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OUT OF REACH

Analysis of evidentiary standards in EU
and US import bans to combat forced
labour in supply chains.

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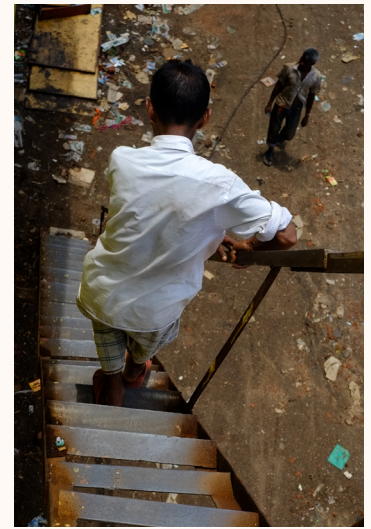
EXECUTIVE SUMMARY

As the world's largest single market, the European Union (**EU**) has an enormous opportunity to demonstrate global leadership in designing its instrument to address forced labour in corporate supply chains. Anti-Slavery International (**ASI**) and the European Center for Constitutional and Human Rights (**ECCHR**) have welcomed the European Commission's "Proposal for a Regulation on prohibiting products made with forced labour on the Union market" (**EU Proposal** or **Commission's Proposal**), published on 14 September 2022. Yet to be effective, significant improvements must be made to the Commission's Proposal, as its current form sets excessively high evidentiary thresholds both to start an investigation and decide upon sanctions.

Crucially, the law must be designed to place workers at the heart and, thus, to protect human rights globally. The current high evidentiary threshold is not only very difficult to reach for workers and their representatives when bringing a complaint, but also for competent authorities in the enforcement process. Additionally, the high evidentiary threshold under the EU Proposal severely weakens the law's potential to take aligned action against forced labour worldwide, as it significantly diverges from the evidentiary requirements present in peer legislation in the United States (**US**). This puts the EU at risk of becoming a '*dumping ground*' for goods tainted with forced labour.

This paper uses the example of the US legislation banning the import of goods made in part or in whole with forced labour, but also other EU standards of evidence used in similar legislation to argue that a lower evidentiary threshold should be set in the instrument.

POTENTIAL EVIDENCE OF FORCED LABOUR AND CHALLENGES



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Forced labour, as defined by the International Labour Organization (ILO), refers to the “*works and services exacted from any person under the threat of penalty, and for which the person has not offered himself or herself voluntarily.*”¹ By that definition, forced labour requires the simultaneous existence of two interrelated concepts: the **threat of penalty** and **involuntariness**. Demonstrating that a product was made using forced labour requires the existence of those two concepts simultaneously, namely the menace or threat of any penalty and the absence of the free and informed consent of the worker (involuntariness). The ILO indicators are a useful basis for demonstrating both concepts and are referred to in practice by US enforcement authorities.²

However, **providing evidence is more complicated than it appears due to the complex nature of forced labour on the ground, and therefore requires an approach commensurate with the specific challenges of forced labour.** Indeed, obtaining evidence from the ground, i.e., through worker interviews or witness testimonies, might be difficult or unsafe due to the fear of retaliation, and even impossible in situations where there is state-imposed forced labour. Also, the safety of workers or witnesses remains a primary concern even if they can provide testimony. Furthermore, since forced labour cannot be identified through the nature of the work itself but through the relationship between workers and employers, it is often not visible at first sight.³

An inherent obstacle in supporting allegations of forced labour pertains to the pervasive **power asymmetry in access to information**. While workers, civil society and unions might have some insight into the working conditions themselves, companies still hold significant parts of the information relating to their supply chain, due diligence practices and recruitment practices. Such power imbalance complicates the ability of those filing complaints to collect the necessary evidence and documentation to assert forced labour, especially if the evidentiary standard is too high.

It is therefore important that **legislative bans on importing products made with forced labour should not overly burden petitioners with providing information that meets a high evidentiary standard** while submitting their allegations. Instead, it is important to align evidentiary standards with evidentiary standards employed elsewhere in the EU (for example EU Regulation No 608/2013 Concerning Customs Enforcement of Intellectual Property Rights) as well as with similar bans elsewhere (for example Section 307 of the United States Tariff Act of 1930), especially when these equally align better with the distinct nature of forced labour and the particular evidentiary challenges.

(1) ILO, What are forced labour, modern slavery and human trafficking?, available at: <https://www.ilo.org/global/topics/forced-labour/definition/lang--en/index.htm> (access date: 25 September 2023).

(2) See US Customs and Border Protection, Forced Labour, available at: <https://www.cbp.gov/trade/forced-labor> (access date: 25 November 2023). It states that these “indicators represent the most common signs that point to the possible existence of forced labor.” Also, each individual enforcement action, CBP lists the specific indicators they have found e.g. US Customs and Border Protection, CBP issues Withhold Release

Order on Brightway Group, available at: <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-withhold-release-order-brightway-group> (access date: 25 November 2023)

(3) ILO, Hard to see, harder to count: Survey guidelines to estimate forced labour of adults and children (2012), p. 27, available at: https://ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_182096.pdf (access date: 25 September 2023).

FORCED LABOUR TRADE RESTRICTIONS IN THE UNITED STATES

Section 307 of the United States Tariff Act of 1930 (19 U.S.C 1307) (**US Tariff Act**) prohibits the importation to the US of goods and merchandise mined, manufactured, or produced wholly or in part with forced, convict, or indentured labour, including forced or indentured child labour, in any part of the world.⁴

INITIATING AN INVESTIGATION

Any individual with a reason to believe that goods being imported to the US are made with forced labour may submit this belief to the enforcement authorities.⁵ Under the US Tariff Act, **no specific statutory evidentiary threshold** is outlined to trigger investigations. Instead, the Commissioner initiates an investigation when it “appears to be warranted by the circumstances”.⁶ In addition, there is guidance provided which refers to the type of the evidence to be provided.

LEVEL I SANCTIONS (OR WITHHOLD RELEASE ORDER)

If the Commissioner for the US Customs and Border Protection (**CBP**) finds that the information available indicates **reasonably but not conclusively** the existence of forced labour for products, then the Commissioner will issue a Withhold Release Order (**WRO**) for such goods.⁷

This evidentiary standard means that petitioners and/or CBP only need to show that the facts and evidence at hand reasonably but not conclusively indicate forced labour in the products in question. Accordingly, CBP is not required to prove the existence of forced labour through conclusive evidence to detain the subject products. Such WROs have demonstrated their effectiveness in stopping products made with forced labour from being circulated on the US market. They have resulted in the payment of over 200 million USD to victims to date.⁸

If CBP decides to impose a WRO as a preventive measure, **the burden to prove that the products subject to WROs are not tainted with forced labour is on importers through a review process**. As the WRO only bars entry into the US market, companies are free to decide whether to request a review of the decision, to destroy their cargo or to ship it away to a different destination, according to their own best interest and strategy.

LEVEL II SANCTIONS (OR ISSUING A FINDING)

After issuing a WRO, if CBP determines that there is **probable cause** the subject merchandise was made in whole or in part with forced labour, they will publish a finding in the Customs Bulletin and the Federal Register.⁹ Unless the importer provides satisfactory evidence to the contrary, this authorises CBP to seize the products and commence forfeiture proceedings in view of their immediate destruction. **Therefore, a finding requires a higher evidentiary standard than a WRO**, with a commensurate higher sanction affecting ownership of the goods.¹⁰

Since 2016, among forty-three WROs issued by CBP, only four of those have led to subsequent findings.¹¹ The limited number of findings under the US Tariff Act underscores the challenges to determine probable cause and demonstrates the problems of setting a higher evidentiary standard.

THE UYGHUR FORCED LABOR PREVENTION ACT

The Uyghur Forced Labor Prevention Act (**UFLPA**) was enacted in the US on 23 December 2021 to ensure that goods made with forced labour in the Xinjiang Uyghur Autonomous Region (**the Uyghur Region**) do not enter the US market.¹² It establishes a **rebuttable presumption** that the importation of goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the **Uyghur Region** or by an **entity on the UFLPA Entity List** is prohibited under Section 307 of the US Tariff Act.¹³ Importers should thus demonstrate, **by clear and convincing evidence (a high standard of proof)**, that the subject good or merchandise was not mined, produced, or manufactured wholly or in part by forced labour. Otherwise, the goods are blocked from entering the US market, such as if under a WRO.

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

(5) 19 CFR § 12.42 - Findings of Commissioner of CBP.

(6) 19 CFR § 12.42 (d) - Findings of Commissioner of CBP

(7) 19 CFR § 12.42 - Findings of Commissioner of CBP.

(8) Speech of Eric Choy, US CBP Executive Director, available at: https://www.youtube.com/watch?v=3p4dvZ4cx54&t=5655s&ab_channel=USChamberofCommerce 1:34:00 (access date: 25 November 2023).

(9) 19 CFR § 12.42- Findings of Commissioner of CBP.

(10) A. Syam and M. Roggensack, Importing Freedom: Using the US Tariff Act to Combat Forced Labor in Supply Chains, The Human Trafficking Legal Centre (2020), p. 24.

(11) This data reflects the situation as of November 2023. See: US Customs and Border Protection, Withhold Release Orders and Findings List, available at: <https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings> (access date: 25 November 2023).

(12) Public Law 117 - 78 - An act to ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China do not enter the United States market, and for other purposes.

(13) Uyghur Forced Labor Prevention Act, Public Law 117-78—Dec. 23, 2021, Section 3 (a). For entities in UFLPA Entity List see: <https://www.dhs.gov/uflpa-entity-list> (access date: 25 November 2023).

EU PROPOSED REGULATION ON PROHIBITING PRODUCTS MADE WITH FORCED LABOUR ON THE UNION MARKET

The EU Proposal for a regulation on prohibiting products made with forced labour on the Union market aims to effectively prohibit the placing on the EU market and the export from the EU of products made with forced labour, including forced child labour.¹⁴ Competent authorities, designated by member states, are authorised to enforce the regulation with investigatory powers.

INITIATING AN INVESTIGATION

Competent authorities can initiate an investigation upon receiving a complaint or ex officio. Any natural¹⁵ or legal person can submit information to competent authorities on alleged violations of the subject prohibition.

Under the EU Proposal, **two stages of investigation are outlined**. Competent authorities should only initiate an official investigation where, based on their assessment of all available information, **they establish that there is a substantiated concern** of a violation of the prohibition **during the preliminary phase of the investigation**.

The EU Proposal outlines an evidentiary threshold (existence of substantiated concern), which is higher than reasonable suspicion, only to initiate official investigations on the suspected violations; while under the US Tariff Act, the reasonable suspicion criteria is already employed to impose the first level of sanction, Withhold Release Orders.

SANCTION LEVEL I – ESTABLISHING A VIOLATION OF THE PROHIBITION

Under the EU Proposal, the competent authorities order the prohibition of placing the products in the EU market, withdrawal of the products already available in the EU market and disposal of products, once it is established that the products were made, whether in whole or in part, with forced labour. The EU Proposal does not establish a tiered sanction system as opposed to the US Tariff Act. Instead, it sets only one level of ultimate sanction upon the final determination of the existence of forced labour. Establishing the existence of forced labour and, consequently,

implementing sanctions rely on a very high evidentiary standard, with the burden of proof placed entirely on the competent authorities.

The evidentiary threshold in the EU Proposal, namely establishing a violation of the prohibition, to impose sanctions is much higher than the US Tariff Act system's first and second level of sanctions and fails to block the entry of products suspected of being made with forced labour into the EU market. It therefore misses the enforcement options under the US legislation (the CBP enforces 51 WROs versus only 8 findings as of December 2023).¹⁶

The EU's existing legislative framework already provides a precedent for promptly addressing potential law violations by suspending or detaining goods in customs. Illustrated by the 'EU Regulation No 608/2013 Concerning Customs Enforcement of Intellectual Property Rights,' which oversees another form of import controls, customs authorities can suspend the release of or detain goods based on reasonable indications of intellectual property rights infringement.¹⁷ The EU Proposal therefore should align with the EU Regulation No 608/2013 Concerning Customs Enforcement of Intellectual Property Rights and US Tariff Act, by requiring a lower level of evidentiary threshold and ensuring a swift and effective response to potential violations.

Also, the EU Proposal **does not differentiate required evidentiary standards** for where **forced labour imposed by state authorities** is well-established with factual data.

(14) European Commission Proposal on prohibiting products made with forced labour on the Union market, (14 September 2022).

(15) Natural person means a living human being.

(16) The numbers of WROs and findings here reflects the data available as of December 2023 on the CBP database: US Customs and Border Protection, Withhold Release Orders and Findings List, available at: <https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings> (access date: 1 December 2023).

(17) Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003.

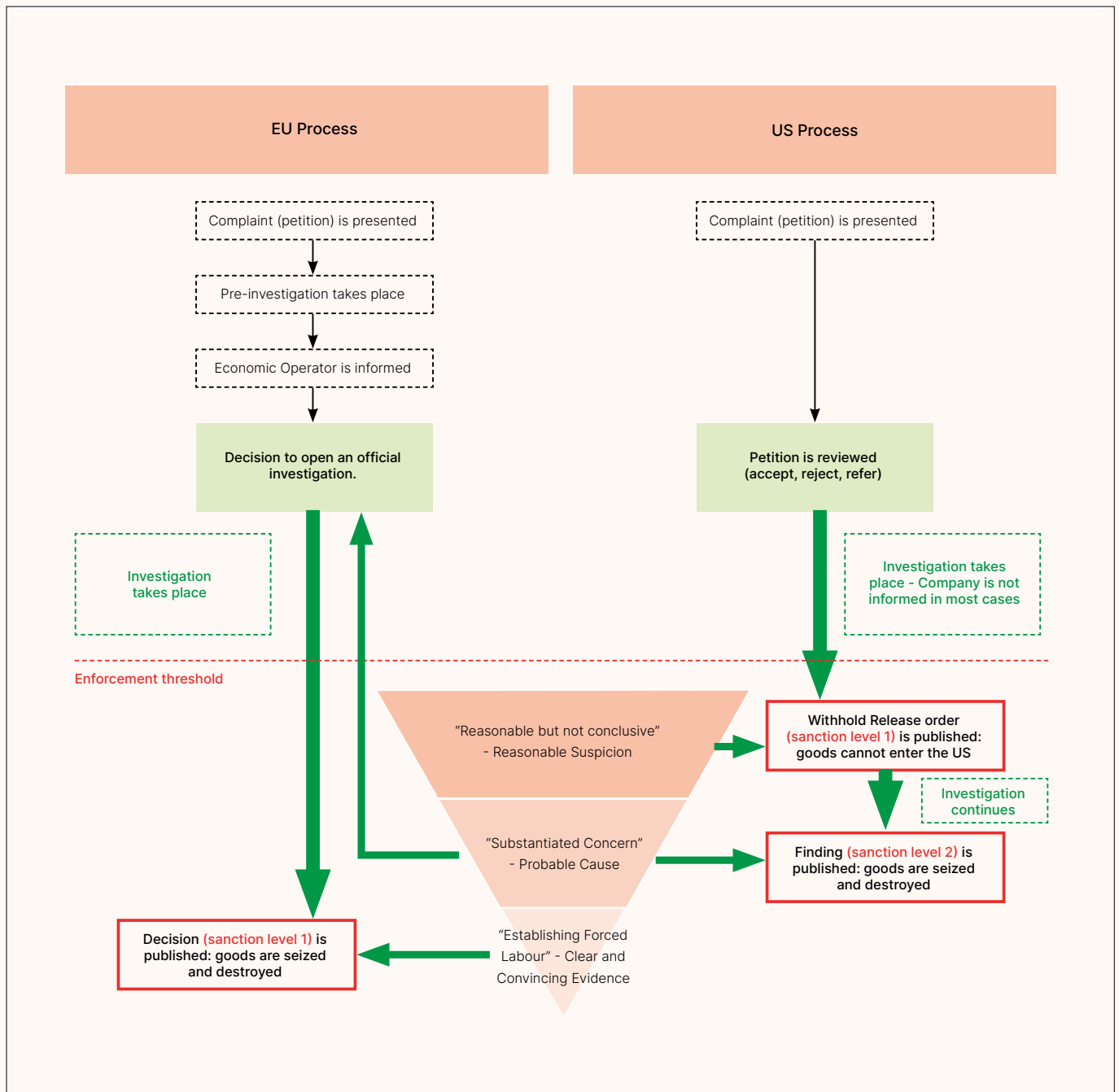


Fig. 01



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04 CONCLUSION

Import bans are emerging as one of the **smart mix of tools to effectively combat forced labour** across the world. These legislations should be carefully designed to ensure effective and meaningful implementation of the bans in practice. At the core of these instruments are the **evidentiary standards** used for initiating investigations and imposing sanctions for the products suspected to be tainted with forced labour.

Considering the challenges to proving forced labour and obtaining comprehensive evidence, the legislative bans on importing products made with forced labour **should not burden petitioners with providing a high degree of evidence while submitting their allegations**. The US Tariff Act and the Uyghur Forced Labor Prevention Act demonstrate difficulties of proving forced labour allegations:

- The US Tariff Act requires only evidence reasonably indicating the existence of forced labour, in other words, *reasonable suspicion* of forced labour, to withhold the release of subject products. For the seizure of good, it requires *probable cause* of forced labour. The burden of proof is on importers if they wish to prove otherwise.
- The Uyghur Forced Labor Prevention Act establishes a *rebuttable presumption*: it presumes that all products related to the Uyghur Region are made with forced labour and requires the importers to prove otherwise with clear and convincing evidence, a very high degree of evidential standard.

The EU Proposal thus substantially diverges from the US system. The EU Proposal requires competent authorities to reach the '**substantiated concern**' level **only to initiate an official investigation**, thus imposing a higher evidentiary degree than reasonable suspicion, which is the evidentiary standard used in the US to impose its first level of sanctions. Finally, the EU Proposal **does not differentiate required evidentiary standards for where forced labour imposed by state authorities is well-established with factual data**.

Greater coordination and alignment on key principles related to forced labour import bans are crucial. The high evidentiary threshold under the EU system **severely weakens** the law's potential to take aligned action against forced labour worldwide. Unless the high evidentiary threshold for initiating investigations and imposing sanctions is amended under the EU Proposal by considering the nuances to address forced labour, the EU risks becoming a "dumping zone" for goods tainted with forced labour.



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II POLICY RECOMMENDATIONS

In light of the above, we recommend the following textual amendments to the Commission Proposal.

On the high level of evidence to even initiate an investigation (substantiated concern or well-founded reason):

ARTICLE 2

(n) 'substantiated concern' means a **reasonable level of indications** ~~well-founded reason, based on objective and verifiable information,~~ for the competent authorities to suspect that products were likely made with forced labour;

or

(n) 'substantiated concern' means a **reason** ~~well-founded reason, based on objective and verifiable information,~~ for the competent authorities to suspect that products were likely made with forced labour;

On the prohibitive level of evidence required to issue a sanction (proof that Article 3 has been violated):

ARTICLE 6

1. The competent authorities shall assess all information and evidence gathered pursuant to Articles 4 and 5 and, on that basis, establish whether, **there is reasonable but not conclusive evidence that** Article 3 has been violated, within a reasonable period of time from the date they initiated the investigation pursuant to Article 5(1).

or

1. The competent authorities shall assess all information and evidence gathered pursuant to Articles 4 and 5 and, on that basis, establish whether Article 3 has **likely** been violated, within a reasonable period of time from the date they initiated the investigation pursuant to Article 5(1).

On the need for the evidentiary threshold to also be commensurate with the nature of the sanction. Where in the Commission Proposal, the same evidentiary threshold applies to all kinds of sanctions, ranging from import restrictions to disposal of goods:

ARTICLE 6

4. Where competent authorities establish that **there is reasonable suspicion or conclusive evidence** that Article 3 has been violated, they shall without delay, **and commensurate with the level of evidence, issue one or more of the following sanctions:**

On the need for establishing a presumption of forced labour where forced labour imposed by state-authorities well-established with factual evidence.

ARTICLE 5

2. **The Commission or** competent authorities that initiate an investigation pursuant to paragraph 1 shall inform the economic operators subject to the investigation, within 3 working days from the date of the decision to initiate such investigation about the following:

....

....

(e) the requirement for the economic operator to demonstrate that Article 3 has not been violated with regard to the products coming from the geographic areas and the economic sectors where high risk of forced labour imposed by state authorities has been identified.



01

INTRODUCTION

Import bans are emerging as one of the effective smart mix of tools to combat forced labour across the world. Among G7 nations, United States¹⁸ and Canada¹⁹ have officially prohibited importing goods produced through forced labour,²⁰ while Mexico also adopted similar legislation in the frame of the United States-Mexico-Canada Agreement.²¹ Such a legislative trend is at its momentum with the European Commission's legislative proposal for a regulation prohibiting products made with forced labour on the Union market (**EU Proposal**).²²

These legislations should be carefully designed to ensure effective and meaningful implementation of the bans in practice. This paper aims to assess one of the core elements of import bans, standards of proof (**or evidentiary standards**), for initiating investigations and imposing sanctions for the products suspected to be tainted with forced labour. This paper focuses on the evidentiary standards in the well-established US practice to inform the upcoming EU regulation on forced labour.

(18) See section IV of this report.

(19) Bill S-211 An Act to enact the Fighting Against Forced Labour and Child Labour in Supply Chains Act and to amend the Customs Tariff.

(20) Center for Strategic & International Studies, Operationalizing the G7 Commitment to End Forced Labor in Global Supply Chains (31 May 2023), available at: <https://www.csis.org/analysis/operationalizing-g7-commitment-end-forced-labor-global-supply-chains> (access date: 28 September 2023).

(21) Gobierno de México, Entra en vigor el Acuerdo para prohibir la importación de mercancías producidas con trabajo forzoso (18 May 2023), available at: <https://www.gob.mx/stps/prensa/entra-en-vigor-el-acuerdo-para-prohibir-la-importacion-de-mercancias-producidas-con-trabajo-forzoso?idiom=es> (access date: 28 September 2023).

(22) European Commission Proposal on prohibiting products made with forced labour on the Union market, (14 September 2022).

A BRIEF OVERVIEW OF POTENTIAL EVIDENCE OF FORCED LABOUR

Forced labour, as defined by the International Labour Organization (ILO), refers to the “*works and services exacted from any person under the threat of penalty, and for which the person has not offered himself or herself voluntarily.*”²³ By that definition, forced labour requires the simultaneous existence of two interrelated concepts: the **threat of penalty** and **involuntariness**.

To raise a claim on the existence of forced labour, one should provide information indicating the probable existence of those two concepts simultaneously. Therefore, the evidence submitted to support such a claim should provide information and insights concerning the menace of any penalty and the absence of the free and informed consent of the worker (*involuntariness*). The ILO indicators are a useful basis for demonstrating both concepts and are referred to in practice by US enforcement authorities.²⁴

Such evidence presented to support the allegations of the existence of forced labour might include:

- any information showing abuse of workers’ vulnerability and threats of penalty
- the testimony of workers/witnesses
- interview transcripts
- audit findings
- evidence showing the limited freedom of movement of workers
- salary records showing withholding of wages
- evidence (e.g. worker contracts) demonstrating that the employer promised a different job or working conditions
- photos or videos documenting working conditions or physical violence,
- government, civil society or media reporting,
- court records,
- government records or policies indicating state-led policies driving coercive labour, etc.²⁵

Submitting these documents (either alone or cumulatively, depending on the contextual circumstances) might establish a belief/or prove that workers are in situations of forced labour. Also, reports from various resources, including international organisations, law enforcement agencies, investigative media reports, or non-governmental organisations, can help support the existence of forced labour allegations.²⁶

Knowing what would constitute valid evidence to support forced labour claims is crucial for enforcing the bans on importing products made with forced labour. To trigger the implementation of these bans, complainants should be able to provide various



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types of evidence briefly mentioned above.²⁷ The evidentiary requirements should take into account the complex nature of obtaining information indicating the existence of forced labour. To clarify, below are a couple of examples demonstrating the challenges in collecting evidence of forced labour:

- Obtaining primary evidence from the ground, i.e., through worker interviews or witness testimonies, might not be possible due to the nature of forced labour (e.g. workers are unable to leave worksites or unwilling to provide testimony due to fear of retaliation from their employer and/or government officials). Third parties such as civil society, journalists or trade unions may not be able to access workers. This is especially the case where there is state-imposed forced labour.²⁸
- The safety of workers or witnesses is a primary concern even if they can provide testimony, and sufficient security measures must be taken by those raising forced labour claims before the authorities, as well as the possibility of providing testimonies anonymously.²⁹
- Since forced labour can be identified not through the nature of the work but through the relationship between workers and employers, it is not visible in most cases at first sight.³⁰ Therefore, conventional survey instruments are often ill-equipped to detect involuntariness and coercion in workers' working situations.³¹
- An inherent obstacle in supporting allegations of forced labour pertains to the pervasive power asymmetry in access to information. Companies often hold information regarding their supply chain and due diligence practice, making it difficult to link a specific importer (in the EU or otherwise) to allegations of forced labour, or the inadequacy of existing measures taken by companies. Such a power imbalance complicates the ability of those filing complaints to include all the necessary evidence and documentation indicating forced labour.

Considering the challenges to document the existence forced labour and to obtain comprehensive evidence, the legislative bans on importing products made with forced labour should not burden petitioners with providing a high degree of evidence. For ease of understanding and clarification, the below section examines the standards of proof concept, which refers to the degree of evidence provided to support/prove a claim.

(23) ILO, What are forced labour, modern slavery and human trafficking?, available at: <https://www.ilo.org/global/topics/forced-labour/definition/lang--en/index.htm> (access date: 25 September 2023).

(24) See US Customs and Border Protection, Forced Labour, available at: <https://www.cbp.gov/trade/forced-labor> (access date: 25 November 2023). It states that these "indicators represent the most common signs that point to the possible existence of forced labor." Also, each individual enforcement action, CBP lists the specific indicators they have found e.g. US Customs and Border Protection, CBP issues Withhold Release Order on Brightway Group, available at: <https://www.cbp.gov/newsroom/national-media-release/cbp-issues-withhold-release-order-brightway-group> (access date: 25 November 2023)

(25) For more detailed information on what kind of evidence might be helpful to demonstrate forced labour see: A. Syam and M. Roggensack, Importing Freedom: Using the US Tariff Act to Combat Forced Labor in Supply Chains, The Human Trafficking Legal Center (2020), p. 11.

(26) A. Syam and M. Roggensack, Importing Freedom: Using the US Tariff Act to Combat Forced Labor in Supply Chains, The Human Trafficking Legal Center (2020).

(27) Also, providing information enabling the identification of products/shipment subject to the forced labour allegations can be vital to demonstrate that subject products are meant to be imported to the given country. Such information might include, for example, a physical description and characteristics of products, tariff classification number, location, time of production, purchase orders, invoices, or shipment documents.

(28) A. Syam and M. Roggensack, Importing Freedom: Using the US Tariff Act to Combat Forced Labor in Supply Chains, The Human Trafficking Legal Center (2020), p. 18.

(29) For more information, please see: A. Syam and M. Roggensack, Importing Freedom: Using the US Tariff Act to Combat Forced Labor in Supply Chains, The Human Trafficking Legal Center (2020), p. 20, 28.

(30) ILO, Hard to see, harder to count: Survey guidelines to estimate forced labour of adults and children (2012), p. 27, available at: https://ilo.org/wcmsp5/groups/public/-/-ed_norm/-/-declaration/documents/publication/wcms_182096.pdf (access date: 29 September 2023).

(31) ILO, Hard to see, harder to count: Survey guidelines to estimate forced labour of adults and children (2012), p. 1, 21.

A BRIEF OVERVIEW OF THE STANDARDS OF PROOF: WHAT CONSTITUTES LOW AND HIGH LEVELS OF EVIDENCE?

This section identifies the standards of proof with a brief analysis and description. Standards of proof refers to the level, quality and quantity of evidence necessary to prove an assertion or claim in legal proceedings. The European Commission defines this term as *“the degree or level of persuasiveness of the evidence required in a specific case.”*³² Different levels of evidence might be required to prove/support the raised claims in various stages of assessment, and the required evidentiary standards might vary in different cases.

For example, under most common law systems, there are various levels of evidence in either civil or criminal cases, which primarily include reasonable suspicion, probable cause, preponderance of the evidence, clear and convincing evidence or beyond reasonable doubt. There is no single and universal definition for these standards, and the established jurisprudence determines their elements.³³

- In the US, the term **reasonable suspicion** refers to a standard used in a criminal procedure.³⁴ The US Supreme Court defines reasonable suspicion as the *“specific and articulable grounds, taken together with rational inferences from those facts that reasonably warrant that intrusion.”*³⁵ It is an evaluation based on whether the facts known and available at the time warrant sufficient suspicion (not a mere hunch) for the illegal activity.³⁶ The “reasonable suspicion” is not enough for an arrest or search warrant under the US system. Under the Council of Europe system, the European Court of Human Rights (ECHR) defines reasonable suspicion as *“the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence.”*³⁷ The Guide published by the Court further states that the authorities must *“make a genuine inquiry into the basic facts of a case in order to verify that whether a complaint is well-founded”* and, *“suspicions must be justifiable based on verifiable and objective evidence.”*³⁸ Therefore under criminal procedures, the reasonable suspicion interpretation of the ECHR is more likely to align with the probable cause standard set under the US system and explained below.

As an example from EU administrative enforcement systems, the EU Regulation No 608/2013 Concerning Customs Enforcement of

Intellectual Property Rights states that *“in order to ensure the swift enforcement of intellectual property rights, it should be provided that, where the customs authorities suspect, on the basis of reasonable indications, that goods under their supervision infringe intellectual property rights, they may suspend the release of or detain the goods whether at their own initiative or upon application [...]”*³⁹ The implementation of this regulation only requires applicants to provide relevant information and indications for the customs authorities’ assessment of the risk of infringement.⁴⁰

- As a higher standard than reasonable suspicion, **probable cause** exists in the US when there are more facts and clearer and concrete evidence. The US Supreme Court defines it as *“facts and circumstances, based on reasonably trustworthy information, are sufficient in themselves to warrant a belief by a person of reasonable caution that a crime is being committed.”*⁴¹ Upon discovering further facts, the reasonable suspicion can ripen into probable cause.⁴² In the US system, the existence of probable cause is required to make an arrest, conduct a search or seizure, and receive a warrant.⁴³
- **Preponderance of evidence** (or balance of probabilities) as a civil standard only requires a certainty greater than 50 percent.⁴⁴ According to the definition of the European Judicial Network, under this standard *“the court will find that a fact is established if satisfied that the fact is more likely to have occurred than not.”*⁴⁵ This is often used in civil litigation, in civil law systems but also in common law including in the US⁴⁶ or United Kingdom⁴⁷.
- **Clear and convincing evidence** is a more rigorous standard than the “preponderance of evidence.” It means the contention is highly probable.⁴⁸ The US Courts identifies it as the evidence of such convincing force, providing a firm belief or conviction that the factual contentions of the claim are probably true.⁴⁹
- **Beyond a reasonable doubt**, is the highest standard of proof. It refers to cases where every reasonable doubt has been eliminated concerning the subject violation of the law, i.e., where the defendant is found guilty in a criminal case.⁵⁰

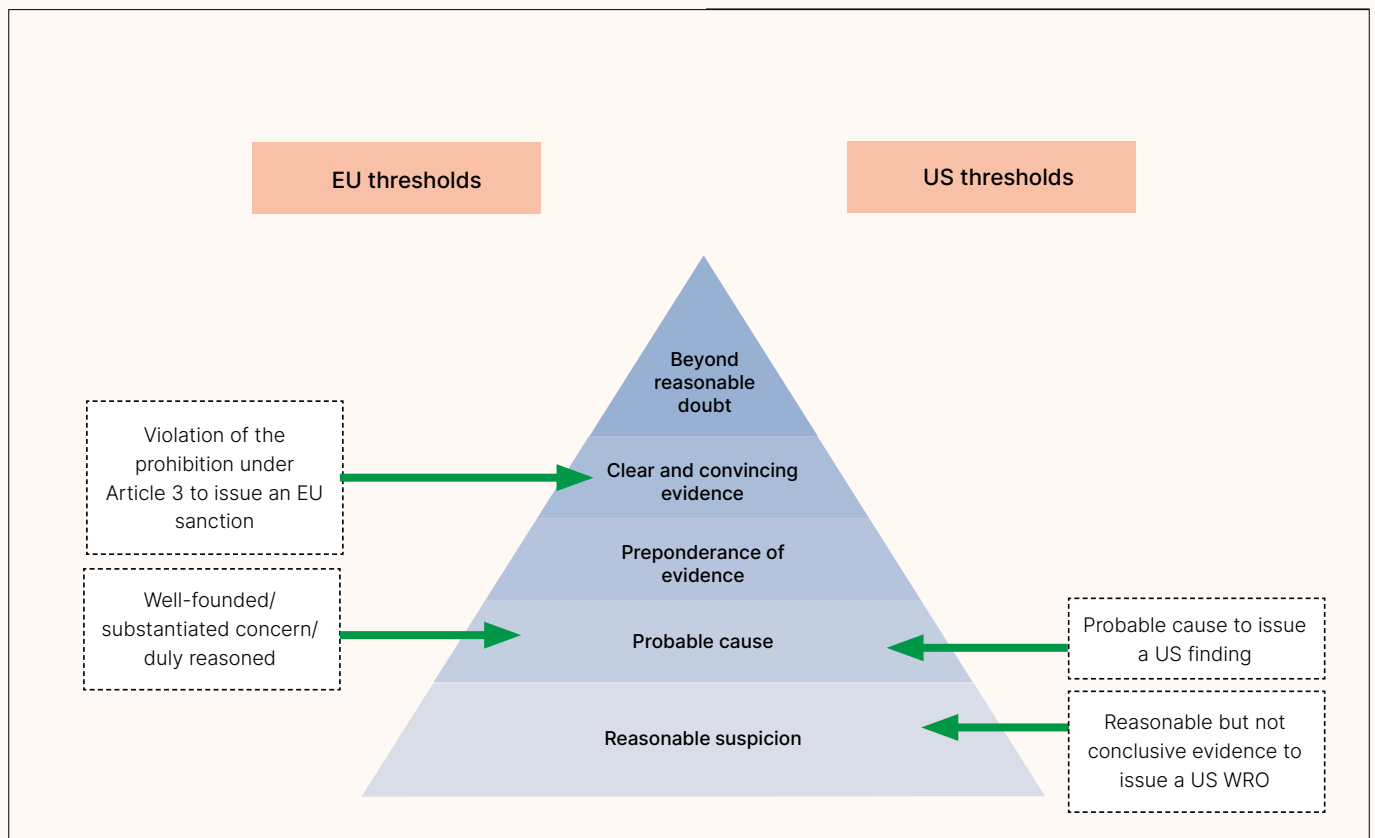


Fig. 02

(32) The European Commission, Standard of Proof Definition(s), available at: https://home-affairs.ec.europa.eu/networks/european-migration-network-emn/emn-asylum-and-migration-glossary/glossary/standard-proof_en (access date: 29 September 2023).
 (33) The comparison of evidentiary standards across jurisdictions, bodies of law and legal frameworks in this section is approximative.
 (34) Cornell Law School Legal Information Institute, Reasonable Suspicion, available at: https://www.law.cornell.edu/wex/reasonable_suspicion (access date: 30 September 2023).
 (35) US Supreme Court, Terry v. Ohio, 392 US 1 (1968), available at: <https://supreme.justia.com/cases/federal/us/392/1/> (access date: 30 September 2023).
 (36) R. Seltzer, R.F. Canan, M. Cannon and H. Hansberry, Legal Standards by the Numbers: Quantifying Burdens of Proof or a Search for Fool's Good? (2016) Vol 100 No 1, Bolch Judicial Institute Duke Law School, available at: <https://judicature.duke.edu/articles/legal-standards-by-the-numbers/> (access date: 30 September 2023). United States v Sokolow, 490 US 1 (1989), available at: <https://supreme.justia.com/cases/federal/us/490/1/#7> (access date: 30 September 2023).
 (37) European Court of Human Rights, Case of Fox, Campbell, and Hartley v. the United Kingdom, (Application No. 12244/86; 12245/86; 12383/86) (30 August 1990), para. 32.
 (38) European Court of Human Rights, Guide on Article 5 of the European Convention on Human Rights: Right to Liberty and Security, (Updated on 31 August 2022), para. 90, available at: https://www.echr.coe.int/documents/d/echr/guide_art_5_eng (access date: 30 September 2023).
 (39) Regulation (EU) No 608/2013 of the European Parliament and of the Council of 12 June 2013 concerning customs enforcement of intellectual property rights and repealing Council Regulation (EC) No 1383/2003, Recital para. 15.
 (40) Customs Enforcement of Intellectual Property Rights in the EU Manual for the Completion of Applications for Action and Extension Requests (August 2014), p. 8, available at: <https://www.douane.gouv.fr/sites/default/files/2023-01/04/manual-application-for-action-en.pdf> (access date: 3 October 2023).

(41) US Supreme Court, Brinegar v. United States, 338 US 160 (1949), available at: <https://supreme.justia.com/cases/federal/us/338/160/> (access date: 3 October 2023).
 (42) R. Seltzer, R.F. Canan, M. Cannon and H. Hansberry, Legal Standards by the Numbers: Quantifying Burdens of Proof or a Search for Fool's Good? (2016) Vol 100 No 1, Bolch Judicial Institute Duke Law School, p. 61.
 (43) Cornell Law School Legal Information Institute, Probable Cause, available at: https://www.law.cornell.edu/wex/probable_cause (access date: 3 October 2023).
 (44) Cornell Law School Legal Information Institute, Preponderance of the Evidence, available at: https://www.law.cornell.edu/wex/preponderance_of_the_evidence (access date: 3 October 2023).
 (45) European Judicial Network, Taking of Evidence, available at: https://e-justice.europa.eu/content_taking_of_evidence-76-ew-en.do?member=1 (access date: 3 October 2023).
 (46) Cornell Law School Legal Information Institute, Preponderance of the Evidence.
 (47) S. Davies, Proof on the balance of probabilities: what this means in practice, Thomson Reuters Practical Law.
 (48) Cornell Law School Legal Information Institute, Clear and Convincing Evidence, available at: https://www.law.cornell.edu/wex/clear_and_convincing_evidence (access date: 3 October 2023).
 (49) United States Courts for the Ninth Circuit, Manual of Model Civil Jury Instructions: 1.Preliminary Instructions, 1.7 Burden of Proof- Clear and Convincing Evidence, available at: <https://www.ce9.uscourts.gov/jury-instructions/node/48> (access date: 5 October 2023). Also see: US Supreme Court, Colorado v. New Mexico, 467 US 310 (1984)
 (50) Cornell Law School Legal Information Institute, Beyond a Reasonable Doubt, available at: https://www.law.cornell.edu/wex/beyond_a_reasonable_doubt (access date: 5 October 2023).





FORCED LABOUR TRADE RESTRICTIONS IN THE UNITED STATES

A. THE UNITED STATES TARIFF ACT

Section 307 of the United States Tariff Act of 1930 (19 U.S.C 1307) prohibits the importation to the US of goods and merchandise mined, manufactured, or produced wholly or in part with forced, convict, or indentured labour, including forced or indentured child labour, in any part of the world.⁵¹ The Tariff Act is enforced by the US Customs and Border Protection Authority (CBP).⁵²

Any individual with a reason to believe that goods being imported to the US are made with forced labour, may submit this belief to the port directors or Commissioner of CBP.⁵³ Also, if the port directors and customs officers have a reason to believe the same, they must communicate their belief to the Commissioner of CBP.⁵⁴ Such communications must include or be supported by the following information:⁵⁵

ADMISSIBILITY STANDARD: INFORMATION REQUIRED TO INITIATE AN INVESTIGATION

1. A full statement of the reasons for the belief
2. A detailed description or sample of the merchandise; and
3. All pertinent facts obtainable as to the production of the merchandise abroad.

Under the US Tariff Act, **investigations are triggered if they “appear to be warranted by the circumstances of the case”**.⁵⁶ Only the existence of the above information is required to further proceed with the investigation. Additionally, in practice, there is also evidence required to show that the products are being imported into the US. In the US, accessibility of shipping data has made it relatively easy for petitioners to show that a subject products is entering the US.

EVIDENTIARY STANDARD REQUIRED TO IMPOSE A SANCTION: LEVEL I – WITHHOLD RELEASE ORDER

If the Commissioner finds that information available indicates **reasonably but not conclusively** the existence of forced labour for the subject products, then the Commissioner will issue a Withhold Release Order (WRO) for such goods.⁵⁷

Petitioners only need to show that the facts and evidence at hand reasonably but not conclusively indicate forced labour in the products in question. It is sufficient to provide evidence that would create a reasonable belief for CBP that subject goods are made with forced labour.⁵⁸ Petitioners are not expected to present comprehensive evidence proving forced labour. Therefore, the analysis shows that the

evidentiary threshold to impose sanctions is lower than *probable cause* or *credible evidence*.⁵⁹

As a competent authority, CBP is not required to prove the existence of forced labour through conclusive evidence to detain subject products. If CBP decides to impose a WRO, **the burden to prove that the products subject to WROs are not tainted with forced labour is on importers.**

In that case, the importer can object against the WRO and has three months to provide evidence of the goods' origin and demonstrate in detail that *"they have made every reasonable effort to determine the source of the merchandise and of every component thereof and to ascertain the character of labour used in the production of the merchandise and each of its components."*

- If the evidence submitted by the importer is deemed sufficient and the importer receives positive results, then the products are released and accepted for entry into the US market.
- If the importer does not object against the WRO ever or within the specified time frame, or if their objection does not establish the admissibility of the subject merchandise, then they will be given 60 days to remove and re-export the subject products. After that, CBP will have the authority to destroy the subject products.⁶⁰

The design of the US Tariff Act in terms of evidentiary standards seems commensurate with **the challenges of proving forced labour and power asymmetries** between the importers and petitioners in terms of access to information:

- The US Tariff Act does not burden petitioners to prove forced labour occurred in the manufacture of specific products by providing comprehensive and conclusive evidence. The evidentiary threshold under the US Tariff Act to adopt a Withhold Release Order decision, in other words suspending the release of products into the US market, is the **lowest degree under the standards of proof: reasonable suspicion.**
- Once CBP, based on the petition and their own investigation, establish reasonable suspicion, CBP imposes a WRO sanction accordingly. Then **the burden of proof shifts to the importers** to establish that the subject products are not made with forced labour and that they adopted all necessary due diligence measures.

EVIDENTIARY STANDARD REQUIRED TO IMPOSE A SANCTION: LEVEL II – ISSUING A FINDING

After issuing a WRO, if the Commissioner determines **probable cause** that the subject merchandise was produced with forced labour, they will publish such a finding in the Customs Bulletin.⁶¹ The publication of a finding authorises CBP to seize the products and commence forfeiture proceedings. **Therefore, a finding requires a higher evidentiary standard than a WRO.**⁶²

According to the official data published by the CBP, since 2016, among forty-three WROs issued by CBP, only four of those have led to subsequent findings.⁶³ The limited number of findings under the US Tariff Act underscore the stringent standards necessary to determine forced labour.

(51) Section 307 of the United States Tariff Act of 1930 (19 U.S.C §1307). While defining forced labour, US law relies on the definition provided by the ILO. The full text is as follows: Title 19- Customs Duties, § 1307. Convict-made goods; importation prohibited: All goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in any foreign country by convict labour or/and forced labour or/and indentured labour 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 labour", 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. For purposes of this section, the term "forced labour or/and indentured labour" includes forced or indentured child labour.

(52) US Customs and Border Protection, Forced Labor, available at: <https://www.cbp.gov/trade/forced-labor> (access date: 5 October 2023).

(53) 19 CFR § 12.42 - Findings of Commissioner of CBP.

(54) 19 CFR § 12.42 - Findings of Commissioner of CBP.

(55) 19 CFR § 12.42 - Findings of Commissioner of CBP.

(56) 19 CFR § 12.42(d)- Findings of Commissioner of CBP.

(57) 19 CFR § 12.42 - Findings of Commissioner of CBP.

(58) A. Syam and M. Roggensack, Importing Freedom: Using the US Tariff Act to Combat Forced Labor in Supply Chains, The Human Trafficking Legal Center (2020), p. 39; The Forced Labour Allegation Submission Checklist clarifies the information useful for CBP while reviewing allegations of forced labour. The below list is not statutory to initiate investigation but includes some guidance for a petition. Among them are:

- Whether the information is part of a publication or an internal study
- Whether the alleged has any contact or involvement in ongoing remediation with the foreign manufacturer or any of the US buyers
- Whether the information has been submitted previously to any law enforcement or other government agency
- Whether there are any lawsuits filed in the US or overseas related to the same allegation
- Whether the allegation has been submitted to the media and/or any other investigative news outlets
- Supply chain details, including the entity using forced labour and description of the products subject to investigation, along with supporting documents such as interview transcripts, audit reports, photos/videos, employee agreements/contracts, email correspondence, and satellite imagery websites. The name of the facility is required, whereas the additional supply chain information is optional.

(59) A. Syam and M. Roggensack, Importing Freedom: Using the US Tariff Act to Combat Forced Labor in Supply Chains, The Human Trafficking Legal Center (2020), p. 10, 39.

(60) 19 CFR § 12.43 - Proof of admissibility.

(61) 19 CFR § 12.42- Findings of Commissioner of CBP.

(62) A. Syam and M. Roggensack, Importing Freedom: Using the US Tariff Act to Combat Forced Labor in Supply Chains, The Human Trafficking Legal Center (2020), p. 24.

(63) The numbers of WROs and findings here reflects the data available as of December 2023 on the CBP database: US Customs and Border Protection, Withhold Release Orders and Findings List, available at: <https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings> (access date: 1 December 2023).

B. THE UYGHUR FORCED LABOR PREVENTION ACT

The Uyghur Forced Labor Prevention Act (**UFLPA**) was enacted in the US on 23 December 2021. It is an act to ensure that goods made with forced labour in the People's Republic of China, especially from the Xinjiang Uyghur Autonomous Region (**the Uyghur Region**), do not enter the US market.⁶⁴

It establishes a rebuttable presumption that the importation⁶⁵ of goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part **in the Uyghur Region** or by an **entity on the UFLPA Entity List**⁶⁶ is prohibited under the US Tariff Act Section 307, and such goods are not entitled to entry to the US.⁶⁷

Although the CBP issued WROs concerning products from the Uyghur Region before the adoption of the UFLPA,⁶⁸ the US legislators adopted an approach that encompasses banning the import of all products originating from the region **due to the widespread and well-documented nature of state-imposed forced labour there**.⁶⁹ Implementation of the UFLPA follows the strategy developed by the Forced Labor Enforcement Task Force (FLETF).⁷⁰

To rebut the presumption, the importers should demonstrate to CBP, through the submission of an applicability review, that:

- They fully complied with the importer guidance (provided under the UFLPA strategy developed by the FLETF) on due diligence, effective supply chain tracing, and supply chain management measures to ensure that they do not import any goods tainted with forced labour from the Uyghur Region
- and
- They completely and substantively responded to all inquiries for information submitted by CBP's Commissioner
- and
- They demonstrate, **by clear and convincing evidence**, that the subject good or merchandise was not mined, produced, or manufactured wholly or in part by forced labour.

As explained by the CBP and seen from the evidentiary threshold pyramid in section 3, clear and convincing evidence represents a high bar.⁷¹ In essence, it signifies that a claim or argument is significantly more likely to be true.

Guidance for applicability review submission (for

claims that subject goods are not connected with the Uyghur Region and have no connection to the UFLPA) and rebutting the presumption is provided for importers by CBP⁷² and the UFLPA strategy.⁷³ These guidance also include the best practices and non-exhaustive evidence and document list.⁷⁴ As long as the presumption stands, the CBP will exercise its authority under the customs laws to detain, exclude, and/or seize and forfeit shipments within the scope of the UFLPA.⁷⁵ If CBP determines that an exception to the presumption is warranted, the subject merchandise will be released, and such a decision will be subject to public disclosure and scrutiny.⁷⁶

Similar to the US Tariff Act, the design of the UFLPA in terms of evidentiary standards is **mindful of the challenges** of proving forced labour and power asymmetries between the importers and petitioners in terms of access to information:

- The UFLPA established a **rebuttable presumption** of forced labour on products from a specified region, considering the widespread nature of state-imposed forced labour in the Uyghur Region. The guidance and strategy provided under the UFLPA are regularly informed by international reports and resources on ongoing, widespread, and pervasive risks posed by state-sponsored forced labour and other human rights abuses in the Uyghur Region.
- **The burden of proof** to establish that the products are not in the scope of the UFLPA's prohibition **is thus on importers**. Considering the well-established data on forced labour in the region, the UFLPA requires **clear and convincing evidence from importers, one of the highest standards of proof**.

(64) Public Law 117 - 78 - An act to ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People's Republic of China do not enter the United States market, and for other purposes.

(65) Rebuttable presumption is a legal principle defined as "A particular rule of law that may be inferred from the existence of a given set of facts, and that is conclusive absent contrary evidence." In other words, this principle presumes something to be true unless proven otherwise. The burden of proof rests with the party seeking to challenge or rebut the presumption.

(66) The list of entities linked to the Xinjiang region and a list of high-priority sectors (apparel, cotton, tomatoes and polysilicon) is being determined under the strategy developed by FLETF. For entities in UFLPA Entity List see: <https://www.dhs.gov/uflpa-entity-list> (access date: 25 November 2023).

(67) Uyghur Forced Labor Prevention Act, Public Law 117-78—Dec. 23, 2021, Section 3 (a).

(68) US Customs and Border Protection, Withhold Release Orders and Findings List.

(69) Center for Strategic & International Studies, The Uyghur Forced Labor Prevention Act Goes into Effect (27 June 2022), available at: <https://www.csis.org/analysis/uyghur-forced-labor-prevention-act-goes-effect> (access date: 5 November 2023).

(70) US Department of Homeland Security, Forced Labor Enforcement Task Force, available at: <https://www.dhs.gov/forced-labor-enforcement-task-force> (access date: 5 November 2023).

(71) US Customs and Border Protection, FAQs: Uyghur Forced Labor Prevention Act (UFLPA) Enforcement, available at: <https://www.cbp.gov/trade/programs-administration/forced-labor/faqs-uflpa-enforcement> (access date: 26 September 2023); Center for Strategic & International Studies, The Uyghur Forced Labor Prevention Act Goes into Effect (27 June 2022).

(72) US Customs and Border Protection, UFLPA Operational Guidance for Importers, available at: <https://www.cbp.gov/document/guidance/uflpa-operational-guidance-importers> (access date: 26 September 2023). CBP provides online statistics on shipments subjected to UFLPA reviews or enforcement actions, including industry or country of origin data. Also, under the UFLPA, authorities provide and regularly update the Xinjiang Business Advisory to urge businesses and individuals to continue to undertake appropriate human rights due diligence measures to identify potential supply chain links to entities linked to the Xinjiang region. This advisory document refers to ongoing, widespread, and pervasive risks posed by forced labour sponsored by the People's Republic of China and other human rights abuses in Xinjiang.

(73) US Department of Homeland Security, Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People's Republic of China, available at: <https://www.dhs.gov/uflpa-strategy> (access date: 30 September 2023).

(74) US Customs and Border Protection, Best Practices for Applicability Reviews: Importer Responsibilities, available at: <https://www.cbp.gov/document/guidance/best-practices-applicability-reviews-importer-responsibilities> (access date: 30 September 2023) ; US Customs and Border Protection, Guidance on Executive Summaries and Sample Tables of Contents, available at: <https://www.cbp.gov/document/guidance/guidance-executive-summaries-and-sample-tables-contents> (access date: 30 September 2023).

(75) Uyghur Forced Labor Prevention Act, US Customs And Border Protection Operational Guidance for Importers (13 June 2022), p. 5, available at: https://www.cbp.gov/sites/default/files/assets/documents/2022-Jun/CBP_Guidance_for_Importers_for_UFLPA_13_June_2022.pdf (access date: 26 September 2023).

(76) Uyghur Forced Labor Prevention Act, Public Law 117–78—Dec. 23, 2021, Section 3 (c).

EU PROPOSED REGULATION ON PROHIBITING PRODUCTS MADE WITH FORCED LABOUR ON THE UNION MARKET

The EU Proposal for a regulation on prohibiting products made with forced labour on the Union market aims to effectively prohibit the placing on the EU market and the export from the EU of products made with forced labour, including forced child labour.⁷⁷

Under the proposed EU regulation to ban forced labour products, forced labour is also defined in line with the ILO's definition.⁷⁸

EVIDENTIARY THRESHOLD TO INITIATE AN INVESTIGATION

Competent authorities, designated by member states, are authorised to enforce the regulation with investigatory powers.⁷⁹ Competent authorities can initiate an investigation upon receiving a complaint or ex officio. Any natural or legal person can submit information to competent authorities on alleged violations of the subject prohibition.⁸⁰ Their submission must contain information on (1) the economic operators or products concerned and (2) the reasons substantiating the allegation.⁸¹

Under the EU Proposal, there are two levels of investigation. Competent authorities should initiate an official investigation where, based on their assessment of all available information, **they establish that there is a substantiated concern** of a violation of the prohibition.⁸² They must reach that level of substantiated concern during the **preliminary phase of the investigation**.

- This information might be derived from submissions from natural or legal persons, publicly available information sources, the database of forced labour risks in specific geographic areas and products, or reports from international organisations or civil society.⁸³
- Before initiating an investigation, the competent authorities should also request information from the economic operators on actions to mitigate, prevent or end the risks of forced labour in their supply chains and value chains.⁸⁴

After assessing all the information obtained, if the competent authority deems that there is no substantiated concern of a violation, it will not initiate an investigation.⁸⁵ Therefore, the existence of substantiated concern is a prerequisite to initiating an official investigation.

The EU Proposal defines substantiated concern as a well-founded reason, based on objective and verifiable information, for the competent authorities to suspect that products were likely made with forced labour.

1. The term **well-founded reason** is not commonly used in EU law and thus its meaning might vary depending on the context and legal standards in a particular jurisdiction or case. That said, a well-founded reason indicates substantial information or a sound basis for a particular decision or action in legal matters, **considered more rigorous than a reasonable suspicion**. It implies that there is substantial evidence, facts, and justification for a claim or belief.
 - Under EU jurisdiction, the Court of Justice may set aside the judgement of the General Court if the appeal is admissible and well-founded.⁸⁶
 - As another example, under the Rules of the Judicial Inquiry and Review Commission in Virginia, well-founded is defined as a finding based upon clear and convincing evidence and supported by facts and sound judgement.⁸⁷
2. The EU Proposal does not define what *objective and verifiable information* is. When examining the sections where the term verifiable is referred to, it might be analysed that it refers to the reliability/credibility of the sources of information rather than the content of it.⁸⁸ However, it is not explicit in the regulation itself.

(77) European Commission Proposal on prohibiting products made with forced labour on the Union market, (14 September 2022).

(78) European Commission Proposal on prohibiting products made with forced labour on the Union market, (14 September 2022), Recital, para. 17, Article 2.

(79) European Commission Proposal on prohibiting products made with forced labour on the Union market, Article 4, 5, 6.

(80) European Commission Proposal on prohibiting products made with forced labour on the Union market, Recital, para. 32. Natural person means a living human being.

(81) European Commission Proposal on prohibiting products made with forced labour on

the Union market, Article 10.

(82) European Commission Proposal on prohibiting products made with forced labour on the Union market, Recital, para. 21.

(83) European Commission Proposal on prohibiting products made with forced labour on the Union market, Article 4.

(84) European Commission Proposal on prohibiting products made with forced labour on the Union market, Recital, para. 22.

(85) European Commission Proposal on prohibiting products made with forced labour on the Union market, Article 4.

The EU Deforestation Regulation (which prohibits making certain products that are not deforestation-free being placed or made available on the market or exported) defines a similar definition of substantiated concern, namely *“a duly reasoned claim based on objective and verifiable information...”*.⁸⁹

To remove the high evidentiary and procedural burden from the petitioners and to address the challenges of obtaining comprehensive evidence concerning forced labour, it is recommended that the EU Proposal on forced labour should avoid phrases that use either well-founded or duly reasoned.

EVIDENTIARY THRESHOLD TO IMPOSE A SANCTION

Under the EU Proposal, the competent authorities order the withdrawal of a product when it is **established that** it was made, whether in whole or in part, with forced labour.⁹⁰

Upon such finding, the competent authorities:

- prohibit placing or making the products concerned available on the EU market and exporting them
- require customs authorities to refuse release of the products for free circulation or export
- and require the economic operators that have been investigated to withdraw the relevant products already made available from the Union market and have them destroyed, rendered inoperable, or otherwise disposed of.⁹¹

Unlike the US Tariff Act, **the EU Proposal outlines a high evidentiary threshold for competent authorities to initiate an investigation.**

The US Tariff Act does not define additional statutory constraints to open an investigation besides petition requirements. The EU Proposal requires competent authorities to evaluate the likelihood of violation, obtain a high level of information before initiating an official investigation, require information from the economic operators, and analyse the size and economic resources of the economic operators, the quantity of products concerned, as well as the scale of suspected forced labour.

The EU Proposal requires an evidentiary threshold (*existence of substantiated concern*), which is higher than reasonable suspicion, only to initiate official investigations on the suspected violations. While under the US Tariff Act, the reasonable suspicion criteria is employed to impose the first level of sanction, Withhold Release Orders.

(86) Publications Office of the European Union, Glossary of Summaries – Appeal, available at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=LEGISSUM:appeal> (access date: 5 November 2023).

(87) Virginia Judicial System, Rules of the Judicial Inquiry and Review Commission, available at: <https://www.vacourts.gov/agencies/jirc/rules.html> (access date: 5 November 2023).

(88) Please see Recital 33 and Article 23 of the European Commission Proposal on prohibiting products made with forced labour on the Union market.

(89) Regulation (EU) 2023/1115 of the European Parliament and of the Council of 31 May

2023 on the making available on the Union market and the export from the Union of certain commodities and products associated with deforestation and forest degradation and repealing Regulation (EU) No 995/2010, Steps of procedure 2021/0366/COD.

(90) European Commission Proposal on prohibiting products made with forced labour on the Union market, Recital, para. 15, Article 6.

(91) European Commission Proposal on prohibiting products made with forced labour on the Union market, Recital, para. 27, 34, Article 6.

The EU Proposal **does not establish a tiered sanction system** as opposed to the US Tariff Act. It sets only one level of ultimate sanction upon the final determination of the existence of forced labour. Establishing the existence of forced labour and, consequently, implementing all these sanctions rely on a very high evidentiary standard. As seen from the peer experience, the limited number of findings issued under the US Tariff Act highlights the difficulty in conclusively determining the existence of forced labour used in the manufacture of products. A lower level of sanctions like WROs therefore play an important role in preventing products that are suspected of being produced with forced labour from entering the market, where this high evidentiary standard has not been satisfied. Also, ensuring tiered sanction system would also be in line with the existing “EU Regulation No 608/2013 Concerning Customs Enforcement of Intellectual Property Rights”, which regulates that customs authorities can suspend the release of or detain goods based on reasonable indications of intellectual property rights infringement.

(92) European Commission Proposal on prohibiting products made with forced labour on the Union market, Recital, para. 26.

(93) European Commission Proposal on prohibiting products made with forced labour on the Union market, Article 5 (6).

Also, **the competent authorities bear the burden of establishing** that forced labour has been used at any production stage based on all information and evidence gathered during the investigation phases.⁹² To do so, the competent authorities may conduct all necessary checks and inspections, including investigations in third countries.⁹³ **It unnecessarily burdens competent authorities** and also petitioners who are providing data and evidence, while **the companies are the ones who have the information and leverage** to obtain the data required to prove that the subject products were not made with forced labour.

Lastly, the EU Proposal requires establishing a database that includes regions, sectors, or products, including with regard to **forced labour imposed by state authorities**. However, unlike the UFLPA, which relies on a well-established fact and evidence of state-imposed forced labour and establishes a rebuttable presumption for goods related to the Uyghur Region, the EU Proposal does not follow the same approach. The EU Proposal **does not differentiate required evidentiary standards and processes** for the cases where **forced labour imposed by state authorities is well-established with factual data**.

06 CONCLUSION

The use of forced labour remains widespread worldwide, as the ILO estimates that 17.3 million people globally experience forced labour exploitation in the private sector.⁹⁴ Import bans are emerging as one of the effective smart mix of tools to combat forced labour across the world. These legislations should be carefully designed to ensure effective and meaningful implementation of the bans in practice. The core element of these instruments are the **evidentiary standards** (*the degree or level of persuasiveness of the evidence required in a specific case*) for initiating investigations and imposing sanctions for the products suspected to be tainted with forced labour.

Information concerning the menace of any penalty and the absence of the free and informed consent of the worker (*involuntariness*) might be derived from workers'/witnesses' testimonies, visual or written records proving the working conditions under threat, physical abuse, violence or the use of force, coercion, or fraud. However, **since forced labour is often hidden and hard to detect in nature, obtaining comprehensive evidence on the existence of forced labour might not always be possible and feasible.** The fear of retaliation from the employer or the state can hinder gathering substantial evidence from the ground and pose a safety risk for victims and their representatives such as civil society groups or trade unions. Also, power imbalance on access to relevant information complicates the ability of those filing complaints to formulate an effective strategy that encompasses substantial evidence and documentation proving forced labour.

Considering the challenges in documenting forced labour and obtaining comprehensive evidence, **the legislative bans on importing products made with forced labour should not burden petitioners with providing a high degree of evidence while submitting their allegations.** The US Tariff Act and the Uyghur Forced Labor Prevention Act demonstrate the difficulties of proving forced labour allegations. The US Tariff Act requires only evidence **reasonably indicating the existence of forced labour**, in other words reasonable suspicion of forced labour, to withhold the release of subject products. The burden of proof is on importers if they wish to prove otherwise.

The Uyghur Forced Labor Prevention Act also constitutes an example of how to design import ban measures and evidentiary standards where there is well-established, credible evidence and consensus on widespread forced labour concerning specific regions or product groups. It establishes the *rebuttable presumption* concept while presuming that all products related to the Uyghur Region are made with forced labour, and the importers must prove otherwise with clear and convincing evidence, a very high degree of evidential standard.

Although it has been stated in the EU Proposal that it has been developed based on learnings from the experience of similar measures adopted by international organisations and partner countries, particularly the US and Canada, the EU Proposal substantially diverges from the US system. The EU Proposal requires competent authorities to reach the *substantiated concern* level to initiate an official investigation. By its definition, **substantiated concern (substantial evidence supporting a claim to qualify it as well-founded), implies a higher evidentiary degree than reasonable suspicion. In contrast, the US Tariff Act relies on reasonable suspicion to impose its first level of sanctions.** Furthermore, the EU Proposal **does not differentiate required evidentiary standards for instances where forced labour imposed by state authorities is well-established with factual data.**

Greater coordination and alignment on key principles related to forced labour import bans are urgently needed. The high evidentiary threshold under the EU system severely weakens the law's potential to take aligned action against forced labour worldwide. Unless the high evidentiary threshold for initiating investigations and imposing sanctions is amended under the EU Proposal by considering the nuances to address forced labour, the EU risks being considered a "dumping ground" by importers for goods tainted with forced labour.

(94) ILO, Forced labour, modern slavery and human trafficking, available at: <https://www.ilo.org/global/topics/forced-labour/lang--en/index.htm> (access date: 10 November 2023).

