24 February 2016, President Barack Obama signed into law the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA).⁹ This law, among many things: (1) authorized the official existence of the US Customs and Border Protection (CBP) as a component agency of the Department of Homeland Security; (2) codified many pre-existing CBP policies and programs, such as the Automated Commercial Environment (ACE), the Centers of Excellence and Expertise, the International Trade Data System (ITDS) also known as the ‘Single Window’; and (3) Enhanced CBP’s ability and role in enforcement of protection of intellectual property rights and in the enforcement and prevention of evasion of anti-dumping and countervailing (AD/CVD) orders.

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³ 1929 *Congressional Record*, 4494.

⁴ See 1929 *Congressional Record*, 4488.

⁵ See Senator Reed’s remarks at 1929 *Congressional Record*, 4494. (Emphasis added.)

⁶ See 1929 *Congressional Record*, 4495–4496.

⁷ See *House Report No. 1326, Conference Report to Accompany H.R. 2667*, 105 (28 Apr. 1930).

⁸ *McKinney, et al. v. United States Department of the Treasury*, 614 F. Supp. 1226, 1234 (CIT 1985) (9 CIT 315) (a case in which the court dismissed a suit brought by members of Congress, a labor union and others to compel the Commissioner of Customs’ issuance of a finding of a violation of section 307).

⁹ See Pub. L. No. 114–125 *Trade Facilitation and Trade Enforcement Act of 2015* (United States Public Laws 2015–2016 Edition).

Tucked away in the *last title of the TFTEA*, under a heading that reads, ‘*Title IX – Miscellaneous Provisions*’ was, *Section 910, Elimination of Consumptive Demand Exception to Prohibition on Importation of Goods Made with Convict Labor, Forced Labor, or Indentured Labor; Report.*’ The title of the section, indeed, was longer than the legislative text itself, which reads: – ‘Section 307 of the Tariff Act of 1930¹⁰ is amended by striking “The provisions of this section” and all that follows through “of the United States”.’ With these spare words, after 86 years, Senator Blaine of Wisconsin was vindicated, and the original purpose of his proposed amendments to H.R. 2667 at last could be realized.

5 NOW WHAT?

While it may be entirely coincidental, *in the three months following the passage of TFTEA this year*, CBP has issued three ‘Withhold Release Orders’ (WRO) covering the following goods coming from identified manufacturers in China: (1) soda ash, calcium chloride, caustic soda; (2) potassium, potassium hydroxide, potassium nitrate and (3) stevia and related products. Three measure in three months? This suggests that importers must begin to take notice and act. So, what can you do as an importer in the wake of the reinvigorated Forced Labor statute.

First, *you can take steps to avoid products that already have been identified by CBP* as being subject to a WRO. CBP has announced on its website that it does not target entire product lines or industries in problematic countries or regions, but rather it acts on specific information relating to specific manufacturers/exporters and specific merchandise. CBP also publishes on its website a list of all WROs and ‘findings’ (which also are published in the Federal Register) that have been issued by the Commissioner. This is sufficient information on which to base precautionary measures for an importer to avoid the covered product. Even though CBP does not generally publicize

specific detentions, re-exportations, exclusions, or seizures of the merchandise that may have been the subject of WROs or findings, the general information is adequate to manage the risk.

Second, even if you fail to identify goods that are covered by an outstanding WRO, and they are detained by CBP at the ports of entry, there is still a chance for the goods to come in. The WROs are issued on the basis of information that ‘*reasonably but not conclusively indicates*’ that specific products shipped from identified manufacturer in a given country were made in whole or in part with the use of ‘forced labour’. Even though Congress removed the ‘consumptive demand’ exception with the amendment of the Forced Labor statute under TFTEA, Congress did not otherwise amend the Forced Labor statute in such a way that voided pre-existing CBP Regulations which allow importers of goods detained under a WRO to provide ‘proof of admissibility’.¹¹

Specifically, section 12.43 of the CBP Regulations provides direct guidance on the information and evidence that one can provide to CBP for consideration as ‘proof of admissibility’ of your detained shipment.¹² Furthermore, if your proffered proof of admissibility (as outlined in the CBP Regulations) is not convincing to CBP, and the goods are finally denied admission, i.e. ‘excluded’ from entry into the US, you still may appeal that decision through filing a ‘protest’ of the decision to ‘exclude’ the imported goods. Finally, you may seek even further redress in the Court of International Trade if CBP denies the protest.¹³ Of course, the procedures set forth in the regulations and statutes cited above include far too many details for discussion in this summary.

6 BUT WAIT, THERE’S MORE RISK!

The repeal of the consumptive demand exception *may have awoken a sleeping giant: 18 U.S.C. 1761 and 1762*, criminal

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¹⁰ (19 U.S.C. 1307).

¹¹ (See 19 CFR 12.42, et. seq.).

¹² 19 CFR 12.43 Proof of admissibility.

(a) If an importer of any article detained under §12.42(e) or (g) desires to contend that the article was not mined, produced, or manufactured in any part with the use of a class of labor specified in section 307, Tariff Act of 1930, he shall submit to the Commissioner of Customs within 3 months after the date the article was imported a certificate of origin, or its electronic equivalent, in the form set forth below, signed by the foreign seller or owner of the article. If the 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, or its electronic equivalent, in such form and signed by the last owner or seller in such other country, substituting the facts of transportation from such other country for the statements with respect to shipment from the country of exportation, shall be so submitted.

CERTIFICATE OF ORIGIN

I, _____, foreign seller or owner of the merchandise hereinafter described, certify that such merchandise, consisting of _____ (Quantity) of _____ (Description) in _____ (Number and kind of packages) bearing the following marks and numbers _____ was mined, produced, or manufactured by _____ (Name) at or near _____, and was laden on board _____ (Carrier to the United States) at _____ (Place of lading) (Place of final departure from country of exportation) which departed from on _____; (Date); and that _____ (Class of labor specified in finding) was not employed in any stage of the mining, production, or manufacture of the merchandise or of any component thereof.

Dated _____ (Signature)

(b) The importer shall also submit to the Commissioner of Customs 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. (c) If the certificate or certificates and statements specified in paragraphs (a) and (b) of this section, or its electronic equivalent, are submitted within the time prescribed and the Commissioner finds that the merchandise is admissible, the port director concerned will be advised to that effect, whereupon he shall release the merchandise upon compliance with the usual entry requirements.

¹³ See protest procedure rights and procedures (including judicial review) at 19 U.S.C. 1514(a)(4) and 19 CFR Part 174.

provisions which prohibit *knowingly* transporting in interstate commerce or 'from any foreign country into the United States', *goods that have been produced or mined 'wholly or in part' by convict labor*. Persons convicted under these provisions can be fined, imprisoned for up to two years or both in addition to goods being forfeited. Unlike section 307 of the Tariff Act of 1930, the criminal provisions under sections 1761 and 1762 never contained a 'consumptive demand' exception to the force of its application, even though they do contain exceptions for *certain U.S. prison produced goods*.¹⁴ CBP port directors *are required by regulations to report* to the appropriate United States Attorney 'any apparent violation of section 1761 or 1762, title 18 United States Code' after detaining the goods involved in such apparent violation. As a result of such a report, CBP may be advised by the United States Attorney to seize and hold the detained goods pending further instructions.¹⁵ Therefore, it should not be a surprise if, hand-in-hand with CBP's stepped up enforcement of section 307 sans consumptive demand exception, there are now *more criminal referrals to the United States Attorney of 'apparent violations' of 18 U.S.C. 1761, 1762 under section 12.45 of the CBP Regulations*.

7 OBSERVATIONS AND RECOMMENDATIONS

So, in the wake of the revised Forced Labor statute (and possible fallout), I wish to conclude with two suggestions:

- (1) '**Avoid**' the importation by using the information that CBP publishes on its website [list of WROs and Findings] issued in connection with products *already identified* as having been produced or manufactured with the use of forced labour; Or
- (2) If avoidance is not possible, '**Defend**' the importation using the legal tools provided in the CBP Regulations to support your position that your shipment was not produced with the use of forced labor as defined under section 307 of the Tariff Act.

If, however, you cannot follow or implement either of these two suggestions, you may find that with the strike-out of a single sentence, the Forced Labor Statute in the Tariff Act of 1930, as most recently amended by TFTEA, *is now indeed, a Force to be reckoned with. Do not be caught by surprise or be unprepared, and do not take chances.*

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¹⁴ See 18 U.S.C. 1761(b)(c)(d).

¹⁵ See 19 CFR 12.45.